A

NEW ABRIDGMENT

OF THE

LAW,

ALPHABETICALLY DIGESTED UNDER PROPER TITLES.

IN FIVE VOLUMES.

By MATTHEW BACON,
OF THE MIDDLE TEMPLE, ESQ.

THE SIXTH EDITION, REVISED AND CORRECTED;
With Additional NOTES and REFERENCES.

ALSO A SUPPLEMENT, CONTAINING

I. A TABLE of the Names of the CASES.
II. A TABLE of the STATUTES, or ACTS of PARLIAMENT cited, referred to, or explained.
III. A TABLE of the REPORTERS and other WRITERS, with their several Contractions and Editions.
IV. A new copious GENERAL INDEX or TABLE of the PRINCIPAL MATTERS.

BY T. CUNNINGHAM, ESQ. BARRISTER AT LAW.

VOL. I.

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PREFACE.

THE Editor of the three firſt volumes, and of ſo much of the fourth, as includes title SHERIFF, thinks it neceſſary, in juſtice to the proprietors of this work, to obſerve, that they have been at a very great expence, in preparing for the preſs, the preſent edition, and rendering it worthy the public approbation.

This abridgment has ever been conſidered as a very valuable acquiſition to the law. It is, in its form, manner of execution, and contents, far ſuperior to any other work of the kind; excluſive of its containing many caſes, not elſewhere reported. In a few words, the excellence of the performance is ſuch, that it does not, at this day, require any *eulogium*.

With reſpect to the original text, the editor has not preſumed to make any alteration, except typographical errors, and evident miſtakes; ſuch as a negative, for an affirmative, &c. But he has added *chapters* to *ſtatutes* cited, (indeed in inſtances innumerable:) he has frequently *referred*, from one part of the work to another, for illuſtration; and where the ancient ſtatutes of *Merton* and *Marleberge*, of *Weſtminſter*, *Glouceſter* and *Wincheſter*, have been generally referred to, he has given the *king*, *year* and *chapter*, which were omitted in former editions. In ſome inſtances, where *caſes* of *law*, or *clauſes* of *ſtatutes* abſolutely neceſſary, have not been inſerted, and in other inſtances where *general heads* were introduced, and not filled up, the editor hath ſupplied the deficiencies.

Although the work is much increaſed in *quantum*, the former numbering of the pages is preſerved, many modern publications having referred to this abridgment.

Since the firſt edition, there have been various determinations of the courts of law and equity of great conſequence, and many reports, &c. publiſhed, (the editor reckons between forty and fifty, moſt of them in folio.) The ſtatute law hath alſo been greatly altered, and much increaſed. The ſubſtance of many of thoſe *determinations*, *alterations*, *&c.* are inſerted in the preſent edition,

in ſhort notes, diſtinguiſhed from the former. They will beſt ſpeak for themſelves—but he thinks, he may with truth ſay, they are almoſt innumerable:—ſome the reſult of his own experience:—a variety of thoſe notes ſhew how the law is *now* ſettled, where caſes formerly differed:—even the variations in the PRACTICE of the courts of law have not been forgotten.

The former editions were, in ſeveral parts, defective, under ſome heads, *now* much in uſe, and worthy attention. The editor hath therefore, in ſuch inſtances, with peculiar care, introduced notes of late determinations; and with great reaſon; as, to the wiſdom of former ages, modern times have added ſome of the moſt elaborate and excellent judgments, ever delivered from human tribunals.

The *references* in the laſt edition were too numerous, ſeveral of them erroneous. The editor hath examined many, retrenched ſome, corrected others—human life would ſcarce ſuffice to examine all—his attention was therefore chiefly directed to caſes, where he *doubted* of the law.

Perhaps it may be thought by ſome, that the references are yet too numerous, but they may have their uſe—to gratify curioſity; or, where caſes vary, to enable the reader to find every thing neceſſary to determine his judgment.

The editor hath ſometimes introduced a *query*, where he has been *inclined to think* the law otherwiſe, than is laid down by the author: but he has never taken the liberty of poſitively diſſenting, unleſs *clearly* of a different opinion:—occaſionally he hath ſuggeſted an hint—perhaps it contains the law.

To ſave the reader the trouble of *peruſing a caſe twice*, words requiring a particular attention, as making neceſſary and eſſential diſtinctions, are printed in *italics*.

As the original work was framed, the editor could not particularly claſs all the *extracts* he made from modern caſes, ſtatutes, &c. He hath, therefore, (where it could not be otherwiſe done) introduced them at the end of the reſpective diviſions, or heads, by way of *ſupplement*.

Though

Though his notes are ſhort, he hath frequently aſſigned the *reaſons* of determinations; for the purpoſe of making an impreſſion, when the mere rule might ſoon be forgotten.

With *reſpect* to references by the *editor*, he hath not given many on any one occaſion, but he has endeavoured to give ſuch as apply to the *point*; and hath in his additions, frequently referred from one part of the work to another, as likewiſe to *ſimilar determinations* of modern date.

As to the *ſtatute law*, where it was judged abſolutely neceſſary to introduce the *words at length*, it has been done; in other caſes, the *ſubſtance*.

As *Co. Lit.* hath double folios where the law cited, is in the *ſecond*, the letter *b* hath been frequently added:—even the *pointing* hath been attended to, (where neceſſary) and that not in a few inſtances.

Some *abſtracts* have alſo been given of *uſeful ſtatutes* made *prior* to former editions of this work, but omitted.

The editor muſt obſerve that ſome caſes may appear *variant*, which, on ſtrict examination, and conſulting different reporters, will not be found eſſentially to differ:—others may have been permitted to ſtand, becauſe they were in the original work:—each may be of uſe:—the point may not be finally ſettled:—the caſes will, at leaſt, afford matter of inquiry to the curious, and perhaps the editor might not preſume to ſay which was right.

A caſe, or the ſubſtance of it, may ſometimes be *repeated*; it was impoſſible, always, to avoid a repetition: it might be uſeful, occaſionally, by ſupplying ſomething wanting—illuſtrating the general doctrine—or completing the head or diviſion.

In ſome parts of the work *very long notes* are introduced, where they are on ſubjects of conſequence; as under *inſurance*, tit. *merchant* and *merchandize*, 3 vol. 601, and in various other inſtances.

It is proper to obſerve, that references to *antient abridgments*, *Theol. Dig.* &c. are ſometimes to the *placita*, under the reſpective heads of thoſe works:—where *Abr. Eq.* is referred to in the text, it in general means the *firſt* volume; ſo, of ſome other late publications.

The

The editor hath only to add, that the original work has always been held in high eſtimation; the principal part being, in fact, the production of that great man LORD CHIEF BARON GILBERT, though the name of another perſon hath hitherto been affixed:—That very able and learned author did not content himſelf with giving the dry rules of juriſprudence, but, where it was neceſſary, aſſigned the various REASONS whereon the ſages of the law founded their judgments. The impreſſion ſuch a writer makes on his reader, is not momentary, but permanent—he ever gives ſatisfaction to the curious and ingenious mind—not ſatisfaction only, but pleaſure; and what is read with pleaſure, will be felt, underſtood, and remembered.

But the editor need not attempt an *eulogium* on his author—his character is eſtabliſhed, and his fame will endure as long as a knowledge of our laws and conſtitution ſhall continue to be the eſteem and veneration of mankind.

Mr. Serjeant *Sayer* begs leave to obſerve, that for the further improvement of this edition, the part compiled by him, beginning with the title SIMONY, ending with the title VERDICT, has been carefully reviſed by him; that every miſtake which has been diſcovered is corrected; that ſome things omitted in the former editions are ſupplied; and that abſtracts of many printed and manuſcript caſes, determined ſince the publication of the laſt edition, are inſerted.

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*ABATEMENT.

A Batement in the general Acceptation of the Word (*a*) ſignifies a (*b*) Plea put in by the Defendant, in which he ſhews Cauſe to the Court why he ſhould not be impleaded, or if impleaded, not in the Manner and Form he then is.

Gilb. Hiſt. C. P. 186. (*a*) For the Derivation and ſeveral Significations of the Word, *vide Co. Lit.* 134. *b.* 277. *a. F. N. B.* 115. If a Man dies ſeiſed of Lands, and a Stranger enters before the Heir, his Entry is called an Abatement, for this, *vide Lit. Sect.* 379. *Co. Lit.* 181. *a.* 242, 271. *a.* 277. *a.* (*b*) As Pleas in Abatement enter not into the Merits of the Cauſe, but are dilatory, the Law has laid the following Reſtrictions on them: *Firſt*, by the Statute 4 *Annæ*, *c.* 16. *ſ.* 11. for Amendment of the Law, no dilatory Plea is to be received unleſs on Oath, and probable cauſe ſhewn to the Court*. *Secondly*, No Plea in Abatement ſhall be received After a *Reſpondeat Ouſter*, for then they would be pleaded *in infinitum*. 2 *Saund.* 41 †. *Thirdly*, that they are to be pleaded before Imparlance; for this, *vide Yelv.* 112. *Lutw.* 464. 178. 2 *Lutw.* 1117. *Doct. Pla.* 224. *Fourthly*, That when Iſſue is joined on them, if found againſt them who plead ſuch dilatory Pleas, they ſhall be peremptory. 2 *Show. Rep.* 42. 6 *Mod.* 236. For the Order of Pleading, and the different Kinds of Pleas, *vide* Head of *Pleas and Pleading* in *Vol.* 4 *ſ.* 1.

* A Plea *puis darrein Continuance* muſt be verified or it will be ſet aſide. *Stra.* 492.

† Qu. If this is law? For it is contrary to the antient Practice, ſee *Theol.* 163. *a. pl.* 6. Cites *H.* 3. *E.* 3. 76. and *vide Theol. Id. pl.* 7.

We will conſider this Title in the following Order ‡, though ſeveral of the Diviſions are more largely treated of under their proper Heads.

‡ According to *Theol. l.* 10. *c.* 1. *pl.* 5. *p.* 162. *b.* (which *vide*) the Order of Pleading is, firſt to the *Juriſdiction*, then to the *Perſon* impleading, or impleaded, then to the *Court*, then to the *Writ*, and laſtly to the *Action*.

(A) Of Pleas in Abatement to the Juriſdiction of the Court. 2.

(B) Of Pleas in Abatement to the Perſon of the Plaintiff; and therein of, 2.

1. Outlawry. 2.
2. Excommunication. 3.
3. Alienage. 4.
4. Premunire. 4.
5. Popiſh Recuſancy. 4.

(C) Of Pleas in Abatement, with reſpect to the Perſon of the Defendant; and therein of privileged Perſons. 5.

(D) Of Pleas in Abatement to the Form of the Writ and Action; and therein of Miſnomer, and the Want of Addition. 6.

(E) Of Abatement by the Demiſe of the King. 7.

(F) Of Abatement by the Death of the Parties. 7.

(G) Of Abatement by Reaſon of Marriage or Coverture. 9.

(H) Where the Writ is abated ex facto, or is only abateable. 10.

(I) Where the Writ ſhall abate in toto or in Part. 11.

(K) Where it ſhall abate by Reaſon of another Action brought for the ſame Thing. 13.

(L) Where a Perſon may plead in Bar or in Abatement. 14.

(M) Of the Manner of pleading in Abatement, and the Proceedings on ſuch Plea. 15.

(A) Of Pleas in Abatement to the Juriſdiction of the Court.

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Gilb. Hiſt. C. P. 187. 2. Kel. 75. pl. 37.

A Plea to the (a) Juriſdiction of a Court muſt be put in before (b) any (c) Imparlance, for by craving Leave to Imparl, the Defendant ſubmits to the Juriſdiction.

2 *Barnard K. B.* 165. (a) 2 *H.* 6. 30. 22 *H.* 6. 7. *Hardr.* 363. 1 *Lutw.* 26. Of the Juriſdiction of the ſeveral Courts, and the Difference between the Courts of *Weſtminſter* and other Courts of Record, and where inferior Courts of Record cannot plead, but muſt demand Conuzance; *vide* Tit. *Courts* and their Juriſdiction. (b) Except where ancient Demeſne is pleaded; becauſe the Lord might reverſe the Judgment by Writ of Diſceit, and it goes in Bar of the Action itſelf; for this, *vide Dyer in Marg.* 210. *Stile* 30. *Latch* 83. 5 *Co.* 105. 9 *Co.* 31. *Han. Ent.* 103. (c) For Imparlance and the Difference between a General and Special Imparlance, *vide* Tit. *Imparlance* in Vol. 4. *p.* 27.

See Pract. Reg. C.P. 6. Barnes 190. Gilb. Hiſt. C. P. 187.

The Defendant muſt plead *in propria Perſona*, for he cannot plead by Attorney without Leave of the Court firſt had, which Leave acknowledges the Juriſdiction; for the Attorney is an Officer of the Court; and if Defendant puts in a Plea by an Officer of the Court, that Plea muſt be ſuppoſed to be put in by Leave of the Court.

Lutw. 9. Show. Rep. 386. Co. Lit. 127. Gilb. Hiſt. C. P. 188.

The Defendant muſt make but half Defence; for if he makes the full Defence, *quando & ubi Curia conſideravit, &c.* he ſubmits to the Juriſdiction of the Court.

As to pleading to the Juriſdiction and demanding Conuzance, See *Poſt*, 559, 560, *&c.*

(B) Of Pleas in Abatement to the Perſon of the Plaintiff; and therein,

1. Of Outlawry.

Gilb. Hiſt. C. P. 196, 197. Lit. Sect. 197. Co. Lit. 123.

Outlawry in the Plaintiff is a good Plea in Abatement, for he thereby loſes his *Liberam legem*, and is out of the Protection of the Law, becauſe he would not be amenable and attendant to the Law; and therefore ſhould not have any Privilege or Benefit from the Law.

But no Man ſhall be ſaid to be outlawed till the Return of the Exigent. *Bro. Nonability* 25. 23. *Aſſ.* 49. *Dyer* 222. but for this, *vide* Head of *Outlawry*.

Co. Lit. 128. Doct. Plac. 397.

But Outlawry does not intirely abate the Writ, but is only a temporary Impediment that diſables the Plaintiff from Proceeding; for upon obtaining a Charter of Pardon, or reverſing the Outlawry, he is reſtored to his Law, and ſhall oblige the Defendant to plead to the ſame Writ.

Co. Lit. 128. Gilb. Hiſt. C. P. 197.

This Diſability is only pleadable when the Plaintiff ſues in his own Right; for if he ſues *in Auter Droit*, as Executor, Adminiſtrator, or as Mayor with his Commonalty, Outlawry ſhall not diſable him, becauſe the Perſon whom he repreſents has the Privilege of the Law.

Doct. Plac. 396. for ſuch Plea would amount to *Exceptio ejuſdem rei cujus petitur diſſolutio.* *Co. Lit.* 128. If there be an Attaint brought, Outlawry grounded on that Verdict cannot be pleaded, 7 *H.* 4. 40.

Nor when he brings a Writ of Error to reverſe an Outlawry, ſhall Outlawry in that Suit, or at any Stranger's, diſable him; for if he were outlawed at ſeveral Men's Suits, and one ſhould be a Bar to another, he could never reverſe any of them.

But

But when Outlawry is pleaded in Abatement, the Plaintiff ſhall not reply that the Outlawry is erroneous, for it is good till reverſed. Lutw. 36.

* As this is a dilatory Plea, when it is pleaded in another Court than where the Outlawry iſſued, the Defendant muſt bring it in immediately; for this being in Delay, if the Court ſhould give Time, and it ſhould not be brought in, the Delay of Juſtice would be from the Court; and ſince there is a Way of having it immediately, by producing it under the Great Seal, no Time ſhall be given to bring it *ſub pede ſigilli*; but otherwiſe when it is in the ſame Court, for then the Record is already in Court. * Page 3 Gilb. Hiſt. C. P. 198. Stampf. 103. Fitz. Coron. 233. Note; In pleading Outlawry in another Court, in Diſability the ancient Way was to have the Record of the Outlawry itſelf *ſub pede ſigilli* by *Certiorari* and *Mittimus*; but this being very expenſive, it is now ſufficient to plead the *Capias utlagatum*, under the Seal of the Court, from whence it iſſues; and if the Plaintiff replies that there was no Judgment on which the *Capias utlagatum* was grounded, the Court will give the Defendant a Day to bring in the Record. *Co. Lit.* 128. *Doct. Plac.* Tit. *Outlawry*. *Thomp.* 8, 9. *Brownl.* 5, 7. If the Defendant has a Day given him to bring in the Record, and in the *Interim* the Plaintiff removes it by Writ of Error, and reverſes it; this ſhall not be peremptory on the Defendant, but he ſhall have Leave to plead a new Plea.

Outlawry in a County Palatine cannot be pleaded in any of the Courts of *Weſtminſter*, for the Party is only ouſted of his Law within that Juriſdiction. Gilb. Hiſt. C. P. 200. Fitz. Corn. 233. 12 *Ed.* 4. 16. But it ſeems that Outlawry in the County Palatine of *Lancaſter* may be pleaded in the Courts of *Weſtminſter*; becauſe that County was erected by Act of Parliament. *Br. Utlaw.* 52. 1 *Vent.* 157. Where Outlawry may be pleaded in Bar or Abatement, *vide poſt*, *Letter* L. (14.)

Outlawry in a perſonal Action goes only to perſonal Actions, in reſpect to the Perſon; but Outlawry in Felony goes to Actions generally. *Doct. pl.* 397. cites 33 *H.* 6. 19.

2. Excommunication.

When Excommunication is pleaded, the Biſhop's Letter under his Seal, witneſſing the Excommunication, muſt be ſhewn; and tho' the Plaintiff cannot deny the Plea, yet the Writ ſhall not abate, but the Defendant *eat inde ſine die*; becauſe the Plaintiff, upon producing his Letters of Abſolution, ſhall have a Re-ſummons or Re-attachment. Gilb. Hiſt. C. P. 202. Lit. Sect. 201. 8 *Co.* 68. Where it cannot be pleaded after a General Imparlance, though it may after a Special Imparlance, *vide* Tit. *Imparlance*. *Plac. Gen.* 10. 9 *E.* 4. 36. *Lutw.* 19. *Latch.* 179.

Excommengement is (*a*) a good Plea to an Executor or Adminiſtrator, though the ſue *in Auter Droit*; for an excommunicate Perſon is excluded from the Body of the Church, and is incapable to lay out the Goods of the Deceaſed to pious Uſes. Gilb. Hiſt. C. P. 202, 203. Co. Lit. 134. 43 *E.* 3. 13. Theol. p. 20.

(*a*) But in an Action brought by the Bailiffs and Commonalty, the Defendant cannot plead Excommengement in the Bailiffs, becauſe they ſue as a Corporation, and a Corporation cannot be excluded from the Communion of the viſible Church. *Gilb. Hiſt. C. P.* 204. *Theol. p.* 20. Excommunication is no Plea on a *Qui tam*, becauſe it is for Example; and the Statute having given the Informer an Ability to ſue, and not excepted excommunicated Perſons from the Liberty of informing, he is enabled to ſue by the Statute, notwithſtanding the Cenſures of the Church. 12 *Co.* 61. *Gilb. Hiſt. C. P.* 203.

When Excommunication is pleaded in the Plaintiff, he ſhall not reply that he has appealed from the Sentence, for the Sentence is in Force until it is repealed; and whilſt it is in Force, he cannot appear in any of the Courts of Juſtice: but he may reply he is abſolved, for then his Diſability is taken away. Bro. Excom 3. 3 Bulſt. 72. 20 *H.* 6. 25. Plac. Gen. 10, 72. &c. Gilb. Hiſt. C. P. 204.

When a Prohibition is brought againſt a Biſhop, and he pleads Excommunication againſt the Plaintiff, and in the Sentence there is no Cauſe Theol. 19, 20. 28 *E.* 3. 97.

Where the Sentence of Excommunication is a Nullity; as where the Ordinary excommunicates for a Temporal Offence, the Court will write to the Biſhop to aſſoil him. *Bro. Excom.* 17. *Rell. Abr.* 883.

of such Excommunication shewn; this is no good Plea, for in such Case it will be intended that the Excommunication was for endeavouring to *hinder the Bishop's Proceeding, by Application to the Temporal Court; and if such Excommunication were allowed, it would destroy all Prohibitions; and the Plea of Excommunication in this Case is *Exceptio ejusdem rei cujus petitur dissolutio.*

* Page 4

Gilb. Hist. C. P. 203.

The Court will not (*a*) receive the Certificate of Excommunication of one Bishop from another, because they must have the Certificate from the Bishop, whose proper Subject he was; and he might have been assoiled by his own Ordinary after the first Certificate to the Bishop.

8 Co. 68. Co. Lit. 131. Roll's Abr. 434, 684, Gilb. Hist. C. P. 204, 205.

(*a*) Nor will they receive a Certificate from a Bishop deceased, because he may stand assoiled by the present Ordinary. *Bro. Excom.* 21. *Fitz. Excom.* 26. It cannot be certified by the Bishop's Commissary or Official, because the Court cannot write to them to assoil him; but it may be certified by the Vicar General, when the Bishop is *in remotis agendis*, or by the Guardian of the Spiritualties, during the Vacancy of the Bishoprick. *Co. Lit.* 131. 8 *Co.* 68. *Roll's Abr.* 183, 434, 884. In times of Popery Excommengement certified by the Pope or Delegates commissioned by him, did not disable the Plaintiff, because the Courts had no Person to whom they could write to have him assoiled. *Gilb. Hist. C. P.* 204. 16 *E.* 3. 31. *Bro. Excom.* 17. *Roll's Abr.* 883*. How it shall be certified by Delegates appointed by Commission out of Chancery, *vide Lutw.* 17.

* See *Theol.* 19. *b.* a curious Note on this Subject.

3. Alienage.

Co. Lit. 128. Vide Head of Aliens; and vide 4 Mod. 285, 405. 12 Mod. 125.

An Alien Enemy, or one whose King is in Enmity with ours, cannot bring any Action either Real, Personal or Mix'd. *But see the Contrary held in* Ld. Raym. 282. Wells *v.* Williams. Lutw. 34, 35. Salk. 46. & Fost. Cr. Law 185.

Co. Lit. 129. b. Yelv. 198. Bulstr. 134. Whether an Alien Enemy may maintain an Action in *Auter Droit* as Executor, *vide* Head of *Aliens.*

But an Alien in League may maintain Personal Actions, otherwise he would not be able to merchandize and trade amongst us; but he shall not maintain Real or Mix'd Actions, because there is no Necessity that he should settle amongst us. *See the true Distinction in* Ld. Raym. 282. Wells *v.* Williams, *above.*

Bro. Denizen 10. Co. Lit. 129. b. Gilb. Hist. C. P. 205.

If Alienage be pleaded to an Alien in League, that must be in Disability of the Plaintiff; but if it be to an Alien Enemy, it may be pleaded to the Action; because it is forfeited to the King as a Reprisal for the Damages committed by the Dominion in Enmity with him†.

† It is a good Replication, that he was at the Time and now remains in this Kingdom, by Licence and Protection of the King. *Forteseue* 221.

4. Premunire.

Gilb. Hist. C. P. 205, 206. Doctr. Pl. 10, in Vol. 4.

Persons attainted of a Premunire are incapable of bringing any Action; for they are out of the Protection of the Law.

Godolph. Orph. Leg. 252, 258. *Lit. Sect.* 199. *Co. Lit.* 129. but for this, *vide* Tit. *Premunire.*

5. Popish Recusancy.

Gilb. Hist. C. P. 207. 3 Vol. 780. Ld. Raym. 243. 3 Lev. 208. 8 Mod. 43.

This Disability of Popish Recusancy convict, is by virtue of the Statute 3 *Jac. cap.* 5. *sect.* 11. which disables to all Intents, *&c.* except where he sues for Lands, Tenements, Leases, Annuities, Rents and Hereditaments, or the Issues or Profits thereof, which are not to be seised into the Hands of the King, his Heirs or Successors.

(C) Of Pleas in Abatement, with respect to the Person of the Defendant; and herein of Privileged Persons.

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THE Officers of each Court enjoy the Privilege of being sued only in those Courts to which they respectively belong; the Reason whereof is, because of the Duty they are under of attending those Courts, and lest their Clients Causes should suffer if they were drawn to answer to Actions in other Courts. 2 Mod. 297. Vaugh. 155. 2 H. 7. 2. 2 Roll. Abr. 272. Lut. 44, 639.

2 *Inst.* 551. 4 *Inst.* 71, 72. *Vaugh.* 154. *Dy.* 377. *a. pl.* 30. *Crom. Jur. Courts.* 11. *Gilb. Hist. C. P.* 209, 212. *Pest.* 191. What Persons are privileged, *vi.* e Head of *Privilege*, in 4 *Vol. p.* 218. and for Precedents of Pleas of Privilege, *vide Thomp.* 4. *Rob. Ent.* 199. *Rast. Ent.* 106, 178, 472. *Brownl.* 161, 167, 168. *Hern.* 3. 3 *Inst. Clericalis* 32 to 35. Where they are not obliged to put in Special Bail; and where Bail must be put in when they sue, *vide* Head of *Bail* in Civil Causes.

But the Plaintiff must have the same Remedy against the Officer in his own Court, as in that where he sues him; for if Money be attached by foreign Attachment in the Sheriffs Court of *London*, he shall not have his Privilege; because in this Case the Plaintiff would be remediless. Sand. 67, 68. Turvill's Case. Gilb. Hist. C. P. 209, 210. Sid. 364. 2. *Keb.* 346. *pl.* 24. 2 *Leon.* 156. *pl.* 190.

So if a Writ of Entry, or other real Action, be brought against an Attorney of the *King's Bench*, he cannot plead his Privilege; because if this should be allowed, the plaintiff would have a Right without a Remedy; for the *King's Bench* hath not Cognisance of Real Actions. Sand. 67. Gilb. Hist. C. P. 210. So if an Attorney of the Common Pleas be sued in an Appeal, he shall not have his Privilege; for his own Court hath no Cognisance of this Action; nor if sued as *Bail. Rep.* and *Cas. Pract. C. P.* 64 *Keb.* 735. *pl.* 16. for this *vide* 38 *H.* 6. 29. *b.* 9 *E.* 4. 35. *Cro. Car.* 585. *Leon.* 189. 2 *Leon.* 156. *pl.* 190. *Gilb. Hist. C. P.* 110.

Also the Privilege which the Court indulges their Officers with, is restrained to those Suits only which they bring in their own Right, or are brought against them in their own Right; for if they sue or are sued as Executors or Administrators, they then represent common Persons, and are to have no Privilege. Hob. 177. Gage's Case. Gilb. Hist. C. P. 211. 2 Roll. Abr. 275. pl. 23.

Lil. Reg. 456. 457. *Noy* 68. 17 *Vin. Abr* 517. *pl.* 2. *Vent.* 299. *Godb.* 10. *pl.* 13. *Dy.* 377. *pl.* 30. *Latch.* 199. *Brownl.* 37, 47. 12 *Mod.* 316. *Ld. Raym.* 533. *Salk.* 2. *pl.* 4. 7. *pl.* 18. 2 *Shd.* 157. *Dy.* 24, 150. in *Marg. Sav.* 20. *pl.* 49.

So if an Officer of one Court sues an Officer of another Court, the Defendant shall not plead his Privilege; for the Attendance of the Plaintiff was necessary in his Court as the Defendant's in his; and therefore the Cause is legally attached in the Court where the Plaintiff is an Officer. 2 Mod. Rep. 298. Hamelton *vers.* Justice Scrogs.

2 Lev. 129. *Gilb. Hist. C. P.* 211. *Godb.* 81. *pl.* 95. 2 *Rol. Abr.* 275. *pl.* 4. *Moor* 556. *Brownl.* 37.

So if a Privileged Person brings a Joint Action, or if an Action be brought against him and others, he shall not have his Privilege; but this is to be understood where the Action is joint, and cannot be severed; for if the Action can be severed, without doing any Injury, the Officer shall have his Privilege. Gilb. Hist. 212, 4 Vol. 223. Dyer 277. Godb. 10. 2 Rol. Abr. 275. 2 *Lev.* 129. *Vent.* 298, 9.

An Officer shall not have his Privilege against the (*a*) King; for as the Executive Power is lodged in the King, it would be unreasonable that his Court, which gives Relief to private Persons, should protect any Subject from being brought to Justice for offending against the Laws, which concern the whole Commonwealth. Forte. 342. Hob. 9. Bro. Superfed. 1. 2 Rol. Abr. 274. 4 Vol. 222. *Gilb. Hist. C. P.* 208.

(*a*) But in an Action, *Qui tam*, at the Suit of an Informer, he shall have his Privilege. *Lil. Reg.* 7. 3 *Lev.* 398. *Lutw.* 193.

If an Attorney of the *Common Pleas* be *in Custodia Mareschi.* for want of Bail, at the Suit of *A.* he may (*b*) plead his Privilege. (*b*) But if he be *in Custodia Mareschal.* at the Suit of *A.* and *B.* declares against him *in Custodia Mareschal.* if he has waved his Privilege as to *A.* he cannot take Advantage of it against *B.* For this *vide* 2 *Rol. Abr.* 275. *pl.* 7. *Salk.* 1. *pl.* 3. 173. 5 *Mod.* 310. *Carth.* 350. 3 *Lev.* 243. *Ld. Raym.* 135.

After

* Page 6 Bro. Priv. 25, 22 H. 6, 6, 22, 71, Rol. Rep. 204. Sid. 29. 2 Roll's Abr. 273, 279. Hard. 365. Lutw. 46. Salk. 1. 3 Lev. 343. Str. 522. Plea of Privilege without Affidavit ſet aſide, 2 Str. 738.

* After a general Imparlance, an Officer cannot plead his Privilege, becauſe by imparling he affirms the Juriſdiction of the Court; but by the better Opinion it ſeems, that after a ſpecial Imparlance he may plead his Privilege.

Salk. 1. pl. 2. Peaſe verſ. Parſons.—Privilege ſhould be pleaded—*Prout patet per recordum*, Salk. 1. p. 2. *vide plus infra*, Letter M. (15)

In an Action againſt *B.* he pleaded *Quod ipſe eſt unus Attornat. Cur. Domini Regis de B.* without ſaying *Fuit tempore impetrationis brevis*; and a *Reſpondeas Ouſter* was awarded.

(D) Of Pleas in Abatement to the Form of the Writ and Action; and herein of Miſnomer, and the Want of Addition.

12 Mod. 273. where ſuch Faults may be amended, vide Tit. Amendment; where ſuch Faults muſt be pleaded, and cannot be taken Advantage of in Error, *vide* Tit. *Error*, and *poſtea* Letter H. (10.) *Vide* 5 Co. 14. 9 H. 7, 16. 10 E. 3. 1. p. 2. 2 *Inſt.* 662. *Heb.* 1, 51, 52, 80. *Carth.* 172.

THE Law is very ſtrict in obliging Men to keep up to the legal Forms it preſcribes; and therefore in the Writ, which is the Foundation of the whole Proceeding, that Certainty and Exactneſs is required that no Perſon ſhould be arreſted or attached by his Goods, unleſs there appears ſufficient Ground to warrant ſuch Proceedings; ſo that if the Writ vary materially from that in the Regiſter, or be defective in Subſtance, the Party may take Advantage of it.

(a) Fitz. Brief, 219, 231. (b) Yelv. 120. Vide Finch's Law 357, Latch 173. Vide Heads Amendment and Jeofail.

So if the Declaration varies from the Writ, as (a) by laying the Cauſe of Action in the Reign of a preſent King, where the Writ ſuppoſed it to have been in the Reign of a former King; or by giving the Defendant a Name different from that in the Writ; as where the Writ (b) calls him *A. B.* of *London*, Alderman, and the Plaintiff declares againſt him as *A. B.* of *London*, Eſq. or where the Declaration is otherwiſe defective, in not purſuing the Writ, or not ſetting forth the Cauſe of Action with that Certainty which the Law requires, or in laying the Offence in a different County from that in which the Writ was brought.

For this vide Heads of Miſnomer, and Addition.

Miſnomer is a good Plea in *Abatement*; for ſince the Names are the only Marks and *Indicium* of Things that human Kind can underſtand each other by, if the Name be omitted or miſtaken, there is a Complaint againſt no Body.

Finch 363, 9 H. 5. 1 pl. 3. Where his appearing by that Name, or not taking Advantage of it, ſuch Miſtake will be aided, *vide* Tit. *Error*. *Vide Yelv.* 112. Muſt, in ſetting forth his Name, ſay that by ſuch Name he was known at the Time of the Writ purchaſed. *Skin.* 620. *pl.* 17. *Vide Salk.* 7, *pl.* 17. *Gouldſ.* 86. (a) See 2 *Str.* 836. 10 *Mod.* 208. 2 *Ld. Raym.* 1178, 1541. Lutw. 36.

But though a Defendant may, by pleading in *Abatement*, take Advantage of a *Miſnomer* when there is a Miſtake in the Writ or Declaration, as to the Name of Baptiſm or Surname; yet in ſuch a Plea he muſt ſet forth his right Name, ſo as to give the Plaintiff a better Writ. (a)

One Defendant cannot plead *Miſnomer* of his Companion; for the other Defendant may admit himſelf to be the Perſon in the Writ.

J. Villars, who pretended himſelf to be Earl of Buckingham, was arreſted by the Name of *J. Villars, Armiger*; and on Motion, the Court gave him Leave to put in Bail, without joining in the Recogniſance, and thereby not eſtop himſelf. *Vide Salk.* 3, *pl.* 7. 2 *Barnes* 70, 71. *Ld. Raym.* 64, 249. 7 *Mod.* 38. *Str.* 205. 2 *Str.* 811.

The Defendant, though his Name be miſtaken, is not obliged to take Advantage of it; and therefore if he be impleaded by a wrong Name, and afterwards impleaded by his right Name, he may plead in Bar the former Judgment, and aver that he is *una & eadem perſona*.

* In Case of Felony at Common Law, if a Person were indicted by a wrong Name, he could not plead *Misnomer*, but was obliged to plead to the Felony; for the Fact being sworn against the Party present, it was thought there could be no Injury by the *Misnomer*, as might be where the Party appeared by Attorney; and Felons generally go by no certain Name, nor have they any fixed Habitation.

* Page 7

But this is altered by the Statute of Additions, viz. 1 H. 5. cap. 5.

which was made to prevent the Inconvenience of troubling one Person for another. *Vide Cro. Car.* 104. 21 *E.* 4. 72. 2 *Inst.* 870. *Stil.* 40. *Lit. Rep.* 8. *Vide* Head of *Misnomer*, and *Addition*, and 2 *Hawk. P. C.* 186, 7. that the Party accused may take Advantage of *Misnomer*, or the *Want of Addition*, but yet must plead over to the Felony; but though such Plea be found for him, he is not to be discharged, but must be indicted over again; neither shall such Plea, if found against him, be peremptory, but he shall be tried on his Plea in Chief.

Also the State, Place of Abode, and Dignity of the Person impleaded is necessary to be set forth in judicial Proceedings, lest an innocent Person, by having the same Name with the real Defendant, should suffer; therefore the 1 *H.* 5. *c.* 5. enacts that in all personal Actions, Appeals and Indictments, there shall be added to the Names of the Defendants their Estates, Degrees, Mystery, and Place of Abode*.

But for this, vide Head of Misnomer, and Addition.

Also Additions, which are inducements to the Action, must be made use of; as if one is liable as Heir, he must be named Heir; so if as Executor, he must be named such†.

But for this, vide also Tit. Misnomer, & Addition.

* The Place where Defendant is *conversant* is sufficient, though not *comorant*, nor *inhabitant*. Barnes 164.

† Not necessary in the Writ. 2 *Stra.* 1232. Defendants Addition shall be inserted in Writs of *excommunicato capiendo*. 5 *El. c.* 23. *s.* 13 & 14.

(E) Of Abatement by the Demise of the King.

AT Common Law all Patents of Justices, Commissions Civil and Military, were determined by the Death of the King; also all Suits depending in the King's Courts were discontinued, so that the Plaintiffs were obliged to commence new Actions, or to have Re-summons or Attachment on the former Processes, to bring the Defendants in; but to prevent the Inconvenience, Expence and Delay which this occasioned, were the Statutes of 1 *E.* 6. *cap.* 7. 7 & 8 *W.* 3. *cap.* 27. *s.* 21. and 1 *Ann. st.* 1, *cap.* 8. *sect.* 5. made, which *vide* under Title *Prerogative**.

Proceedings on an Information, in Nature of a *Quo Warranto*, are not abated by the Demise of the Crown.

2 Stra. 782. Where the King brings a Writ of Error in *Quare Impedit*, it abates by his Death. 2 *Stra.* 837. *Fort.* 213.

* As to the Effect of this Abatement at Common Law, see 7. *Co.* 29, 30, &c. See also 1 *Com. Dig.* 62. (*H.* 38.)

Scire Facias to repeal a Grant of a Market, is an original Writ, and within the general Words of the Statute 1 *El.* 6. *c.* 7. and 1 *Ann. c.* 8. and does not abate. *Stra.* 43. Information in the Nature of a *Quo Warranto* does not abate. *Str.* 782.

(F) Of Abatement by the Death of the Parties.

THE general Rule to be observed in this Case is, that where the Death of any Party happens, and yet the Plea is in the same Condition as if such Party were living, there such Death makes no Alteration or Abatement of the Writ.

Gilb. Hist. C. P. 242. 10 Mod. 251.

A Difference has been held with Respect to real Actions, where there are several Plaintiffs, and there is Summons and Severance, (as there is in most Real Actions) that in these the Death of one of the Parties abates the Writ, but not in Personal or Mix'd Actions, where one intire Thing is

10 Co. 134. 6 Co. 2. Cro. Eliz. 854. Cro. Jac. 11. 1 Co. Lit. 139.

Doug. 109. 3 Term Rep. 355. Jones 452. Gilb. Hill. C. P. 243.

is to be recovered; as if there be two Jointenants or Copartners, and they bring a Real Action, and one is ſummoned and ſevered, the other ſhall proceed for his Moiety; for having a Right to a diſtinct Moiety, there is no Reaſon why he ſhould not have a Remedy for the Recovery of it, notwithſtanding the Unwillingneſs of the other to join with him; but if the Perſon ſevered dies, the Writ abates, becauſe he goes for the Whole, in Caſe of the Death of the Jointenant, or of the Copartner, without Iſſue, which would be improper on that Writ, where by the Summons and Severence he went only for a Moiety; for that would be

* Page 8

making the Writ have a double Effect, *viz.* * in Caſe of Summons and Severance, for a Moiety; and in Caſe of Survivorſhip, for the Whole.

8 Mod. 115. And. 57, 58.

'By the 8 & 9 *W.* 3. *cap.* 11. *ſect.* 7. it is enacted, That if there be 'two or more Plaintiffs or Defendants, and one or more of them ſhould 'die, if the Cauſe of ſuch Action ſhould ſurvive to the ſurviving Plaintiff 'or Plaintiffs, or againſt the ſurviving Defendant or Defendants, the 'Writ or Action ſhall not be thereby abated: but ſuch Death being 'ſuggeſted upon the Record, the Action ſhall proceed at the ſuit of the 'ſurviving Plaintiff or Plaintiffs, againſt the ſurviving Defendant or 'Defendants.'

Cro. El. 652. Hard. 317. Went. 96. Co. Lit. 139. Leon. 11. Vide Head of Executors & Adminiſtrat. Dyer 279.

And before this Statute it was held, that if there were two Executors, and they brought an Action of Debt, and one of them died, that the Writ ſhould not abate; for in this Caſe Summons and Severance lies, after which the one Executor does not proceed for a Moiety, but for a Whole, as Repreſentative of the Teſtator.

So in a *Quare Impedit* by two Jointenants, and one is ſummoned and ſevered, and the ſevered Perſon dies, the Writ ſhall not abate, becauſe the Advowſon is an intire Thing, and he proceeded for the Whole after the Severance; and ſo he may after the Death of the ſevered Jointenants.

That there ſhall be no Abatement in 263. *Co. Lit.* 139.

Judicial Writs, nor Summons nor Severance. *Vide* 10 *Co.* 134. *Brownl.* 64. *Leon.*

Hard. 151, 164. Stile 299. 3 Mod. 249. Cro. Car. 426. W. Jones 367.

If there were ſeveral Defendants in the original Action, and one died, the Writ did not abate; becauſe there being a joint Demand, it ſurvived againſt the Reſidue; but in this Caſe there muſt be a Suggeſtion on the Roll, becauſe it would be Error to give Judgment againſt a deceaſed Perſon.

Rol. Abr. 756. *Show. Rep.* 186.

Bridg. 78. Yelv. 208. 212. 213. 10 Co. 135. Vent. 38. Sid. 419.

But in a Writ of *Error*, if there be ſeveral Plaintiffs, and one dies, the Writ ſhall abate, becauſe the Writ of *Error* is to ſet Perſons *in ſtatu quo*, before the erroneous Judgment given below; and they that are Plaintiffs in Error were diſtinct Sufferers in the Judgment, ſince there might be different Executions iſſued thereupon, on the Lands of each of them, and there are different Heirs; and by Conſequence the Survivor cannot proſecute the Writ of *Error* for the whole Lands, leſt by a colluſive Perſuaſion, or by Negligence or Deſign he ſhould hurt the Repreſentative of the deceaſed.

cont. but if any of the Defendants in Error die, yet all Things ſhall proceed, becauſe the Benefit of ſuch Judgment goes to the Survivor, and he only is to defend it. *Sid.* 419. *Yelv.* 208.

Vent. 34. 3 H. 7. 10. 3 Mod. 249.

In an *Audita Querela* by two, the Death of one ſhall not abate the Writ; for the Survivor is not to be reſtored to any Thing he has loſt, but to diſcharge himſelf of the Execution; and thereupon notwithſtanding the Death of the other, he may proceed for a Diſcharge *in toto* for himſelf.

20 H. 6. 30. 18 E. 4. 1. 2 H. 7. 16. Brown. 334. Clift. Ent. 6. Rall. Ent. 146.

If there be ſeveral Perſons named as Plaintiffs in the Writ, and one of them was dead at the Time of purchaſing the Writ, this may be pleaded in *Abatement*, becauſe it falſifies the Writ, and becauſe the Right was in the Survivors, at the Time of ſuing the Writ, and the Writ not accommodated, as the Caſe then was.

'By

'By the (a) 17 *Car.* 2. *cap.* 8. it is enacted, That the Death of either 'of the Parties (b) between Verdict and Judgment, shall not be alledged 'for Error, so as Judgment be (c) entered within two Terms after such 'Verdict.'

(a) Continued by 30 Car. 2. c. 6. and made perpetual by the 1 *Jac.* 2. *cap.* 17. *sect.* 5. (b) If either of the Parties die at any Time before the Assises, it is out of the Statute; but if after the Assises, tho' before the Trial, it is no Error; for the Assises is but one Day in Law. *Salk.* 8. *pl.* 21. 9. This means where the Party dying, is the only Party on that Side the Question, *viz.* Plaintiff or Defendant. See 2 *Ld. Raym.* 1415. (c) If after Verdict and before the Day in *Bank*, the Plaintiff dies, and the Defendant signs Judgment the second Term after the Verdict, this is within the Statute, and the same as if he had actually entered Judgment on the Roll. *Sid.* 385.

'By the 8 & 9 *W.* 3. *cap.* 11. *sect.* 6. it is enacted, That if any 'Plaintiff happen to die after an interlocutory Judgment, and before a 'final Judgment obtained therein, the said Action shall not abate by 'Reason thereof, if such Action might originally be prosecuted or main-'tained by the Executors or Administrators of such Plaintiff: and if the 'Defendant die after such interlocutory Judgment, and before final 'Judgment therein obtained, the said Action shall not abate, if such 'Action might originally be prosecuted or maintained against the Exe-'cutors or Administrators of such Defendant; and the Plaintiff, or if he 'be dead after such interlocutory Judgment, his Executors or Admi-'nistrators shall and may have a *Scire facias* against the Defendant, if 'living after such interlocutory Judgment; or if he died after, then 'against his Executors or Administrators, to shew Cause why Damages 'in such Action should not be assessed and recovered by him or them; 'and if such Defendant, his Executors or Administrators, shall appear 'at the Return of such Writ, and not shew or alledge any Matter suffi-'cient to arrest the final Judgment; or being returned warned, or 'upon two Writs of *Scire facias* it be returned, that the Defendant, his 'Executors or Administrators, had nothing whereby to be summoned, or 'could not be found in the County, shall make Default, that thereupon 'a Writ of Enquiry of Damage shall be awarded, which being executed 'and returned, Judgment final shall be given for the said Plaintiff, his 'Executors or Administrators, prosecuting such Writ or Writs of *Scire 'facias*, against such Defendant, his Executors or Administrators re-'spectively.' * Page 9

(G) Of Abatement by Reason of Marriage or Coverture.

COverture is a good Plea in *Abatement*, which may be either before the Writ sued, or pending the Writ. By the first the Writ is abated *de facto*, but the second only proves the Writ abateable; both are to be pleaded, with this Difference, that Coverture, pending the Writ, must be pleaded *post ultimam continuationem*; whereas Coverture before the Writ brought, may be pleaded at any Time, because the Writ is *de facto* abated; (a) but if a Feme Sole takes out a Writ, and after marries, the Defendant was legally attached on such Suit; and therefore may plead in Chief to it any Defence he has; but such Plea must be *Puis darrein continuance*.

Doct. Pl. 3. Sid. 140. Leon. 168. 169. Vide Tit. Baron and Feme.

(a) The Feme, by her Marriage, cannot abate her own Writ; for this would be taking Advantage of her own Act. 2 *Rol. Rep.* 53. *Stra.* 811. *L. Ray.* 1525. But in an Action against Baron and Feme, the Baron died, and the Feme married again *pendente placito*; and the Court inclined to think the Writ abated, because her Name was changed. *Stile* 138. But 2 *Ld. Raym.* 1525. 2 *Str.* 811. *Barnard. K. B.* 70. are all express, that Coverture after Action brought cannot abate Plaintiff's Writ.

If

Fitz. Brief, 476.

If a Writ be brought by *A.* and *B.* as Baron and Feme, whereas they were not married until the Suit depended, the Defendant may plead this in *Abatement*; for though they cannot have a Writ in any other Form, yet the Writ ſhall abate, becauſe it was falſe when ſued out.

Latch 24. Stile 254, 280. 2 Rol. Rep. 53.

If a Writ be brought againſt a Feme Covert or Sole, ſhe may plead her Coverture; but if ſhe neglects to do it, and there is a Recovery againſt her as a Feme Sole, the Huſband may avoid it by Writ of *Error*, and may come in at any Time and plead it.

For this *vide* Tit. *Baron and Feme.*

Salk. 8. pl. 20. Hetherington v. Reynolds. Gilb. Hiſt. C. P. 245. * Page 10

If an Action be brought in an inferior Court againſt a Feme Sole and pending the Suit ſhe intermarries, and afterwards removes the Cauſe by *Habeas Corpus*, and the Plaintiff declares againſt her as a Feme Sole, ſhe *may plead Coverture at the Time of ſuing the *Habeas Corpus*, becauſe the Proceedings here are *de novo*, and the Court takes no Notice of what was precedent to the *Habeas Corpus*; but upon Motion on the Return of the *Habeas Corpus*, the Court will grant a *Procedendo*; for though this be a Writ of Right, yet where it is to abate a rightful Suit, the Court may refuſe it; and the Plaintiff had Bail below to this Suit, which by this Contrivance he is ouſted of, and poſſibly by the ſame Means of the Debt*.

* If ſhe removes the Plaint Coverture is not a good Plea. *Barnes* 355.

Cro. Jac. 356. Cro. Car. 509. Rol. Rep. 14. Runn on Ejectm. 137. Moor 469. Cro. Car. 232. 1 Bulſt. 5. 1 Com. Dig. 76.

In Ejectment againſt Baron and Feme, after Verdict for the Plaintiff, Baron dies between the Day of *Niſi prius* and the Day in *Bank*; adjudged that the Writ ſhould ſtand good againſt the Feme, becauſe it is in Nature of a Treſpaſs, and the Feme is charged for her own Act; and therefore the Action ſurvives againſt her. So if the Wife had died, the Baron ſhould have Judgment entered againſt him.

If a Feme Sole Plaintiff, after the Verdict, and before the Day in Bank, takes Huſband, ſhe ſhall have Judgment, and the Defendant cannot plead this coverture, for he has no Day to plead it at.

Prohibition at the Suit of Huſband and Wife, does not abate by the Death of the Huſband. 2 Str. 1063.

(H) Where the Writ is abated ex facto, or is only abateable.

2 H. 6. 4. Doct. Pl. 3. Where the Court *ex officio* may abate the Writ, vide Cro. Eliz. 121, 185, 193, 330. Gouſ. 106. 2 Leon. 162. 3 Leon. 93. Rol. Rep. 176. Palm. 311. Hob. 37, 162, 279, 281. Gedb. 149. Stile 477. Yelv. 56. 3 Co. 85. a. Vaugh. 95.

HERE the general Rule to be obſerved is, that where the Writ is *de facto* a Nullity and deſtroyed, ſo that Judgment thereupon would be erroneous, there the Writ is *de facto* abated; as if an Action be brought againſt a Feme Covert as Sole, this makes another Man's Property liable without giving him an opportunity of defending himſelf; which would be contrary to common Juſtice, and therefore the Writ is *de facto* abated.

Carth. 172. But in this Caſe the Court gave Leave to amend.

So if the Return of a *Pluries Mandamus* is laid to be after the Beginning of a Term, and the *Memorandum* of the Bill is entered generally of that Term, this makes the Writ a perfect Nullity; for by the Plaintiff's own ſhewing he had no Cauſe of Action at the Time when the Action was brought.

Where

Where the Writ is only abateable, it must be abated by pleading in Time; for Matters (*a*) in and (*b*) before the Writ, cannot be taken Advantage of in *Error*.

(*a*) Salk. 2. pl. 5. See 2 Ld. Raym. 853. Comb. 31, 86.

7 *Mod.* 35, 51, 105. *Shew.* 169. *Rol. Abr.* 783. That a Man shall not assign that for *Error* which he might have pleaded in *Abatement*. *Carth.* 124. There is a Difference between Original and Judicial Writs; for in the former, Matter of Form abates them as well as Substance; *aliter* in the latter; for if the Substance be good, the Want of Form will be aided. 4 *H.* 6. 34. 4 *E.* 3. 13. 14. (*b*) Otherwise of Faults in the Proceedings after the Writ. *Bro. Faux Latin* 9, 48. For this *vide* Tit. *Error*.

Therefore if a Feme Covert bring an Action in her own Name *per attornatum*, and the Defendant pleads in Bar to the Action, he shall never afterwards assign the Coverture for Error.

Carth. 124. per Holt.

So though it be a good Plea for a Defendant to say, that a Stranger is Tenant in Common with the Plaintiff, yet if he does not plead it in *Abatement*, he shall not have Advantage of it in Arrest of Judgment.

Cro. El. 554. Stra. 810. Cowp. 213. Skin. 12. pl. 12.

So if a *Quare Impedit* be brought against the Bishop and Incumbent, only, without naming the Patron, though this might have been pleaded in *Abatement*, yet if the Defendant pleads in Bar, &c. it cannot after, upon a Writ of *Error*, be assigned for Error; for though the Want of the Patron's being made a Defendant might make the Writ abateable, yet it *was not thereby actually abated; and nothing shall be assigned for Error concerning the Writ, but what actually abates it.

Salk. 4. pl. 10. Cro. Jac. 651. Bulst. 4, 5. 2 Bro. 229. Palm. 306, 311. 2 Rol. Rep. 239.

If an Action be brought against Sir *Francis Fortescue Militem & Baronettum*, and he appears and pleads to Issue, and a Verdict and Judgment is given for the Plaintiff, the Defendant in a Writ of *Error* shall not assign for Error that he was a *Knight of the Bath*, and ought to be so named; for he has lost this Advantage by appearing to the other Name, and thereby concluded himself.

* Page 11 Rol. Abr. 781, 791, 869. S. C. Rol. Rep. 450. S. C.

If a Writ be brought to the Damage of 40*l.* and the Plaintiff declares *Ad damnum* 200*l.* and the Verdict gives 30*l.* this is no Error after Verdict, for the Writ is not abated *de facto*, but only abateable by Plea.

Palm. 270, 271. But as to this, the Difference is, that if the Declaration varies in Form, the Defendant must plead it in *Abatement*; but if it varies in Substance, the Defendant may move it in Arrest of Judgment, or take Advantage of it in Error; because the Court has no Authority to proceed, having prosecuted a different Matter from that which the Writ has given the Court Authority to take Cognizance of. *Jones* 304. *Cro. Elin.* 722, *Cro. Jac.* 654. For this vide Tit. *Error*.

(I) Where the Writ shall abate in Toto or in Part.

WHatever proves the Writ (*a*) false at the Time of suing it out, shall abate the Writ entirely; as if it appears by the Plaintiff's own shewing that he had no Cause of Action for Part; therefore if an Action of Trespass be brought against two Defendants, and the one pleads that the other was dead *die impetrationis brevis*, or that there is none such *in rerum natura*, the whole Writ shall abate; for it is the Plaintiff's Fault, to use the Authority of the Court, to call in a Man that was dead; and it was no less an Abuse of the Process to issue it against a feigned Person.

22 *E.* 4. 4. Hob. 199. 217, 345. Bulst. 1.

(*a*) But this Falsification of the Writ must be in a material Point; for in a *Precipe quod reddat* against two, if one pleads Non-tenure, and the other takes the whole Tenancy on himself, the Writ shall not abate in the Whole, but stand good against him that hath accepted the Tenancy, because he has a proper Defendant to the Action; and the Non-tenure of the one does in no ways prejudice the other Defendant. *Rast. Ent.* 365. *Doct. Pl.* 7.

But

Raſt. Ent. 365. Doct. Pl. 7.

But if one of the Defendants die pending the Writ, this ſhall not abate the Action againſt the other Defendant; for this is the Act of GOD, and no default in the Plaintiff.

Co. Lit. 285. a. Doct. Pl. 7. 21 H. 6. 4. (*b*) The Diſability of one Plaintiff ſhall ſtop the others from proceeding;

If there be two Executors, and one is named of *D.* and ſays he is of *C.* the Writ ſhall abate againſt both, becauſe they are both Repreſentatives of one Perſon and muſt both be legally ſummoned; and as they are both but one Perſon in the Eye of the Law, the Plaintiff cannot (*b*) proceed againſt the one without the other; but in this Caſe, the other Defendant will be obliged to plead, though the Defendant's Plea in *Abatement* ſhall be firſt determined; and if it be found for him, ſhall abate the Writ *in Toto.*

for the Writ, when abated for want of Form, is abated *quoad* all, though they have pleaded to Iſſue. 8 *Co.* 159. *Carth.* 96. But if two Executors ſue, and ſet forth themſelves to be Executors, and that they proved the Will; but upon the Probate ſet forth, it appears that one only proved the Will; and the Defendant pleads this in *Abatement*, a *Reſpondeas ouſter* will be awarded; for both have a Right; and he that did not prove may come in when he pleaſes. *Salk.* 3. *pl.* 6. The ſetting forth that they had proved the Will, amounted only to Surpluſage: The Method is to declare as Executors, generally, and make a Profert of the Letters Teſtamentary, whereby it appears they are Executors. *Vide* Head of *Executors* and *Adminiſtrators.*

Booth 29. 38 H. 6. 7.

At Common Law, Non-tenure of Parcel of the Lands abated the whole Writ; for this falſified the Writ which alledged the Defendant to be Tenant of the Whole; but it was thought very hard that a Writ which was good in Part ſhould be totally deſtroyed by this Plea; and

* Page 12 From this Statute

*therefore 25 *E.* 3. *cap.* 16 enacts that the Writ ſhall only abate for that Part of which Non-tenure is alledged.

aroſe the Diſtinction in our Books, that the Plaintiff cannot deſtroy, but may abridge his Demand.

Co. Lit. 362, 363. Raſt. Ent. 278. 3 Lev. 330. Lutw. 963.

At Common Law, if the Tenant plead *Non-tenure and Diſclaimer*, the Plaintiff could not aver his Writ, and ſay he was Tenant; for in Real Actions anciently there were no Damages given; and the Plaintiff by this Plea has the Effect of his Writ, which is to be put into Poſſeſſion of the Lands; but if *Non-tenure* be pleaded, without *Diſclaimer*, the Plaintiff may aver his Writ, and ſhew that the Tenant has the Reverſion in Fee in him as well as the Freehold, or take Judgment at his Election.

4 E. 4. 32. Doct. Pl. 5.

If the Demandant enters into any of the Lands, pending the Writ, this ſhall abate the Writ *in Toto.*

Saund. 182. Duppa and Mayo.

The Plaintiff declared for Arrears of a Rent-charge, and demanded a larger Sum than was due to him, upon his own ſhewing, by 7*l.* 10*s.* The Defendant pleaded a bad Plea, and the Plaintiff had Judgment for his whole Demand; but perceiving his Miſtake on the Entry of the Judgment, he releaſed the 7*l.* 10*s.* and it was held a good Releaſe; and that it was not a Falſification of his Writ, but rather an Affirmance; but if the Defendant had taken Advantage of it in due Time, it would have abated the Writ.

Co. Lit. 285. a.

If an Action is well begun, and Part of the Action determines by Act in Law, and yet the like Action is given for the Reſidue, the Writ ſhall not abate, but the Plaintiff may proceed for the Reſidue; but where, by the Determination of Part, the like Action does not remain for the Reſidue, there the Action, though well commenced, ſhall abate.

Co. Lit. 28. a.

As if an Action of Waſte be brought againſt Tenant *pur auter vie*, and, pending the Writ, *Ceſtuy que vie* die, this ſhall not abate the Writ *in Toto*; but the Plaintiff may proceed to recover Damages on this Writ, for the Leſſor might have an Action for the Damages, though *Ceſtuy que vie* had died before any Action of Waſte brought.

So

So if an Ejectment be brought, and the Term determine pending the Writ, yet the Action ſhall proceed for Damages only. Co.Lit. 285. a.

But if Tenant *pur auter vie* had brought an Aſſiſe, and pending the Writ, *Ceſtuy que vie* died, altho' the Action was well commenced, yet the Writ ſhall abate, becauſe no Aſſiſe lies for Damages only. Co.Lit. 285. a.

So if an Action of Waſte were brought by Baron and Feme in Remainder, in eſpecial Tail, and pending the Writ the Wife die without Iſſue, the Writ would abate, becauſe all Actions of Waſte muſt be *Ad exhæreditationem* Co.Lit. 285. a.

So if a Writ of *Annuity* be brought, and, pending the Writ, the Annuity determine, the Writ faileth for ever, becauſe the like Action cannot be maintained for the Arrearages only. Co.Lit. 285. a.

When a Writ is brought for two Things, and it appears the Plaintiff cannot have any other Action for the one of them, the Writ ſhall ſtand for the Part that is good; but where it appears he can have another Writ in another Form for one, there the whole Writ ſhall abate; becauſe, when there can be no better Writ brought for the Parcel, it ought to continue; but if another Writ could be brought for that Parcel, it is bad, and ought to abate *in Toto.* 11 Co. 45. Godfrey's Caſe. Saund. 285.

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* (K) Where it ſhall abate by Reaſon of another Action brought for the ſame Thing. * Page 13

THE Law abhors Multiplicity of Actions; and therefore whenever it appears on Record, that the Plaintiff has ſued out two Writs againſt the ſame Defendant for the ſame Thing, the ſecond Writ ſhall abate; for if it were allowed that a Man ſhould be twice arreſted, or twice attached by his Goods for the ſame Thing, by the ſame Reaſon he might ſuffer *in infinitum*; and it is not neceſſary that both ſhould be pending at the Time of the Defendant's pleading in *Abatement*, for if there was a Writ in Being at the Time of ſuing out the ſecond, it is plain the ſecond was vexatious and ill *ab initio.* 9 H. 6. 12. Mo. 418, 539. 5 Co. 61. Doct. Pl. 10, 67. Where a prior Writ of Appeal may be pleaded in Abatement to a ſecond Appeal.

2 *Hawk. P. C.* 190. Where a prior Suit depending, may be pleaded to an Information. 2 *Hawk. P. C.* 275. But it is no good Plea in *Abatement* of an Indictment, as it is of an Appeal or an Information, that there is another Indictment againſt the Defendant for the ſame Offence; but in ſuch a Caſe the Court, in Diſcretion, will quaſh the firſt Indictment. 2 *Hawk. P. C.* 367.

But then it muſt appear plainly to be for the ſame Thing; for an Aſſiſe of Lands in one County ſhall not abate an Aſſiſe in another County, for theſe cannot be the ſame Lands. 4 *H.* 6. 24. Doct. Pl. 10.

In general Writs, as *Treſpaſs*, *Aſſiſe*, *Covenant*, where the ſpecial Matter is not alledged, and the Plaintiff is nonſuited before he counts, the ſecond Writ is ſued pending the other; yet the former ſhall not be pleaded in *Abatement*, becauſe it does not appear to the Court that it was for the ſame Thing; for the firſt Writ being general, the Plaintiff might have declared for a diſtinct Thing from what he demanded by the ſecond Writ; but when the firſt is a ſpecial Writ, and ſets forth the particular Demand, as in a *Præcipe quod reddat*, &c. there the Court can readily ſee that it is for the ſame Thing; and therefore, though the Plaintiff be 5 Co. 61. Doct. Pl. 11, 12.

nonſuited

nonſuited before he counts, yet the firſt ſhall abate the ſecond Writ, it being apparently brought for the ſame Thing*.

* This muſt mean where the Plaintiff ſues a ſecond Writ, before the Plaintiff is nonſuited on the firſt, becauſe in ſuch Caſe, the firſt Writ was pending, when the ſecond Writ iſſued.

5 Co. 62. vide for this Tit. Courts, and their Juriſdiction in general. Dyer 92, 93.

An Action depending in an inferior Court cannot be pleaded to an Action brought in one of the Courts at *Weſtminſter* for the ſame Thing.

The Law will not allow two *Quare Impedits* to be brought for the ſame Preſentation, *viz.* a ſecond by the Defendant againſt the Plaintiff, when there is one pending in Court by the Plaintiff againſt the Defendant, *Et ſic in brevi de partitione*, becauſe the Defendant can have the ſame Remedy on the firſt Writ as he could on a ſecond.

The Law is ſo watchful againſt all vexatious Suits, that it will neither ſuffer two Actions of the ſame Nature to be pending for the ſame Demand, nor even two Actions of (*a*) a different Nature.

(*a*) Therefore it is a good Plea in *Treſpaſs*, that the Plaintiff has brought a Replevin for the ſame Thing, becauſe in both Caſes Damages are to be given for that Caption. 8 *H.* 6. 27. *Doct. Pl.* 10. *Sed. Qu.* And ſee *Comb.* 229. and *Skin.* 388. So in an Aſſiſe of *Darrein* Preſentment, a *Quare Impedit* depending for the ſame Preſentation is a good Plea. *Hob.* 184.

Hob. 137.

In a *Quare Impedit*, brought by the Earl of *Bedford* againſt the Biſhop of *Exeter* and Others, the Defendants pleaded that the Plaintiff had brought another *Quare Impedit* for the ſame Preſentation, which is ſtill depending and undetermined, with an Averment that it was the ſame Plaint, Avoidance and Diſturbance; the Earl replies, That ſince his former Writ purchaſed, the ſame Church being ſtill void, he preſented *Henry Curtis* to the Biſhop, who refuſed him, which is the Diſturbance he now complains of, and traverſes that it is the ſame Diſturbance on which both Actions were brought; the Defendant demurs; and ruled the Writ ſhould abate; for though there muſt be a Diſturbance naturally

* Page 14

* to maintain the Action, yet the principal Effect of the Suit is to recover the Preſentation; and the Nature of a *Quare Impedit* is to be Final, or Nonſuit, or Diſcontinuance, which this would defeat; for by this Rule the Plaintiff might bring a new one, without leaving the former Suit. And though in this Caſe there was (*a*) a new Defendant, yet the Writ abated, becauſe there were two *Quare Impedits* againſt the ſame Man; and therefore a freſh Defendant could no more enable him to bring a ſecond *Quare Impedit*, than a new Diſturbance could.

(*a*) That where an Action of Treſpaſs is brought, and afterwards Replevin for the ſame Thing, there muſt not be more Defendants in the Replevin than there were in the Action of Treſpaſs, becauſe it cannot ſquare with the Averment, and that it is *una eademque captio. Doct. Pl.* 10. *Sed. qu.* If the other Action might not be pleaded in *Abatement*, averring the *Fact* to be the ſame. In Treſpaſs againſt two Defendants, they both pleaded in *Abatement* another Bill of Treſpaſs pending againſt one of them; and three Judges againſt *Holt*, who doubted, held the Plea good as to both. *Carth.* 96, 97.

Allen 34. Gilb. Hiſt. C. P. 260.

If a ſecond Writ be brought teſted the ſame Day the former is abated, it ſhall be deemed to be ſued out after the *Abatement* of the firſt.

Dyer 227. Carth. 417, 453. See Lord Raym. 347. 6 Mod. 122.

If an Action, pending in the ſame Court, be pleaded to a ſecond Action brought for the ſame Thing, the Plaintiff may pray that the Record may be inſpected by the Court, or demand *Oyer* of it, which if not given him in convenient Time, he may ſign his Judgment.

(L) Where a Perſon may Plead in Bar, or in Abatement.

OUtlawry may be pleaded always in *Abatement*, but not in Bar, unleſs the Cauſe of Action be forfeited. 12Mod.400. Co.Lit. 128. b. Doct. Pl. 395.

In Perſonal Actions, where the Damages are uncertain, Outlawry cannot be pleaded in Bar; but in Actions on the Caſe, where the Debt, to avoid the Law Wager, is turned into Damages, there Outlawry may be pleaded in Bar; for it was veſted in the King, by the forfeiture, as a Debt certain, and due to the Outlaw; and the turning it into Damages, whereby it becomes uncertain, ſhall not diveſt the King of what he once lawfully poſſeſſed. 2 Lutw. 1604. 3 Lev. 29. 2Vent. 282. 3Leon. 197. 203. Cro. Eliz. 204. Owen 22. 11 *H.* 7. 11.

Outlawry may be pleaded in Bar after it is pleaded in *Abatement*, becauſe the Thing is forfeited, and the Plaintiff has no Right to recover.

Alienage may be pleaded either in Bar or *Abatement*; but with this Difference, that Alienage can be only pleaded in *Abatement* to an Alien in League, but may be pleaded in Bar to an Alien Enemy, becauſe the Cauſe of Action is forfeited to the King, as a Repriſal for the Damages committed by the Dominion in Enmity with him. 2 Lutw. 1604. Bro. Denizen 10. Co.Lit. 129. b.

Whatever deſtroys the Plaintiff's Action, and diſables him for ever from recovering, may be pleaded in Bar: but the Defendant is not always obliged to plead in Bar, but may plead in *Abatement*; as in Replevin for Goods, the Defendant may plead Property in himſelf, or in a Stranger, either in Bar or in *Abatement*; for if the Plaintiff cannot prove Property in himſelf, he fails of his Action for ever; and it is of no avail to him who has the Property, if he has it not. Vent. 249. 2 Lev. 92. Salk. 5. pl. 12. See 2 Lord Raym. 984. 12Mod. 122. 6 Mod. 81, 103.

In an Action of Debt on a Judgment obtained, the Defendant cannot plead a Writ of *Error* brought and pending, either in Bar or in *Abatement**. Carth. 243. See 2 Lord Raym. 1017.

**But the Court on Motion will ſtay Proceedings, until the Error is determined, on terms.* *Priſal in auter lieu* muſt be pleaded in *Abatement*, and cannot be pleaded in Bar. *Salk.* 3. *pl.* 8. See 2 *Ld. Raym.* 1016. *Carth.* 244. *Show.* 98, 146. *Carth.* 136. *Vide Carth.* 1, 2. where it is ſaid, that it may be pleaded in *Abatement*, though not in Bar; but *Quære*, and *vide* Tit. *Error*; and 10 *Mod.* 17. *Ld. Raym.* 47.

If a Defendant pleads Matter in *Abatement*, and concludes in Bar, this ſhall be eſteemed a Plea in Bar, and the Court will give final Judgment; * becauſe, by pleading to the Action, the Writ it admitted to be good; and he puts the whole Matter upon his Plea. * Page 15 Lev. 312. 2 Mod. 64. *Fitzgib.* 269.

2 *Rol. Rep.* 64. 10 *Mod.* 112. *Ld. Raym.* 593, 694. 12 *Mod.* 524. 2 *Ld. Raym.* 1018

So if a Man pleads in Bar, and concludes in *Abatement*, this ſhall be eſteemed a Plea in Bar; becauſe he could have no Writ if he could have no Action, and where there could be no Action, the Diſpute about the Writ would be inſignificant. 6 Mod. 103. 18 *H.* 6. 27. Lutw. 34. 36.cont. Ld. Raym. 593. contr.

See 2 *Ld. Raym.* 1018. *Comb.* 483. *Show. Rep.* 4. See *Ld. Raym.* 128.

(M) Of

(M) Of the Manner of pleading in Abatement, and the Proceedings on such Plea.

Lutw. 1181. Hob. 19. 2 Stra. 1192. Freem. 458. pl. 628.

A Plea in *Abatement* must be put in within four Days after the Return of the Writ, because the Person coming in by the Process of the Court, ought not to have Time to delay the Plaintiff.

Salk. 367. *Inst. Legal.* 518, 519. *Pract. Reg. C. P.* 1, 3, 286. *Barnes* 149. *Rep. & Cas. of Pract. C. P.* 63, 63. 11 *Mod.* 2. *Comb.* 251.

Hob. 250. Carth. 8. 9.

The Defendant in *Abatement* shall not plead two Outlawries, or two Excommunications; for Duplicity (*a*) is a Fault in *Abatement* as well as in Bar.

(*a*) Comb. 64. 239. 240. Salk. 4. pl. 14. 6.

Carth. 363. 12 Mod. 225, 295.

In Pleas in *Abatement* which relate to the Person, there is no Necessity of laying a Venue, for all such Pleas are to be tried where the Action is laid.

Salk. 220. pl. 9. See 4 Lord Raym. 869. 7 Mod. 97. 6 Mod. 198.

If the Plaintiff demurs in *Abatement*, the Court will give final Judgment, because there can be no Demurrer in *Abatement*; for if the Matter of *Abatement* be *dehors*, it must be pleaded; if intrinsic, the Court will take Notice of it themselves.

But a Demurrer in *Abatement* to an Indictment for a capital Offence, or Appeal of Death, shall not conclude the Party, but he shall have Leave to answer over to the Offence. 2 *Hawk. P. C.* 334.

Salk. 218. pl. 2. 10 Mod. 112. See 2 *Ld. Raym.* 1020. *Show.* 155. See 2 *Ld. Raym.* 338. *Carth.* 139.

If the Plaintiff demurs in Bar to a Plea in *Abatement*, he discontinues the Suit, because he does not maintain the Writ. (*a*)

(*a*) It is aided by Verdict *Salk.* 218.

Hob. 250.

If there be two Defendants, and they plead two several Pleas in *Abatement*, and there be Issue to one, and Demurrer to the other, if the Issue be found for the Defendant, the Court will not proceed on the Demurrer, & *sic vice versa*; for in both Cases the Writ being once abated, it would be impertinent to judge whether it ought to abate on the other's Plea.

Moor 30. Carth. 363. 5 Mod. 136, 145. Fort. 334.

Where the Matter of *Abatement* appears on the Face of the Record, the Plea shall begin and end with a *Petit judicium de brevi*; but where the Matter is *dehors*, the Defendant shall only end his Plea with a *Petit judicium*.*

* This Distinction is not now often attended to, nor is it perhaps material.

Salk. 298. Lutw. 1592. Carth. 172. 3 Lev. 351, 364.

On a Plea in *Abatement*, no Advantage can be taken of the Errors in the Declaration; as nothing but the Writ is then in Question, for nothing else is pleaded to.

Carth. 447. See Lord Raym. 329. 5 Mod. 396. Carth. 499.

If on a Plea in *Abatement* a *Respondeas Ouster* is awarded, and afterwards the Defendant pleads in Chief, and there is a Verdict for the Plaintiff, yet if the Plea in *Abatement* does not appear to have been entred on the *Nisi prius* Record, Judgment will be arrested; for it being entred on the Plea Roll, (which was in Court) it must be mentioned in the *Nisi prius* Roll, otherwise it does not appear that it was a Verdict in the same Cause.

The

The Judgment for the Defendant on a Plea in *Abatement* is *Quod breve*, or *Narratio Caſſetur*; and for the Plaintiff, a *Reſpondeas Ouſter*; but if iſſue be joined on a Plea in *Abatement*, and it be found for the Plaintiff, it ſhall be peremptory againſt the Defendant; and the Judgment ſhall be *Quod recuperet**, becauſe the Defendant chuſing to put the whole Weight of his Cauſe upon this Iſſue, when he might have had a Plea in Chief, is an Admittance that he had no other Defence. Yelv. 112. 2 Show. 42. Stra. 542. * And in an Action to recover Damages, the Jury muſt aſſeſs the Damages. 10 *Mod.* 112, 192, 210. *Gilb. Caſ.* 80, 138. Not peremptory on Indictments for capital Offences. 2 *Hawk. P. C.* 334.

* Upon a *Reſpondeas Ouſter* the Defendant pleads the General Iſſue, the Plaintiff ſhall ſign Judgment, if the Defendant's Attorney, on redelivering back a Copy of the Iſſue, will not pay for it; and it ſeems the old Courſe was to deliver in a Copy of the whole Record, *viz.* the Declaration, Plea in *Abatement*, &c. and Iſſue; but the Court made a Rule for the Future, that a Copy of the Declaration and Iſſue ſhould only be paid for. * Page 16 Salk. 4. pl. 11.

Upon a *Reſpondeas Ouſter*, no Notice need be given of it; for the Defendant is ſuppoſed to be attending his Cauſe in the Paper to maintain his Plea. Salk. 7. pl. 18.

See farther as to Abatement, *Com. Dig.* 1 *V.* And as to pleading another Suit depending, for the ſame Cauſe. See *Com. Dig.* 1 *V.* 52. *H.* 24.) If a Writ abates, without the Default of the Demandant or Plaintiff, he may have a new Writ by *Journey's Accompts*. Vide 1 *Com. Dig.* 86. (*P.*)

ACCOUNT.

THE Writ or Action of *Account* lay only at Common Law againſt one as Guardian in Socage, Bailiff or Receiver, except in Favour of Trade and Merchandize. Co. Lit. 172. a.

The Proceedings in this Action being difficult, dilatory and expenſive, it is now ſeldom uſed, eſpecially if the Party has other Remedy, as *Debt*, *Covenant*, *Caſe*, or other Action; or if the Demand be of Conſequence, and the Matter of an intricate Nature; for in ſuch Caſe it is more adviſeable to reſort to a Court of Equity, where Matters of *Account* are more commodiouſly adjuſted, and more advantageouſly determined for both Parties, the Plaintiff being in that Court intitled to a Diſcovery of Books, Papers, and the Defendant's Oath; and on the other Hand, the Defendant allowed to diſcount the Sums paid or expended by him, and all reaſonable Allowances to diſcharge himſelf of Sums under 40*s.* by his own Oath, if by Anſwer or other Writing he charges himſelf by the ſame, to diſcharge himſelf, which will be good, if there be no other Evidence; and is intitled after the Account is ſtated, to a Decree in his Favour, if any Thing be due to him on the Ballancing thereof. Salk. 9. Carth. 89. Chan. Ca. 249. Vern. 283, 470. 2 Vern. 176. Abridg. in Equ. 10.

We ſhall therefore, under this Head, but briefly conſider,

(A) Againſt whom either by the Common Law, or by Statute, this Action lies. 17.

(B) Of the Manner of bringing Account, with Reſpect to the Perſons againſt whom it is brought; and herein of charging one as Receiver when Bailiff, & vice verſa. 17.
(C) The Nature of the Demands for which it may be brought. 19.
(D) In what Caſes this is the proper Action, or ſome other may be brought. 19.
(E) What ſhall be a good Bar to this Action. 20.
(F) Of the Auditors, and what ſhall be a good Diſcharge before them. 21.

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* Page 17 * (A) Againſt whom, either by the Common Law or by Statute, this Action lies.

9 *H.* 4. 12. *b.* Co. Lit. 172. *a.* Co. Lit. 90. *b.* F. N. B. 117. 11 Co. 90. *a.* 2 Roll. Abr. 161. 2 Inſt. 404.

BY the Common Law, *Account* lay only againſt a Guardian in Socage, Bailiff or Receiver, or by one in Favour of Trade and Commerce, naming himſelf Merchant, againſt another naming him Merchant, and for the Executors of a Merchant; for between theſe there were ſuch a Privity, that the Law preſumed them conuſant of each other's Diſburſements, Receipts and Acquittances.

13 E. c. 123. 25 E. 3. ſt. 5. c. 5. 31 E. 3. c. 11. 4 Ann. c. 16. ſect. 27. Co. Lit. 89. *b.*

The Statute 13 *Ed.* 1. *cap.* 23. gives an Action of *Account* to the Executors of a Merchant, the 25 *Ed.* 3. *ſt.* 5. *cap.* 5. to Executors of Executors, the 31 *Ed.* 3. *cap.* 11. to Adminiſtrators; and by the Statute 4 *Ann cap.* 16. *ſect.* 27. Actions of *Account* may be brought againſt the Executors and Adminiſtrators of every Guardian, Bailiff and Receiver, and by one Jointenant, Tenant in Common, his Executors and Adminiſtrators, againſt the other as Bailiff, for receiving more than his Share, and againſt their Executors and Adminiſtrators.

Before theſe Statutes, if one Jointenant, or Tenant in Common, received all the Profits, the other could not have his Action, unleſs he actually appointed him Bailiff or Receiver. *Co. Lit.* 172. *a.* 186. *a.* 200. *b.* So if two had a Ward in Common, and one took all the Profits. *F. N. B.* 118. So if there had been two Executors, and one had received all the Debts of the Teſtator; for between theſe there was not ſuch a Privity as the Law required. *Bro.* Tit. *Accompt* 58. 39 *Ed.* 3. 28.

Rol. Abr. 117. F. N. B. 118. Co. Lit. 172. S. P. Abr. Ca. Eq. 6. pl. 3.

Though an Infant may be an Executor, or may be charged in Trover, being a Tort; yet if he be made Factor, Bailiff or Receiver, he ſhall not be accountable for what he does during his Infancy, either in Law or Equity, for the ſame Reaſon that other Acts of his bind him not; therefore when ſuch a one is appointed Factor, his Friends ſhould give Security for his accounting.

F. N. B. 119. 4 Leon. 32. vide 1 Vern. 208. where in Chancery, on Exceptions to a Maſter's Report, it was held ſufficient for a Servant or Apprentice, in anſwer to a Bill for an *Account*, to ſay in general, that whatever he received was by him received and laid out again by his Maſter's Orders.

If I make *J. S.* my Bailiff or Receiver, and makes a Deputy, I muſt have *Account* againſt the Bailiff or Receiver himſelf, and not againſt the Deputy; for the Receipt of the Deputy was to the Uſe of his Maſter.

An

An Apprentice, by the Name of an Apprentice, is not chargeable in *Account*. 11 Co. 89. b. Though he is not chargeable for the Ordinary Receipts upon his Master's Trade, yet upon collateral Receipts, which concern not the ordinary Trade of his Master, he is chargeable as well as another, 3 *Leon.* 63. but then he must be charged as Bailiff or Receiver. 2 *Inst.* 379, 380.

(B) Of the Manner of bringing Account, with Respect to the Persons against whom it is brought; and herein of charging one as Bailiff when Receiver, & vice versa.

IF the King appoints *J. S.* or he of his own Head takes upon himself the Charge and Care of the Estate of a Lunatick, he is but in Nature of a Bailiff, and accountable to the Lunatick, his Executors or Administrators. 4 Co. 127.

* A Man shall not be charged in *Account*, as Surveyor, Comptroller, Apprentice, Reive or Heyward, or a (*a*) Disseisor, or other Wrong-doer; for, to maintain an Action of *Account*, there must be a Privity either in Law or by the Provision of the Parties. * Page 18 Co. Lit. 172. (*a*) So if a Disseisor appoints *J. S.* to receive his Rents, the Disseisor cannot have a Writ of Account against *J. S.* Dalt. 99. S. P. 3 *Leon.* 24.

At Common Law, if a Man were disseised, and his Entry taken away, he could never recover, by any Action, the mesne Profits; but if the Disseisor made a Feoffment in Fee, by the Statute of *Glouc.* the Disseisee in an (*b*) Assise might have recovered Damages for the mesne Profits, being a Continuation of the first Wrong. 2 Rol. Abr. 550. (*b*) But whether he could have an Action of Trespass, seems to have been much controverted; for which *vide Roll's Abr.* 554. 10 *Co.* 51. *And.* 352. *Co.* 51. *Hob.* 93. *Roll's Rep.* 101. *Godb.* 338. *Qu.* If against the Disseisor Trespass would not lie, and Damages be recovered for the Time he wrongfully held Possession, and if Ejectment would not lie against the Feoffee, and after Recovery an Action for the mesne Profits, for the Time he was in Possession?

But the Chancery interposed, and at last carried the Remedy farther than had been admitted at Common Law; for though in the Case of *Owen* and *Aprice*, which was adjudged 4 *Car.* 1. the Court left the Plaintiff to his Remedy at Common Law for the Recovery of the mesne Profits, and would not assist by their Decree: And though in the Case of *Eyre* and *Jackson*, 14 *Car.* 2. they refuse to assess any Damages for a Trespass, for that was a Matter determinable at Common Law, and to be ascertained by a Jury; yet afterwards they began to make the Person, who was the Disseisor of the mesne Profits, accountant to him who had the Right; and this was first begun where Lands were settled for the Payment of Debts, there such Trustees, and the Heir of the Debtor, were Accountants to the Creditors for whom the Profits were to be received; and this was very clear and plain, because such Person came in and took the Profits under the Trust; and this was settled in the Case of *Gilpin* and *Smith*, 18 & 19 *Car.* 2. Afterwards they came to extend their Notions; and the Person that took the mesne Profits by wrong, was taken as Trustee for, and accountant to, him that had the Right; and this was settled in the great Case of *Coventry* and *Hall*, which was in the Years 33. 34 & 35 *Car.* 2. and was this: Sir *Thomas Thynn* having treated with the Lord Chan. Rep. 82, 229. Chan. Ca. 80, 81 2 Chan. Ca. 71, 72, 134, 135. 2 Chan. Rep. 259, 261. Vern. 295. 2 Vern. 724.

Keeper *Coventry* for a Marriage between his Son and *Catharine* the Daughter of the Lord Keeper, the ſaid Sir *Thomas* covenanted to ſettle Lands on his Son, but the Conveyance was defective, becauſe it wanted the Words, *That he ſhould ſtand ſeiſed*; the Son recovered the Lands by a Decree in Chancery, notwithſtanding the Defect in the Conveyance, againſt the Heir at Law of Sir *Thomas* the Father, and afterwards came with his Bill for the meſne Profits; and though the Heir at Law was intitled to the meſne Profits at Law, becauſe the Conveyance was defective, and the firſt Decree which ſet up the Title under the Settlement, had ordered no Account for the meſne Profits, yet the Court, on this Bill, carried back the Account againſt the Heir at Law for all the Profits received by him; and though it was objected, there was no Agreement, nor no Truſt, that the Heir ſhould receive the Profits for the rightful Proprietor, yet the Court reſolved that he ſhould account from the original Juſtice, which intitled the Proprietor to ſeek an *Account* againſt that Perſon that had taken the Profits of the Land, which in Equity and Juſtice belonged to him; and though the Heir had the Title in Law, yet ſince, in Equity and Conſcience, the Eſtate belonging to another, ſuch Heir ought to account with him for the Profits he had made of what was his; and from hence Equity began to make all Perſons account for the meſne Profits they had received, to ſuch Perſons as had the equitable Title; but in a Caſe where the Huſband ſold Lands for valuable Conſideration, and the Wife, after his Death, recovered her Dower againſt the Purchaſer, and brought her Bill in Chancery for the meſne Profits
* Page 19 from the Time of *the Death of her Huſband; the Lord Ch. *Cowper* would not relieve her; for he ſaid that he could not alter the Law of Dower, which gave no Damages againſt a Purchaſer under the Huſband; and he ſaw no Reaſon in Equity to introduce a different Rule*.

* The Proceeding in Equity is proper where the wrongful Poſſeſſor hath been in Poſſeſſion 20 Years, otherwiſe, the Proceeding by Ejectment, and after Recovery by Action for the meſne Profits, may be the moſt eligible Method.

A Bailiff cannot be charged as Receiver, becauſe if he be charged as
(a) Rol. Abr. 119. (*a*) Bailiff upon his Account, he ſhall have Allowance of his Charges and Expences; which he is not intitled to when he is charged as a Receiver; alſo he is not allowed, in an Action brought againſt him as a Receiver, to plead that he was before charged as Receiver.

By Bailiff is underſtood a Servant that hath Adminiſtration and Charge of Lands, Goods and Chattels, to make the beſt Benefit for the Owner, againſt whom an Action of Account doth lie for the Profits which he hath raiſed or made, his reaſonable Charges and Expences deducted. Co. Lit. 172. a. A Receiver is one who receiveth Money, and is to render an Account of it, but is not allowed any Charges or Expences but what is agreed on by the Parties: and in this Caſe the Plaintiff is to declare by whoſe Hands he received it. Co. Lit. 172. a. If a Bailiff be charged as Receiver, it ſeems the beſt Way is to plead it ſpecially. 2 Lev. 126. Whether a Perſon may not in the ſame Action be charged as Bailiff and Receiver, *Quære*, and *vide* 2 Rol. Abr. 119. Cro. Car. 240. In ſome Caſes in an Action of Account againſt one as *Receptor denariorum* he ſhall have Allowance of his Expences, and ſhall account for the Profit he received, or might reaſonably receive. Co. Lit. 172. a.

(C) The Nature of the Demands for which it may be brought.

Bro. Tit. Account 355. 4 Brown. 76. AN Action of *Account* lies not for a Thing certain; as, if a Man delivers 10*l.* to *B.* to merchandize with, he ſhall not have Account of the 10*l.* but of the Profits, which are uncertain.

No

No Action of *Account* lies for Rent reſerved on a Leaſe; ſo if a Leſſee of Goods waſte them, yet no Action of *Account* lies againſt him. Rol. Abr. 116.

If the Bailee of Goods waſte them, or refuſe to deliver them, no Action of *Account* lies, but an Action of *Detinue* or *Trover* and *Converſion*. Rol. Abr. 116. Owen 86.

If *A.* hath a Term for Years in a Rectory, and Tithes being ſet forth and ſevered from the nine Parts, *B.* without any Pretence of Title, carries them away and ſells them, yet *A.* ſhall not have a Writ of *Account* againſt *B.* for after Severance the Tithes immediately veſted in *A.* and the Taking by *B.* was merely wrongful, and therefore without Privity*. 3 Leon. 24.

* In this Caſe *Trover*, or *Treſpaſs*, is the proper Remedy.

(D) In what Caſes this is the proper Action, or ſome other may be brought.

IF a Man, by Obligation, acknowledges that he has received Money *ad proficiendum & computandum*, the Obligee may either ſue the Bond, or have an Action of *Account*, at his Election. Rol. Abr. 118. Dyer 20. Cro. El. 644.

So if *A.* acknowledges by Deed, that he has received 100*l.* from *B.* to be adventured to the *Weſt Indies*, and thence to *England* back again, and covenants to render a true Account thereof upon his Return, though *B.* may have a Writ of Covenant upon this Deed, yet he may alſo have a Writ of *Account* thereupon, at his Election. Rol. Rep. 52. 2 Bulſt. 256.

Aſſumpſit, in which the Plaintiff declared, that he intended to go beyond Sea, he delivered a Box full of Goods to the Defendant, which he promiſed to diſpoſe of, and to give the Plaintiff an Account thereof at his Return; the Defendant pleaded in *Abatement*, that he was Bailiff to the * Plaintiff, to merchandize the ſaid Goods; and that he ought to bring an Action of *Account*, and not an Action on the Caſe; and upon Demurrer it was adjudged, that there being an expreſs Promiſe, on which the Action is founded, *Aſſumpſit* will lie as well as *Account*; and that wherever one acts as Bailiff, he promiſes to render an Account. * Page 20 Salk. 9. pl. 1. Wilkins *verſ.* Wilkins, Carth. 89. S. C.

Where it was held, that the Action would lie, by three Judges againſt Holt, who doubted, and who told the Plaintiff, that when it came to be tried, he would not ſuffer him to give all the Account in Evidence, or to enter into the Particulars thereof; but that he ſhould direct his Proof only as to the Damages which he had ſuſtained for not accounting according to the Promiſe, for he would not ravel into an Account in ſuch Actions. Comber 149. S. C. *Qu.* If it is not now the daily Practice, and very proper in ſuch Caſes, to bring an Action of Aſſumpſit. And if the Plaintiff is not at Liberty to go into the whole of his Proofs: The Action of *Account* being now little uſed or underſtood?

In *Aſſumpſit* for Money received *ad computandum*, and Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that this Action did not lie, but *Account*; for if a Man receives Money to a ſpecial Purpoſe, as to Account, or to Merchandize, it is not to be demanded of the Party as a Duty, till he has neglected or refuſed to apply it according to the Truſt under which he received it; and the Declaration muſt ſhew a Miſapplication or a Breach of Truſt: But it was held, that in this Caſe the Verdict had aided the Declaration; for it muſt be intended there was Proof to the Jury that the Defendant refuſed to account, or had done ſomewhat elſe that rendered him an abſolute Debtor. *Qu.* Does not the Law in all ſuch Caſes imply a *Promiſe*? Salk. 9. pl. 2. Poulter *verſ.* Cornwall. vide 2 Show. Rep. 301.

(E) What

(E) What shall be a good Bar to this Action.

Rol. Abr. 121. IN Account against one as Bailiff, it is a good Plea that he was never his Bailiff.

Bro. 34. Rol. Abr. 121. In Account against a Bailiff, it is a good Plea that he was the Plaintiff's Servant to drive his Plough, and keep his Cattle for the drawing of his Plough, *absque hoc* that he was his Bailiff in other Manner, because he is not accountable for this Occupation*.

* This relates to an Action of *Account*, but if he misbehaves, whereby the Plaintiff is damnified, a *special Action on the Case* will lie.

Rol. Abr. 123. So if the Plaintiff had refused to him all the Advantage and Profit that he might have by the Account. Rol. Abr. 123. It is a good Ple in Bar to an Action of *Account*, that the Plaintiff hath released to him all Actions.

Cro. Car. 116. Hetl. 114. Cowp. 728. So it is a good Plea in Bar, that the Plaintiff and Defendant submitted to the Award of *J. S.* who awarded that the Defendant ought to be acquitted against the Plaintiff.

Bro. 48. Rol. Abr. 123. But the bare Acceptance of an Obligation would not be sufficient. Vide Yely. 202. So it is a good Plea in Bar, that after the Receipt of the Sum of which the Account is demanded, by the Mediation of their Friends it was agreed between them, that the Defendant should make an Obligation of 100*l.* for the 100*l.* received and the Profit thence to arise, which Obligation of 100*l.* he did make and deliver accordingly to the Plaintiff; for the Acceptance of the Obligation destroys the Duty, and the Sum in Demand is thereby as strongly released as by a release of all Actions*.

* See the first Case under Head (D.)

Rol. Abr. 123, 124. So if the Defendant pleads that the Plaintiff has given him an Acquittance for the Sum received. Bro. Tit. Account 59. For these Pleas, being Matters which shew that he was once accountable, are only to be made use of before the Auditors. Vide Dyer, 22, 145. 6 Co. Ferrer's Case. 4 Leon 61. Stile 353, 410. It is no good Plea in Bar to the Action, that the Defendant has made Payment of the Money which he hath received to account with, or that he hath made Satisfaction for the same.

(F) Of the Auditors, and what shall be a good Discharge before them.

* Page 21

Mod. 42. Brownl. 24. Co. Ent. 46. Of Auditors assigned by the Parties themselves, by Virtue of the Statute W. 2. cap. 11. Vide 2 Inst. 380. IN an Action of *Account* there are two Judgments; the first is *Quod computet**, after which the Court assigns Auditors, usually two of the Officers of the Court, who are armed with Authority to convene the Parties before them *de die in diem*, at any Day or Place that they shall appoint, till the *Account* is determined; the Time by which the Account is to be settled, is prefix'd by the Court; but if the Account be of a long and confused Nature, the Court, on Application, will enlarge the Time. If either of the Parties think they do him Injustice, he may apply to the Court; and if the Defendant denies any Article, or demurs to any Demand, it is to be tried and determined in Court.

Brownl. 24. * Therefore if the Jury find for Plaintiff, and assess Damages, &c. and Judgment is entered accordingly, and a *Fi. fa.* executed, and Money levied, on Motion, Judgment and Execution shall be set aside, and the Money restored with Costs. Andr. 19.

Whatever

Whatever may be pleaded to the Action, ſhall never be allowed of as a good Diſcharge before the Auditors; therefore, where in *Account* the Defendant pleaded *Never his Receiver*, &c. and this being found againſt him, he was adjudged to account; and before the Auditors, he pleaded a Submiſſion of all Debts, Accounts, &c. to *J. S.* who awarded that the Defendant ſhould pay 10*l.* only, in diſcharge of all Debts, Accounts, &c. which he paid accordingly; this was held no good Plea, for this Award, made before the Action brought, ought to have been pleaded in Bar thereof; which being omitted, he hath loſt the Advantage thereof, and ſhall not plead it before Auditors. Leon. 219. Cro. Car. 116. Taylor *verſ.* Page. Hetl. 114. S. C. Stra. 680. 3 Wils. 73. Cowp. 728.

It is a good Diſcharge before Auditors, for a Factor to ſay, That in a Tempeſt, becauſe the Ship was ſurcharged, the Goods were caſt overboard into the Sea. Rol. Abr. 124. Bro. Tit. Account 10.

So it is a good Diſcharge before Auditors, that he was robbed of the Goods without his Default or Negligence*. Co. Lit. 89.

*Or that he put them in a Warehouſe from whence they were taken by an Enemy. Stra. 680.

It is a good Diſcharge before Auditors in *Account*, as a Receiver of 10*l.* if he tenders the 10*l.* (*a*) and ſwears that after the Time that the Money was delivered him, that he found that he durſt not buy, for Fear of Loſs; for he is not obliged to run any Hazard himſelf. Rol. Abr. 124.

(*a*) This muſt be underſtood of one who receives Money to trade and merchandize therewith; for no other Receiver is in any Caſe obliged to buy or ſell. Rol. Abr. 124. *Quære* whether ſuch Oath be neceſſary; and vide 2 Mod. 101. 1 Bulſt. 104. Equ. Ca. Abr. 369. 2 Vern. 638. 3 Wms. 185, 187, 279. 10 Mod. 144. 12 Mod. 514, 602. 2 Stra. 1182.

If a Bailiff of a Manor receives the Rents and Profits of the Tenants, and retains them two or three Years, yet in a Writ of *Account* he is not to account for the Profits thence ariſing in the mean Time, for he had not any Warrant to merchandize with the Money, or to gain or loſe thereby†. Rol. Abr. 125.

†Therefore for *Money had and received* would have been the proper mode of an Action Proceeding.

If in *Account* the Defendant pleads before Auditors, That the Goods for which he is to account were *bona peritura*; and, notwithſtanding his Care in keeping them, were worſe, and that they remained in his Hands for want of Buyers, and were in Danger of growing worſe, and that therefore he ſold them upon Credit to a Man beyond Sea; this is no good Plea, for a Factor cannot ſell even *bona peritura* upon (*b*) Credit, without a (*c*) particular Commiſſion ſo to do, 2 Mod. 100. and the above Authorities.

(*b*) Nor pawn. 2 Stra. 1187.

(*c*) Factors now have uſually ſuch Commiſſion.

Special Actions of *Aſſumpſit* or Actions for *Money had and received*, where the principal Sum only is intended to be recovered, are more generally uſed inſtead of the Action of *Account*, as the Jury aſſeſſes what the Plaintiff ought to recover;

* Accord

* Accord and Satisfaction.

5 E. 4. 7. Plow. 5. b. Rol. Abr. 129. Vide Raym. 450. 2 Keb. 332. 2 Jones 158, 168. Vide Head of Arbitrament and Award, That an Award may

ACCORD is an Agreement between two Perſons to give and accept ſomething in Satisfaction of a Treſpaſs, &c. done by one to the other. This Agreement, when executed, may be pleaded in Bar to an Action for the Treſpaſs; for in all Perſonal Injuries, the Law gives Damages as an Equivalent; and when the Party accepts of an Equivalent, there is no Injury or Cauſe of Complaint, and therefore preſent Satisfaction is a good Plea; but if the Wrong-doer only promiſes a future Satisfaction, the Injury continues till Satisfaction is actually made, and conſequently there is a Cauſe of Complaint in Being; and if the Treſpaſs were now barred by this Plea, he can have no Remedy for the future Satisfaction, for that ſuppoſes the Injury to have Continuance*.

be pleaded in Bar to an Action, though not executed; and how it differs from an *Accord*. * But if a Defendant has promiſed to pay the Plaintiff ſo much as a Satisfaction, in Caſe the Plaintiff will not ſue for the Treſpaſs, Action of *Aſſumpſit* will lie on that Promiſe.

(A) What ſhall be deemed a good Accord and Satisfaction. 22.
(B) To what Actions may Accord and Satisfaction be pleaded. 24.
(C) Of the Form and Manner of pleading Accords. 25.

(A) What ſhall be deemed a good Accord and Satisfaction.

9 E. 4. 19. Rol. Abr. 128. Vide Stra. 426. 2 Wils. 86. But if it was

AN *Accord* muſt appear to be Advantageous to the Party, otherwiſe it can be no Satisfaction; therefore in an Action of *Treſpaſs* for taking the Plaintiff's Cattle, it is no good Plea to ſay, that there was an *Accord* that the Plaintiff ſhould have his Cattle again; for this is not any Satisfaction.

to drive them to a certain Place; ſo that it would be a Charge to him to do it; this would make it a good *Accord*. 2 Rol. Rep. 96. In Covenant againſt the Executor or Tenants for Life, &c. he pleads an *Accord* that he ſhould quietly depart, and leave the Poſſeſſion, &c. and held good; tho' after the Death of Tenant for Life he had no Intereſt, but a Licence in Law only to carry away his Goods. Yelv. 124. *per* three Judges againſt one. See the Caſe more at large, *poſt* C. (25.)

Rol. Abr. 128. Stile 245.

An *Accord* that each of them ſhould be quit of Actions againſt the other, is not (*a*) good; becauſe it is not any Satisfaction.

(*a*) But an *Accord* that each ſhould give the other a Quart of Wine, in Satisfaction of Action, is good. Rol Abr. 128.

9 E. 4. 19. Rol. Abr. 128. S. C. Cro. Eliz. 194. S. C. cited.

In an Action upon the Statute of 5 *Rich.* 2. *ſt.* 1. *c.* 8. if the Defendant ſaith, That after the Entry an *Accord* was made between them, that the Plaintiff ſhould re-enter into the Land, and that the Defendant ſhould deliver the Evidences of the Plaintiff to the Plaintiff, this is not any Bar

Dyer 356. S. C. cited.

Bar of the *Action; for the Delivery of the Plaintiff's (a) own Evidences can be no Satisfaction of the tortious Entry. * Page 23 (a) But if he made Title to the Evidence, it would be a good Bar. Rol. Abr. 128. That the Delivery of the Deed by the Feoffee to *Ceſtuy que Uſe*, is a good *Accord*, becauſe it belongs to the Feoffee. Cro. Eliz. 357.

An *Accord* that the Defendant ſhould endeavour to make up and adjuſt Differences between the Plaintiff and *J. S.* that he did endeavour, and at his own Coſts make up ſuch Differences, is a good Plea. Rol. Abr. 128.

In Treſpaſs for trampling his Graſs, the Defendant pleads that he was amerced in the Court-Baron of the Plaintiff for the ſame Treſpaſs, which was aſſeered to two Shillings, for which he hath agreed with the Plaintiff; and held a good Plea by the Acceptance thereof, though the Amercement in the Court-Baron was Extortion. Bro. Treſpaſs 66.

In an Action upon the Caſe for ſcandalous Words, the Defendant pleads, That after the Words ſpoken, the Plaintiff ſued the Defendant in the Military Court before the Lord Marſhal; where it was ordered by that Court, with the Conſent of the Plaintiff and Defendant, in Diſcharge of this Suit, and all other Differences betwen them, that the Defendant ſhould make a Submiſſion in Writing, in a Place appointed, and before certain Perſons, &c. and avers that he did ſo accordingly, &c. and on Demurrer it was held no good Plea; for it being a Point of Honour only, (b) could be no Diſcharge of the Damages. Rol. Abr. 128, 129. (b) Where the Defendant pleaded that it was agreed the Defendant ſhould confeſs to the Plaintiff he had done him wrong, and ſhould aſk Forgiveneſs on his Knees, whether this was a ſufficient Conſideration or Satisfaction. 2 Rol. Rep. 96. *dubitatur*. Vide Stile 245. Salk. 71. pl. 5. and Head of *Arbitrament* and *Award*. *If he agreed to accept the Submiſſion, and it was accordingly made, a Jury would ſcarce find a Verdict for the Plaintiff.

Debt upon an Obligation, dated the twenty-third of *March* 24 *Car.* 2. upon Condition to pay 10*l.* the Defendant pleaded an *Accord* the laſt of *April* 31 *Car.* 2. whereby it was agreed that the Defendant ſhould give the Plaintiff a new Security for this Debt, and for another due to him by Obligation likewiſe; and he being the Executor of the Obligor, and the Perſon with whom this *Accord* was made, gave Security, purſuant to the *Accord*, by a Bill ſealed by himſelf; the Plaintiff demurred; and by the whole Court Judgment was given for the Plaintiff; for one Obligation given in Satisfaction for another is no Diſcharge, whether grounded upon an *Accord* or not; for the Concord does not mend the Matter; and yet here the new Obligation binds him *de bonis propriis*, whereas the firſt Obligation bound him only, *de bonis teſtatoris*. 3 Lev. 55, 56. Lobly and Gildart. Where a new Obligation was given; and it was held no Satisfaction, becauſe it appeared that the firſt Obligation was forfeited, and then a Penalty was the Debt; and therefore the ſecond being for leſs, could not be a Satisfaction for a greater Sum, Lutw. 466. Vide 5 Co. 117. 4 Mod. 88. 7 Mod. 17. Ld. Raym. 122, 566. If a Debt is on Deed or Obligation without Condition, the Accord and Satisfaction muſt be by Deed, and ſo pleaded, if there appears a Condition for Payment of Money, perhaps it may be pleaded without Deed. 2 Wils. 86.

If an *Accord* be to do two Things, and he doth one and not the other, yet this is no Bar of the Action, becauſe the Plaintiff hath not any Remedy for that which is not performed. Rol. Abr. 122. That the Accord muſt be executed, *vide ſupra*, and Plow. 5, 11. b. 9 Co. 79. h. 2 Jones 158, 168. 2 Keb. 332. Salk 76. T. Raym. 450. where it is ſaid, that an *Accord* may be pleaded without Execution, as well as an Arbitrament; but *Quære*.

But if an *Accord* be that the Defendant ſhall do a certain Thing at a Day to come, in Satisfaction of an Action; if he doth perform it at the Day, this is a good Bar of the Action, tho' it was Executory at the Time of the Accord made, inaſmuch as he hath accepted it in Satisfaction. 6 H. 7. 11. b. Rol. Abr. 129.

If

Raym. 203. 2 Keb. 690. S. C. Cock and Honeychurch. * Page 24

If in *Treſpaſs* the Defendant pleads a Concord between himſelf and the Plaintiff, that he ſhould pay the Plaintiff 3*l.* in Hand, and ſhould undertake to pay the Plaintiff's Attorney's Bill, but avers that he had paid 3*l.* and was always ready to pay the Attorney's Bill, but he never ſhewed him *any; this is no good Plea, becauſe the *Accord* is not ſhewn to be fully executed*.

* It was in the Defendant's Power to have demanded a Bill, and tendered a reaſonable Sum: If this had been done and Pleaded, it might probably have been adjudged a good Anſwer, being all the Party could do.

Raym. 450. 2 Jones 158. S. C. between Caſe and Barber.

If in an *Indebitatus Aſſumpſit*, &c. the Defendant pleads an Agreement between the Plaintiff and Defendant, and *J. S.* the Son of the Defendant, that the Plaintiff ſhould deliver to the Defendant certain Clothes which the Plaintiff then had in his Cuſtody; and that the Plaintiff ſhould accept the ſaid Son her Debtor for 9*l.* to be paid ſo ſoon as he received certain Pay from the King, due to him as Lieutenant of a certain Ship, in full Satisfaction, &c. and that after, ſo ſoon as the Son received his ſaid Pay, he was ready and offered to pay, &c. and that he yet is ready; this is no good Plea, for it doth not appear that there was any good Conſideration why the Son ſhould pay, but (*a*) a bare Agreement, without Conſideration; and admit the Promiſe good, if not in Writing, by 29 *Car.* 2. *cap.* 3. no Action lies thereupon; and therefore it ought to have been ſhewn that it was in Writing; for when ſuch Agreement is pleaded in Bar, it muſt appear to the Court, that an Action will lie thereupon; for the Defendant ſhall not take away the Plaintiff's preſent Action, and not give him another upon Agreement pleaded.

(*a*) Vide 2 Jones 168. and Tit. Agreement.

3 Lev. 189. Ruſſel and Ruſſel.

If in Covenant to permit the Plaintiff to receive 100*l. per Ann.* Rent, the Defendant pleads a Concord between the Plaintiff and Defendant, that each of them ſhould deliver his Part of the Indenture into the Hands of a third Perſon, to be cancelled, and that each of them ſhould be diſcharged of all Actions upon the Indenture, and avers that he had delivered his Part to the third Perſon; yet this is no good Plea, becauſe it does not appear to be executed on both Parts. *Sed, qu.* the Default being the Plaintiff's.

(B) To what Actions may Accord with Satisfaction be pleaded.

4 Co. 1. 9 Co. 79. b. (*a*) But in Detinue, for

AN *Accord* with Satisfaction is no good Plea to an Action (*a*) Real; for a Right or Title to a Freehold cannot be barred by any collateral Satisfaction.

Charters concerning a Freehold and Inheritance, an *Accord* is a good Plea. 7 E. 4. 33. 2 Co. 78. So in *Waſte* againſt a Leſſee for Years, though in the *Tenet* an *Accord* is a good Plea, becauſe a Chattel only is to be recovered. N. Bendl. 35. Mo. 6. 9 Co. 78. 6 Co. 44. So in *Raviſhment de gard*, and *Quare ejecit infra Terminum*. 9 Co. 78. An *Accord* with Satisfaction is a good Plea in an *Ejectione Firmæ*; for an Ejectment includes a Treſpaſs, and they are ſo interwoven that they cannot be ſevered; and in all Actions which ſuppoſe a wrong *vi & armis*, where a Capias and Exigent lay at Common Law, there an *Accord* is a good Plea. 9 Co. 77. Brownl. 134. S. C. 2 Brownl. 128. S. C. Godb. 149. In an Appeal of *Mayhem* an *Accord* with Satisfaction is a good Plea, notwithſtanding the Writ be *Felonice*. 6 Co. 44. 9 Co. 78. So in *Attaint*, 13 E. 4. 1. 6 Co. 44. Cro. Eliz. 357. Dyer 75. If an *Accord* be a good Plea in a *Quare Impedit*, *Quære*; and *vide* 11 H. 7. 13. b. 6 Co. 44. a. 2 Brownl. 128, 129. Brownl. 134.

When

When a Duty in certain accrues by the Deed *Tempore confectionis ſcripti*, as by (*b*) Covenant, Bill, or (*c*) Obligation, to pay a certain Sum of Money; this certain Duty takes its Eſſence originally and only by Writing, and therefore ought to be avoided by Matter of as high a Nature, tho' the Duty be merely in the Perſonalty.

(*b*) 6 Co. 43. Lutw. 358. S. P. Cro. Jac. 254. S. P. (*c*) Vide 2 Rol. Rep. 187. Palm. 110. All. 39. Cro. Jac. 304. Yelv. 123, 192. 2 Keb. 51. Kelw. 106. Noy 110. S. C. Cro. Jac. 100. See 2 Wils. 86. Cowp. 47.

But if in Covenant againſt an Aſſignee a Breach is aſſigned, in not repairing the Houſe, the Defendant may plead an *Accord* between himſelf and the Plaintiff, and Execution thereof, *in ſatisfactione & exoneratione reparationum præd'*; for no certain Duty accrued by the Deed, but the Action is founded upon a Tort or Default ſubſequent, together with the Deed, and Damages only to be recovered, which are in the Perſonalty.

* An *Accord* with Satisfaction generally is a good Plea in all Actions where Damages only are to be recovered. * Page 25 6 Co. 44. Dyer 75. Ld. Raym. 122.

Note; It cannot be pleaded without Performance. (This is generally: But ſee the preceding Caſes and Notes) See Note at the End of Letter (C).

(C) Of the Form and Manner of pleading Accords.

THE beſt and ſafeſt Way to plead an *Accord*, is to plead it by Way of *Satisfaction*, and not by way of *Accord*; for if it is to be pleaded by way of *Accord*, a preciſe Execution thereof, in every Part, muſt be pleaded, and if there be a Failure in any Part, the Plea is inſufficient; but if it be pleaded by Way of *Satisfaction*, the Defendant need plea no more, but that he paid the Plaintiff 10*s*. in full Satisfaction for the Action, which he received. 9 Co. 80. Vide Rol. Abr. 129. Danv. Abr. 241. Stra. 573.

If in *Covenant*, by the Heir of the Reverſioner againſt the Executor of Tenant for Life, for not repairing, &c. the Defendant pleads that the Teſtator died 19 *March*, and that the 22 *March concordat' & argreat' fuit* between the Plaintiff and Defendant, that the Defendant ſhould quietly depart and leave the Poſſeſſion to the Plaintiff, and that *in conſideratione inde* the Plaintiff did agree to diſcharge him of the Breach *in non reparando*, and ſhews that the 25 *March* he did depart, &c. this is no good Plea, becauſe the Concord is uncertain as to the Time of his Departure; and though he ſhews a departure within five Days, yet he cannot help the original Inſufficiency of the Concord, which is the Foundation of all. Yelv. 124, 125. Between Sanford and Cutcliff; adjudged by Yelv. and Croke: And Williams ſaid the Time being indefinite, the Departure ought to have been immediately. Noy 110. S. C. cited.

In an *Aſſumpſit* for Wares ſold and delivered, the Defendant pleaded that he gave and delivered unto the Plaintiff a *Beaver Hat* in Satisfaction and Diſcharge, &c. and that the Plaintiff accepted the ſaid Hat in full Satisfaction and Diſcharge of the Promiſes, &c. The Plaintiff replied *proteſtando* that the Defendant never gave him any ſuch Hat in Satisfaction and Diſcharge of the ſaid Promiſes, *pro placito dicit*, that he never accepted a Beaver Hat in Satisfaction and Diſcharge, &c. On Demurrer it was inſiſted firſt, that the Iſſue ought to be upon the giving in Satisfaction, and not upon the receiving in Satisfaction, becauſe every Gift Carth. 347. 5 Mod. 86. 2 Salk. 627. pl. 1. S. C. Young and Rudd. Lord Raym. 60.

or

(a) See 2 Stra. 1194, 1195.

or Payment must be directed by him who gives or pays, and not by him who receives it (a); but the Court held it well enough, and that the whole Matter concerning the Payment, as well as the Acceptance in Satisfaction, would be tried upon this Iſſue; as to the ſaid Objection of its being pleaded to be given in Satisfaction and Diſcharge of the Promiſes, &c. when it ſhould be pleaded in Satisfaction of the Money mentioned in the Promiſes, and not of the very Promiſes, the Court held it of no Weight.

(The uſual Way of replying now, is, as ſtated above, and the proper Iſſue is the *Acceptance*). And the Plea muſt ſtate the *Acceptance*, *Stra.* 573.

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* Page 26

* Actions in General.

THE Deſign of entering into Society being the Protection of our Perſons and Security of our Property, Men in civil Society have a Right, and indeed are obliged to apply to the Public for Redreſs, when they are injured; for were they allowed to be their own Carvers, or to make Repriſals, which they might do in the State of Nature, ſuch Permiſſion would introduce all that Inconvenience which the State of Nature did endure, and which Government was at firſt invented to prevent: Hence therefore they are obliged to ſubmit to the Public the Meaſure of their Damages, and to have Recourſe to the Law and the Courts of Juſtice, which are appointed to give them Redreſs and Eaſe in their Affairs; and this Application is what we call bringing an (a) *Action*,

(a) *Actio nihil aliud eſt quam jus proſequendi in judicio quod ſibi debetur.* Co. Lit. 285. or otherwiſe a legal Demand of one's Right. Co. Lit. 285. 2 Inſt. 40. It implies a Recovery of or Reſtitution to ſomething. Co. Lit. 289. and differs from a Writ of *Error*, which is no Action, but only a Commiſſion to the Judges to examine the Record, &c. Jenk. 25. 2 Inſt. 40. Yelv. 209. Yet, if by Writ of *Error* the Plaintiff therein may recover, or be reſtored to any Thing, it may be releaſed by the Name of an Action. Co. Lit. 288. b. *Vide* for this 2 Rol. Abr. 405. The Suit till Judgment is properly called an Action, but not after; and therefore a Releaſe of all Actions is regularly no Bar of an Execution. Co. Lit. 289. a. Rol. Abr. 291.

Under this Head we ſhall briefly take Notice,

(A) Of the different Kinds of Actions. 26.
(B) In what Caſes an Action will lie, and for whom, and againſt whom. 28.
(C) In what Caſes diſtinct Things may be laid in the ſame Action. 29.

(A) Of

(A) Of the different Kinds of Actions.

ACTIONS are divided into Criminal or Civil; Criminal are either to have Judgment of Death, as Appeals of Death, Robbery, &c. or only to have Judgment of Damages to the Party, Fine to the King, and Impriſonment; as Appeals of *Mayhem*, &c. Co.Lit. 284. 2 Inſt. 40.

Civil Actions are again divided into Real, Perſonal or Mix'd; and here it may be proper to inquire a little into the Nature of thoſe Real Actions which were formerly in Uſe, and how they came to be diſcontinued. Co.Lit. 284. 2 Inſt. 40.

Actions Real, or relating unto Lands, are either *Droitural*, that is of the Right of the Anceſtor; or Poſſeſſory, which complains of the Violation of a Right of which they themſelves were poſſeſſed. Co.Lit. 164. Vide Ejectment, Replevin and Avowry, Treſpaſs, Aſſiſe.

The Law always diſtinguiſhed between a Right of Entry and a naked Right to the Land itſelf; and therefore there were different Remedies; for to recover the naked Right, the Law only gave a Writ of *Right*; and in this Action, the Defendant at his Election might put himſelf upon his Country, or wage Battle; but when the Diſſeiſee had a Right of Entry, it *was preſumed that the Diſſeiſin was freſh and recent; and therefore the Trial was *coram paribus curtis*; but if the Diſſeiſee did not come till the Heir was ſeated in the Poſſeſſion, and had paid Relief to the Lord, then the Entry of the Diſſeiſee was taken away, and his Title became doubtful; and then they appealed to Providence in ſuch Deciſions; and if any Freeman would, with his own Body, defend the Title of the Poſſeſſor, the Demandant was obliged to find a Champion to enter the Liſts with him. Booth 99. Co.Ent.182. 1 H. 6. 7. * Page 27

But to recover the Right of Poſſeſſion, the ancient Way was by Writ of Entry, where the Proceſs was by *Summons*, *Grand Cape* before Appearance, and *Petit Cape* afterwards, as in the Writ of Right, and the General Iſſue was *diſſeiſivit vel non diſſeiſivit*; and this Iſſue was tried by a Jury, becauſe when the Diſſeiſin was freſh, they did not put it upon the Hazard of a Battle, as they did in thoſe Caſes where the long Poſſeſſion had made the Right doubtful. Booth 177. 179.

But in the Writ of *Entry* they recovered no Damages; for that ſuch Writ only demanded the Freehold, and was not mixed with the Perſonalty; and therefore to recover the Profits which are merely Perſonal, they had an Action of Treſpaſs, which was the proper Remedy for the Damages ſuſtained. Booth 175. 2 Inſt. 289, 343.

There were anciently only three Sorts of Writs of *Entry*; one againſt the Diſſeiſor himſelf, the other, which was againſt his Feoffee, which was called the *Writ of Entry in the Per*; the third was after a ſecond Alienation, which was called a *Writ of Entry in the Per and Cui*; but the Statute of *Marlb. cap.* 30. gave a Writ of *Entry* in the *Poſt*, which did not lie at common Law againſt an Alienee at a third Hand. F.N.B. 191. Booth 175. 2 Inſt. 153.

And as a Man might have brought ſuch Writ of *Entry* as his own Diſſeiſin, ſo he might have brought it for the Diſſeiſin of his Father, or he might have brought it for a Diſſeiſin done to his Grandfather, which was called a Writ of *Ayel*, or a Diſſeiſin done to his Great Grandfather, which was called a Writ of *Beſail*, or any collateral Couſins that were more remote than Brothers and Siſters, Uncles and Aunts, Nephews or Nieces; and this was called a Writ of *Coſinage*. F.N.B. 191, 221. Booth 175, 176, 200.

But becauſe the Proceſs in a Writ of *Entry* became tedious, when ſuch Actions were removed out of the Lord's Court into that of the King's, and thereby the Proceſs which iſſued from three Weeks to three Weeks in the Lord's Court, was depending ſo many ſeveral Terms in the King's Court, Glan. c. 7. ſ. 17. Fleta 214, 215. Vide Aſſiſe.

Court, therefore the Aſſiſe was invented, which was in the Nature of a Commiſſion to put the Diſſeiſee in Poſſeſſion by Trial at one Aſſiſes; and this was ſo ſudden and immediate a Remedy, that the Writ of *Entry* became obſolete; and therefore when the Aſſiſe was the uſual Remedy, the Writ of *Entry* began to be called a *Writ of Entry in the Nature of an Aſſiſe*.

There were likewiſe other Remedies, as the *Formedon in Remainder and Reverter*, and a *Formedon in Deſcender*, which was given by the Statute *De donis*, which created Eſtates tail.

F.N.B. 220. Vide Head of Ejectment.

But the Proceedings on theſe Real Actions being dilatory and expenſive, and in many Caſes concluding the Party upon one Trial, a more commodious Method was contrived to diſpute the Title to Lands, which began in the Reign of *Hen.* 7. in this Manner; by forming a Term for Years, and then the Leſſees bringing an Ejectment to recover the Term, and thereby to aſſert the Title of the Leſſor of the Plaintiff; before this Time, if a Termor for Years, who only claimed as a Bailiff to the Freeholder, had been ouſted of his Poſſeſſion, he had only a Remedy to recover Damages in Ejectment, and could not recover the Term itſelf; but in the Reign of *Hen.* 7. the Courts of Equity having obliged ſuch Wrong-doer to a ſpecific Reſtitution, the Courts of Law have likewiſe given an *Habere facias poſſeſſionem* to recover the Term *in Specie*.

* Page 28 For which vide the ſeveral Heads.

* Perſonal Actions are *ex contractu*, or thoſe founded on Contract, as Debt, which is to reſtore the Thing *in Numero*; or *Detinue*, which is to reſtore the ſame in Specie, or Damages, where it cannot be had; alſo Actions of *Account*, *Covenant*, *Aſſumpſit*, *Quantum Meruit*, *Quantum Valebat*, *Covenant* and *Annuity*.

Vide Heads Treſpaſs, Trover and Converſion, and Actions on the Caſe.

Or *ex delicto*, as Treſpaſſes founded upon Force, which are Treſpaſſes *vi & armis*, or upon *Fraud*, which are Actions upon the Caſe.

Therefore if a Man gets the Goods or Chattels of another by lawful Means, as by Bailment, Borrowing or Pledging, he cannot have an Action of *Treſpaſs*, but muſt bring *Detinue* or *Trover*, becauſe the Party had not violated his Poſſeſſion.

Vide Tit. Trover and Converſion.

So where a Man comes to buy Goods, and they agree upon a Price and a Day for the Payment, and the Buyer takes them away, no *Trover* lies, but an *Aſſumpſit* for the Money, becauſe the Property was changed by a lawful Bargain.

Rol. Rep. 128.

If I borrow a Horſe to go to *Dover*, and go to other Places, the Owner may have an Action on the Caſe againſt me, for exceeding the Purpoſes of the Loan; for ſo far it is a ſecret and fallacious Abuſe of his Property, but no general Action of *Treſpaſs*, becauſe it is not an open and violent Invaſion of it.

8 Mod. 272. 2 Ld. Raym. 1399. Forteſc. 212. Stra. 634.

Where the Act is lawful, as the fixing a Spout, and the Conſequence is injurious; the Remedy is by Caſe, and not Treſpaſs.

(B) In what Caſes an Action will lie, and for whom, and againſt whom.

* (See *infra* as to *damnum ſine injuria*.) Co. Lit. 145. Stile 4.

IT is clear that for all Injuries done to a Man's Perſon, Reputation or Property, he ſhall have an Action, and that for every Right he is to have a Remedy; for want of Right and want of Remedy are the ſame Thing*.

It is alſo agreed, that where a Perſon has ſeveral Remedies, he may chuſe which he pleaſes; but he cannot deviſe or lay hold on any but thoſe preſcribed by the Laws of his Country; for if this were allowed, it would be conſtituting as many Actions as there are Men, which would be highly inconvenient.

But

But in this the great Difficulty is, when a Man ſhall be ſaid to have ſuffered an Injury, or to have ſuch a Right as will intitle him to an Action; and here the Rules eſtabliſhed by that Society, of which he is a Member, muſt govern; and therefore though a Man had a Right, and is barred by the Statute of Limitations, yet he can have no Remedy. Vide Limitation of Actions.

So if I promiſe by Word only to convey Lands, or to give Goods, without delivering Poſſeſſion, or if I promiſe to (*a*) build a Houſe without Conſideration, &c. though by the Laws of Nature theſe Promiſes are binding, yet no Action lies; for without Deed duly ſealed and executed, or without Conſideration, no Property is altered; and every ſuch Promiſe is eſteemed, in the Eye of the Law, to be *Nudum pactum unde non oritur Actio.* Yelv. 196. Cro. Car. 270. Brownl. 111. 6 Co. 18. Rol. Abr. 9.

(*a*) But if a Carpenter undertakes to build a Houſe for me, and does it ill, an *Action on the Caſe* lies againſt him. Kelw. 78. Rol. Abr. 9. So if a Carpenter promiſes to repair my Houſe before ſuch a Day, and does not do it, by which the Houſe falls, an *Action on the Caſe* lies. Rol. Abr. 9. but for this *vide Aſſumpſit* and *Action on the Caſe.*

Alſo in Caſes where there may be *damnum abſque injuria**, the Party can have no Action; as if a School be ſet up in the ſame Town where an ancient School has been Time out of Mind, by which the old School receives Damage, yet no Action lies. Rol. Abr. 107. 1 Mod. 69. Noy 184.

* See on this Subject *Poſt.* 48.

So if I retain a Maſter in my Houſe to inſtruct my Children, tho' this be to the Damage of the common Maſter, yet no Action lies. 11 H. 4. 47. Rol. Abr. 107.

* As the Law grants Redreſs for all Injuries, and gives a Remedy for every Kind of Right, ſo it is open to all Kinds of Perſons, and none are excluded from bringing an Action, except on account of their Crimes or their Country; as Men attainted of Treaſon or Felony, Popiſh Recuſants, Perſons outlawed or excommunicated, convict in a *Præmunire*, or Alien Enemies. (See *Alienage, Ante*, fo. 4.) * Page 28 Co. Lit. 128. Vide the ſeveral Heads.

A Man that hath a ſpecial and limited Property in Goods as a Carrier that hath Goods delivered to him, a Sheriff who hath levied Goods, a Bailee who hath Goods in his keeping, &c. ſhall have Actions againſt Strangers who take them away, becauſe they are anſwerable in Damages to the abſolute Owner. 2 Bulſtr. 311. Sid. 438. Mod. 30. 2 Sand. 47. 2 Keb. 588. Yelv. 44. Cro. Jac. 73. Dyer 98, 99. Cowp. 406.

Alſo a Man who has Cauſe of Action againſt two may bring it againſt which he pleaſes; as if *A.* takes the Goods of *C.* and *B.* takes them from *A. C.* ſhall have his Action againſt *A.* or *B.* at his Election, becauſe both damnified *C.* in their Taking. (If againſt *B. Trover* may be the moſt eligible, and preceding the Action a Demand ſhould be made, unleſs a *Converſion* can be proved.) Sid. 438.

So if two of the Sheep of *A.* have been loſt, and one of them is found again, and the Shepherd of *A.* affirms it to be one of them, whereupon *A.* pays for the Feeding of it, and cauſes it to be ſhorn and marked with his own Mark, and after the Shepherd knowing this to be the Sheep of *A.* falſly and fraudulently affirms to the Bailiff of the Manor, to which Waif and Stray belongs, that the ſaid Sheep is a Stray, whereupon the ſaid Bailiff ſeizes it, &c. *A.* may have an Action againſt the Shepherd, for that by his falſe Practice he hath created a Trouble, Diſgrace and Damage to him; and though he hath good Cauſe of Action againſt the Bailiff, yet this will not excuſe the Shepherd. Alleyn 3. Newman and Zachary. Rol. Abr. 101. S. C.

So if one ſlander my Title, whereby I am wrongfully diſturbed in my Poſſeſſion, though I have Remedy againſt the Treſpaſſer, yet I may have an Action againſt him who cauſed the Diſturbance. Alleyn 3.

If

Carth. 58. Baſon and Sandford 2 Salk. 440. pl. 1. 3 Lev. 258. 3 Mod. 321. S. C. Show. 29. Vern. 297, 298, 465. 2 Vern. 643. 8 Mod. 89. 12 Mod. 446.

If there are ſeveral Proprietors of a Ship which hath uſually tranſported Goods for Hire, and a Maſter placed therein by the Part-Owners, who hath 60*l.* Wages for every Voyage from *London* to *T.* and *J. S.* without making any Contract with the Part-Owners, and none of them being preſent, delivers certain Goods aboard to the Maſter, to be carried for Hire, from *London* to *T.* and the Ship ſafely arrives there, but the Goods are ſpoiled through the Neglect of the Maſter, an Action lies againſt the Part-Owners; for though the Maſter is chargeable in Reſpect of his Wages, ſo are the Proprietors in Reſpect of the Freight, at the Election of the Plaintiff.

Stra. 503. But *Q.* whether all the Part-Owners are not to be ſued; but clearly, if they are not, it muſt be pleaded in Abatement. Stra. 553, 820. A foreign trading Company (as the *Dutch Weſt India Company*) may ſue by their Name of Reputation. Stra. 612. A Perſon attainted, is not to be charged with civil Suits but by the Leave of the Court, or of a Judge. *Foſter* 61.

(C) In what Caſes diſtinct Things may be laid in the ſame Action.

8 Co. 87. but for this vide F.N.B. 209. Owen 11. Kelw. 105. Dyer 145. 2 Brownl. 274.

THE Diſtinction herein, with Reſpect to Real Actions, depends on the different Kinds of Writs; for all original Writs are of two Sorts, *viz. Breve nominatum & innominatum*; the firſt contains the Time, Place and Demand very particularly, and therefore in ſuch Writ ſeveral Lands by ſeveral Titles cannot be demanded in the ſame Writ; the other contains only a general Complaint, without expreſſing Time, Damages, &c. as the Writ of Treſpaſs, *Quare Clauſum fregit, &c.* and therefore ſeveral Lands coming to the Demandant by ſeveral Titles, may be demanded in ſuch Writ.

* Page 30

Cro. Car. 20, 316. Vent. 366. Keb. 847. Bro. Joinder in Action 97. Regiſter 95, 139. 3 Term Rep. 433, 659, 779. 4 Term Rep. 347.

* As to Perſonal Actions, the Difference ariſes from the above-mentioned Diviſion of Perſonal Actions, *viz.* ſuch as are *ex contractu*, and ſuch as are *ex delicto*, or founded on a *Tort*; therefore Debt on an Obligation and on a *Mutuatus* may be joined, becauſe the Writ is general, and the Declaration upon both will be warranted by the Authority given by the general Words of the Writ; ſo Debt and Detinue may be joined in the ſame Writ, becauſe there are Writs in Regiſter, in which they are both compriſed in the ſame Writ; ſo Debt upon a Leaſe and for Clothes, they being in the Words of the ſame Writ; but Debt and Account, or Debt and Treſpaſs (*a*) cannot be joined.

(*a*) The true Reaſon why Actions may or may not be joined is not the Difference of the Defendant's Pleas; for if that were the Reaſon, Debt upon an Obligation, to which the Plea is *Non eſt factum*, and on a *Mutuatus*, *nil debet* could not be joined; therefore the true Reaſon ariſes from the Difference of the Proceſs, and the Fines paid on taking out the Original; for in Debt the old Proceſs was Summons, Attachment and Diſtreſs, and on taking out the Original a Fine was paid to the King, which was in Proportion to the Sum demanded; but in Treſpaſs the Proceſs was a *Capias*, becauſe the Man that had committed *a Tort* might be ſuppoſed to fly from Juſtice; and in this Action the Court ſet a Fine on him in Proportion to his Offence, and levied it by a *Capiatur*. 1 Vent. 366.

8 Co. 87. Jenk. 211. 3 Lev. 93. Raym. 233.

In Perſonal Actions ſeveral Wrongs or Treſpaſſes may be joined, becauſe they may be compriſed in the ſame Writ, and ſo may ſeveral Actions on the Caſe, where the Caſe is of the ſame Kind; as an Action for a Fraud on the Delivery of the Goods, and on the Warranty of the ſame Goods, being both on the Contract; ſo againſt a common Carrier on the Cuſtom of the Realm, and *Trover* may be joined, becauſe both on the *Tort*, it being a Violation of the Cuſtom not to deliver the Charge.

But

But Actions founded upon a *Tort* and upon a Contract cannot be joined, as *Aſſumpſit* and Trover againſt a Carrier; for tho' theſe come under the general Head of Actions on the Caſe, yet they are more diſtinct Caſes than Debt and (*b*) Account, which cannot be joined. 2 Lev. 101. 3 Keb. 59. 1 Sid. 244. 12 Mod. 73.

See Ld. Raym. 58. Salk. 10. 3 Salk. 204. 5 Mod. 85. Comb. 332. (*b*) Bro. Joinder in Actions 97.

If Trover and *Aſſumpſit* are joined in one Action, and upon Not guilty the Jury *quoad* the Trover find for the Defendant, and *quoad* the *Aſſumpſit* for the Plaintiff, yet he ſhall not have Judgment, for theſe cannot be joined in the ſame Action, and the Severance by the Jury will not help it, the Declaration being naught at firſt. 3 Lev. 99. Bage and Bromwell.

One Action will lie for entering the Houſe of the Plaintiff, breaking his Cheſts, and carrying away his Goods, and for beating his Servant *per quod ſervitium amiſit*. Alleyn 9. Stile 43, 202.

If in an Action upon the Caſe the Plaintiff declares, That whereas *accommodaſſet* to the Defendant a Gelding *ad equitand' ab L. uſque E. & ibidem ſalvo deliberand'* to the Plaintiff, the Defendant intending to deceive the Plaintiff rid upon the ſaid Gelding from *L.* to *E.* and *E.* unto *L.* again, and by that Riding ſo much abuſed the ſaid Horſe, that he became of little Value; and though the Plaintiff at *E.* demanded a Redelivery of the ſaid Gelding, yet the Defendant refuſed, and yet doth refuſe to deliver him, and hath converted the ſaid Gelding to his own Uſe, this Declaration is not (*c*) good, becauſe it contains diſtinct Matters, for Part is founded upon the Contract, and Part upon the *Tort*, which are ſeveral Cauſes of Action*. Cro. Car. 20. White and Riſden. 1 Term Rep. 12. (*c*) But the Plaintiff had Judgment, being after Verdict;

but *per Hobart*, the Defendant might have demurred for the Doubleneſs of the Declaration. *Vide* Head of *Amendment* and *Jeofail*. * The riding farther than agreed for, and abuſing the Gelding (being contrary to the Contract) intitled the Plaintiff to an Action on the Promiſe, &c. the not delivering the Gelding, intitled him to an *Action* of *Trover*, of *Detinue* or of *Promiſe*.

* An Ejectment and Aſſault and Battery were joined in one Writ, and not guilty pleaded, and a Verdict and intire Damages given for the Plaintiff; and it ſeems to have been aided after Verdict. * Page 31 Hob. 249. Brownl. 235.

S. C. and *Winch* held the Writ naught, but the Damages being found ſeverally, the Plaintiff releaſed thoſe for the Battery, and had Judgment for the Ejectment. An Ejectment is now uſed as a Fiction to try Titles and obtain Poſſeſſion of Lands, &c. therefore if Aſſault, &c. was now introduced into the Declaration. *Qu.* If the Court, on Application, would not order it to be ſtruck out? *Parco fracto* and *Reſcous* joined. Treſpaſs and Caſe cannot. Ld. Raym. 273, 274. 2 Bur. Rep. 1114.

Where one hath a Right to recover in the ſame Kind of Action, tho' he derives his Righ from different Titles, yet being conjoined in him, he may recover in one Action; as if in Debt upon 2 & 3 *E.* 6. *c.* 13. for not ſetting forth of Tithes, though the Plaintiff ſhews, that by Preſcription the Rector of *A.* hath had two Parts, and the Vicar of *A.* the third Part of the Tithes there, and that the ſaid Rector and Vicar, by ſeveral Leaſes, did demiſe to the Plaintiff, *per quod* he became *Proprietarius* of the ſaid Tithes, and the Defendant ſowed, &c. this Action is well brought, for though the Vicar and Parſon could not join, becauſe they claim ſeverally by divided Rights, yet when both Titles are conjoined in one Perſon, the Matter of the Title is alſo conjoined; and this being a Perſonal Action and founded upon a Wrong, it is ſufficient to ſhew generally, that the Plaintiff is *Firmarius* or *Proprietarius* of the Tithes, without ſaying by what Title. Yelv. 63. Champernoon v. Hill. Brownl. 86. Cro. Jac. 68. Moor 914. Noy 3. S. C.

If *A.* being ſeiſed of a third Part of a Meſſuage, &c. in Fee, demiſes the ſame to *B.* for Years who aſſigns to *C.* and *A.* by Bargain and Sale inrolled conveys his Reverſion to *D.* and his Heirs, who was then ſeiſed of another third Part in Fee, and afterwards the ſaid *D.* leaſes his third Part alſo to the ſaid *C.* for Years, and dies; and his Heir by Bargain and Poph. 24, 25. Haydock v. Warnford. Cro. Eliz. 290. Owen 11. S. C.

3 Bl. Com. 229. (a) And the rather because the Assignment of Waste is in one and the same Thing. *Per. Poph.* Ch. Just. *Vide* Head of *Waste.*

and Sale inrolled conveys the Reversion of the said two third Parts to *E.* and his Heirs, after which Waste is done; *E.* (a) may bring one Action of Waste upon these several Leases, for that neither the interest of the Terms nor of the Inheritance were severed or divided to several, but were in one Person at the Time when the Waste was done.

Cro. Jac. 329. Pyot & Lady St. John. Lev. 110. S. C. cited.

If in Covenant the Plaintiff shews that *A.* was seised in Fee of one Messuage, and possessed of another for a certain Term of Years yet enduring, and let both to the Defendant for a less Term of Years, and that the Defendant did covenant to Repair, &c. and shews that *A.* by one Deed did grant to the Plaintiff the Reversion in Fee, and by another the Reversion for Years, &c. and that after the Houses were out of Repair, &c. this Action is well brought, for as upon several Leases or upon several Grants of a Reversion one Action of Waste lies, so for the same Reason one Writ of Covenant will lie.

Hob. 88. Harend and Palmer. And. 358. S. P. For this vide Head of Executors and Administrators. and Cro. Eliz. 406. Moor 419. Hob. 184. Noy 19. Vent. 268. 2 Lev. 110, 111, 228. 2 Keb. 814. 3 Lev. 74.

But one cannot in the same Action join a Demand against one in his own Right, and a Demand on him as Representative of another; as if in *Assumpsit* against an Administrator, the Plaintiff declares upon a Sale of Goods to the Intestate for 200*l.* and upon another Sale to the Defendant herself for 27*l.* and that upon Account the Defendant was found indebted to the Plaintiff in these Sums, and promised, &c. the Declaration is naught, for the Charge being in several Manners, *viz.* in his own Right and as Administrator, it ought to have been by several Actions*.

* *Sed. Qy.* If Plaintiff had declared that he and Defendant had accounted concerning divers Sums due from Defendant to Plaintiff generally, and laid the Sum found in Arrear under a *Scilicet*, he would not have been intitled to recover the whole? He must at least have recovered what was due to him, in his own Right.

For this vide Head of Jointenants. Stile 156. Rol. Abr. 31. S. C.

Several Persons may join in an Action where their Interest is joint; as if the several Cattle of *A.* and *B.* are destrained, and *C.* in Consideration of 10*l.* to him paid by *A.* and *B.* assumes and promises to them to procure the Cattle to be re-delivered to them, if they are not re-delivered accordingly, one joint Action lies, for the Consideration is intire and cannot be divided.

* Page 32

2 Lev. 27. Litheley & Coryton. 2 Keb. 631. 2 Sand. 115. Vent 167. S.C. agreed

* So if *A.* hath one Mill and *B.* another in the same Manor, which they have used to repair, and Time out of Mind all the Grain which was ground and spent in the Houses of the Tenants of the said Manor, and was not ground at one of the said Mills, hath always and ought to be ground at the other, and *C.* a Tenant of the said Manor, grinds at another Mill, &c. *A.* and *B.* may join in one Action against *C.* for the Damage is intire to both their Mills.

per totam Curiam; but because the Plaintiffs had declared that all the Grain ought to be ground at those two Mills, or one of them, which might be if all ought to be ground at one of the Mills, and nothing at the other, for their Expedition they prayed a *Nil Cap. per billam.*

3 Lev. 362. Ward & al' v. Brampston.

If within the Parish of *A.* there is a Custom for the Parishioners yearly to elect two Persons to be Churchwardens there, and according to the said Custom *B.* and *C.* are elected, but the Surrogate of the Bishop refuses to admit and swear them into the said Office; upon which they bring a *Mandamus*, and he falsly returns a Custom for the Vicar to chuse one Churchwarden, and that therefore he cannot admit both the said Parties, but is ready to admit one of them; they may join in an Action for this false Return, for the *Mandamus* and whole Prosecution thereof was joint, and this is no Office of Profit, nor Action brought for that, but for the unjust Return.

So

So if the Regiſter of the Biſhop refuſes to regiſter a Licence of a Chapel for a conventicle, according to 1 *W. & M. c.* 18. and upon a *Mandamus* to do it makes a falſe Return, all the Inhabitants may join in one Action againſt him. 3 Lev. 363.

But if one Man calls two other Men Thieves, and ſhews in certain of what &c. they ſhall not (*a*) join in one Action againſt him, for the Wrong done to one is no Wrong to the other. Dyer 19. Gouldſb. 76. S. P. Cro Car. Cowp. 276.

512. S. P. (*a*) So in falſe Impriſonment. Dyer 19.

So in Aſſault and Battery; for the Battery done to one cannot be the ſame as that done to the other; and one Battery may hurt more than the other. Kelw. 55. Fitz Joinder in Action 17. Reg. 105. Owen 106.

If a Man holds ſeveral Lands of ſeveral Lords by Heriot Cuſtom, and to defraud them of their Heriots makes a fraudulent Gift of all his Beaſts heriotable, all the Lords may join in one Action upon the 13 *Eliz. c.* 5. Dyer 351. Q.

If two joint Owners of a Sum of Money are robbed upon the Highway, they may join in one Action againſt the Hundred in which, &c. otherwiſe if the Sums are ſeveral, and ſeveral Properties. Dyer 370.

If *A.* delivers Goods to *B.* to deliver over to *C.* and *B.* does not deliver them over accordingly, but converts them to his own Uſe, either *A.* or *C.* may have an Action againſt *B.* but both ſhall not have an Action, but he who firſt begins his Action ſhall go on with the ſame. 1 Bulſt. 68. Hard. 321. S. P. and there ſaid that they could not both join.

If *A.* is ſeiſed in Fee of the Reverſion of a Cloſe expectant upon a Term for Years, and *B.* is poſſeſſed of another Cloſe adjoining thereto, between which ſaid Cloſes there runs a Rivulet, and *B.* ſtops it, *per quod* the Cloſe of *A.* is ſurrounded, ſo that the Timber-Trees &c. become rotten; *A.* in reſpect of the Prejudice to the Reverſion, may have one Action, and the Termor in Reſpect of the Poſſeſſion, and of the Shade, Shelter, &c. may have another Action, and a Satisfaction given to the one is no Bar to the other. 3 Lev. 209. Bridlesford and Onſlow.

* One Action will not lie againſt ſeveral Men for ſpeaking the ſame Words; for the Words of the one are not the Words of the other, and can no more produce a joint Action, than their Words and Tongues can be ſaid to be one. * Page 33 Palm. 313. Adjudged upon Motion after a Verdict for Plaintiff. Cro. Jac. 647. S. C. adjudged. Bulſt. 15. S. P. but there ſaid, that it was otherwiſe in the Spiritual Court, for that one Libel may be againſt ſeveral Perſons.

But if two Men procure another to be indicted falſly for a common Barretor, he may have an Action upon the Caſe againſt them both; though in Strictneſs the Procurement of one is not the Procurement of the other*. Latch. 262. So if two conſpire to maintain a Suit, and one only

* Money. Bro. Joinder in Action 47. Fitz. Error 31. Fitz. Maintenance 15. So in Treſpaſs. Latch. 262. *Vide* Head of *Treſpaſs.* So one *Decies tantum* lies againſt all the Jurors who take Money, for they all give but one Verdict, and are but one Jury. Bro. Joinder in Action 5, 47, 100, 108. Fitz. *Decies tantum* 1, 4, 6. * It is in the Nature of a *Conſpiracy.* It is one *joint, entire* Act.

A Man cannot declare againſt one Defendant for an Aſſault and Battery, and againſt the other for taking away his Goods; becauſe the Treſpaſſes are of ſeveral Natures, and againſt ſeveral Perſons*. Stile 153. adjudged.

* And are ſeveral diſtinct Cauſes of Action.

Palm 283. If *A.* leaſes for Years to *B.* and *C.* rendering Rent, and *C.* aſſigns his Moiety to *D.* and after Rent is arrear, *A.* may bring one Action of Debt for the Rent againſt *B.* and *D.* for the Reverſion remains intire*.

* See farther as to the Law relating to various Actions. Tit. Actions *Local and Tranſitory*, below. Tit. *Actions Qui Tum*, *poſt* 37. Tit. *Actions of the Caſe*, *poſt* 44.

Actions Local and Tranſitory.

7 Co. 1. Gilb. Hiſt. C. P. 89. ORiginally all Actions were tried in the proper Counties in which they aroſe, purſuant to *Maxime Vicini Vicinorum facta præſumuntur ſcire*; this created no Inconveniency, for all Men being anciently *in Decenna* they were eaſily come at, the *Decenna* being reſponſible for their Appearance; but when the Cuſtom of the *Decennary* began to wear off, Men uſed to fly from their Creditors, and this begot the Diſtinction between *Local and Tranſitory Actions*; the firſt relating to Lands, which muſt be tried where the Lands lie; the other a Debt or Duty adhering to the Perſon wherever he fled; Hence Men omitted to date their Contracts from any certain Place, and began their Obligations with a *Noverint Univerſi*; when this Diſtinction was eſtabliſhed, it began to be abuſed to a great Degree; for Plaintiffs would lay their Actions far from the Place where the Fact was done; and the Defendants, for fear of being outlawed, were neceſſitated to carry their Witneſſes into that County, how far ſoever remote from the Place where the Fact was done. To remedy this,

2 Inſt. 130. Fitz. Brief 18, 23, 44, 274, 649, 691. Raſt. 178. "The 6 *R.* 2. *cap.* 2. provides, That to the Intent that Writs of Debt "and of Account, and all other ſuch Actions, be from henceforth taken "in their Counties, and directed to the Sheriff of the County where "the Contracts of the ſame Actions did ariſe; it is ordained that from "thenceforth on Pleas on ſuch Writs, when it ſhall be declared "that the Contract thereof was made in another County than is con"tained in the original Writ, that then incontinently the ſaid Writ "ſhall be abated."

* Page 34 Gilb. Hiſt. C. P. 89, 90. * This was intended to have confined all Actions to their proper Counties; but as it would have created greater Miſchief than it was intended to prevent, if a Creditor could not follow his Debtor into another County; and as the Statute is ſo worded, that it only preſcribes that the Declaration ſhall agree with the Writ, as to the Place, the Judges conſtrued it ſo as to impower them to change the Venue, and thereby oblige the Plaintiff to give Evidence of the Fact within the County where the Writ is brought; and this in Effect tends to abate the Writ according to the Statute; and here we ſhall conſider,

(A) What Actions are Local and Tranſitory. 34
(B) In what Caſes the Court will change the Venue. 35.

(A)

(A) (a) What Actions are Local or Transitory.

(a) That all Actions on Penal Statutes must be laid in the proper County, *vide Actions Qui tam*, Letter C. (39.) Co. Lit. 282. 6 Mod. 222.

ALL Actions Real or Mixed, as *Treſpaſſes, Quare Clauſum fregit, Ejectment, Waſte, &c.* muſt be laid in the County where the Land lie.

So an Action of Debt for Rent, againſt an Aſſignee of a Term, on the Privity of Eſtate, is Local, and will lie no where but in that County where the Lands are. Cro. Car. 183. Lach 187. Jones 43.

See 7 Co. 2. a. Com. Dig. L. 130. (N. 41.) *Id.* 132. (N. 6.) and the next Caſe but one, with the References. Wils. 165. Tidd's Pract. 11. Cowper 176. 3 Term Rep. 387.

So where *A.* granted a Rent-charge to *B.* and *C.* for their Lives, and the Lands out of which it iſſued came to the Defendant after the Death of *A.* and the Plaintiff, as Executor of the Survivor of the Grantees, brought Debt for Arrears incurred in their Life-time, and laid his Action in the County where the Lands lay; and on Application of the Defendants to have it tried elſewhere, ſuggeſting the Plaintiff's Power and Intereſt in that County; it was held a Local Action, and not triable elſewhere, Hob. 37. Pine *verſ.* Counteſs of Leiceſter.

A. as Aſſignee of a Reverſion, brought Covenant againſt the Aſſignee of the Leſſee, on an expreſs Covenant between the Leſſor and the Leiſee, for Payment of Rent reſerved out of Lands which lay in *Ireland*, and which was made payable in *London*; on Plea to the Juriſdiction of the Court, it was held that though ſuch Action may be maintained here by the (*b*) Leſſor againſt the Leſſee, yet that by the Aſſignment the Privity of Contract was deſtroyed; and there being nothing but a Privity of Eſtate between the two Aſſignees, it made the Action Local. Carth. 182. Damer and Barker. Salk. 80. pl. 1. 3 Mod. 336. Show. 191. S. C. 6 Mod. 194. S. C. cited, and admitted to be good Law, there being no Privity of Contract remaining: and there is no Difference between Debt and Covenant where the Action is by *Leſſor* againſt *Leſſee*, &c. (*b*) The Aſſignee of the Reverſion may maintain Debt or Covenant upon the Statute 32 *H.* 8. *cap.* 34. againſt the Leſſee *per Holt* Ch. Juſt. 6 Mod. 194. for the Privity of Contract is transferred to the Grantee, by the Statute. Carth. 183. Sand. 238. S. P. 240. S. P. 3 Lev. 154.

But where the Leſſor brought Debt againſt the Leſſee, and declared on a Demiſe of Lands which lay in *Jamaica*, on Plea to the Juriſdiction of the Court, and Objection, that if the Defendant had any good Local Plea, he was hereby deprived of it; the Court held that this being on the Privity of Contract, was a (*c*) Tranſitory Action, and might be laid any where; and that if a foreign Iſſue aroſe which was Local, it might be tried where the Action was laid; and for that Purpoſe there may be a Suggeſtion entered on the Roll, that ſuch a Place in ſuch a County is next (*d*) adjacent; and it may be tried here by a Jury from that Place, according to the Laws of that Country; and upon *Nil debet* pleaded, the Laws of that Country may be given in Evidence. 6 Mod. 194. Way and Yally. 2 Salk. 651. p. 31. S. C. (*c*) 2 Stra. 776. S. P. 2 Vin. Ab. 82. pl. 19. (*d*) For this vid. 6 Co. 48. 7 Co. 26. Vent. 59.

* If a Declaration contains Matters lying in two Counties that join, it ſhall be tried by both Counties, on a *Venire* directed to the Sheriffs of both Counties, who are to ſummon ſix of each County*. * Page 35 Cro. Eliz. 646, 741. Vide Trial *per Pais* 103. And that the Trial may by Conſent of Parties be otherwiſe; and 16 & 17 *Car.* 2. *cap.* 8. *ſect.* 3. that after Verdict, Judgment ſhall not be ſtayed or reverſed, for that there was no right Venue; ſo that the Cauſe was tried by a Jury of the proper County or Place where the Action is laid. *Vide* 4 *Ann. c.* 16. the Act for *Amendment of the Law.* * As to an Aſſiſe in *Comitatus*, ſee the Stat. 7 *R.* 2. 10. Co. Lit. 154. a. F. N. B. 180. a. and 35 H. 6. 30. a, or Com. Dig. 1 V. 130.

An Action of *Debt* againſt the Executor of a Leſſee, in the *Detinet* for Arrears in the Teſtator's Life-time, may be brought any where; but Latch 262, 271. 3 Co. 24.

where

where it is in the *Debet* and *Detinet* for Rent accrued in the Executor's Time, it muſt be where the Land lies.

Co.Lit. 282. *debitum & contractus ſunt nullius loci.* 2 Inſt. 231. 7 Co. 3. All Perſonal Actions, as *Debt*, *Detinue*, *Aſſault*, *Deceit*, *Trover*, and *Converſion*, *Account*, &c. may be brought in any County, and laid in any Place; and the Defendant cannot traverſe it, or be allowed to ſay, that the Cauſe of Action accrued in another County or different Place, except in the Caſe of an Officer of Juſtice, who may plead a ſpecial Juſtification.

Co.Lit. 261. Latch 4. 6 Mod. 228. See 2 Lord Raym. 1043. 2 Salk. 659. pl. 5. 10 Mod. 255. 2 Ld. Raym. 1212, 1214. An Action may be brought on a Contract or Matter which aroſe beyond Sea; as if *A.* enters into a Bond to *B.* in any foreign Country, and the Bond bears Date in no Place, *B.* may bring his Action where he pleaſes, and alledge that the Bond was made in any Place in *England*; but if there be a Place mentioned, as *Bourdeaux* in *France*, then ſhall he alledge that the Bond was made *in quodam loco vocat' Bourdeaux* in *France*, in *Iſlington* in the Co. of *Middleſex*, and from thence the Jury ſhall come.

11 Mod. 51. pl. 21 12 Mod. 568. But where it is dated at *Paris* in *France* within the Kingdom of *France*, it is not triable at all, and that ſo it hath been held by good Opinion. 2 Keb. 315. pl. 26. *Sed. qu?*

(B) In what Caſes the Court will change the Venue.

Sid. 44. 2 Salk. 669. pl. 6. Changing the Venue is *Ex gratia Curiæ*, and not *Ex debito Juſtitiæ*; *Quære.* (a) The Practice of changing the Venue began in King *James* the Firſt's Time; *per Holt* Ch. Juſt. 2 Salk. 670. pl. 9. It is not to be changed in Actions, on Bills of Exchange or Notes, &c. Evidence being given, on the Bill or Note, only, * Or material Evidence in the County where laid.

THE Defendant cannot by his Plea oblige the Plaintiff to lay his Action in a different County from that in which he brought it, unleſs the Matter pleaded be Local; for in Tranſitory Actions he muſt move the Court on Affidavit, that if the Plaintiff hath any Cauſe of Action, ſuch Cauſe accrued in the County of, &c. and not where the Plaintiff hath laid it, &c. and ſuch Motion muſt be made before Iſſue joined, for by joining Iſſue, he agrees with the Plaintiff as to the Manner of bringing the Action; and though the Court ſeldom (a) refuſes on ſuch Affidavit to change the Venue, yet if before or after the Motion made, the Plaintiff will enter into a Rule to offer no * Evidence but what ariſes in the County where he has laid his Action, the Cauſe will be tried there.

2 Mod. 215. Gilb. Hiſt. C. P. 90. See 2 Lord Raym 954. 11 Mod. 9. 12 Mod. 121. But though the Court, on Application, ſeldom refuſes to change the Venue, yet there are Caſes in which the Judges have refuſed; as where a Peer of the Realm brings an Action of *Scandalum Magnatum*, the Court will not change the Venue becauſe a Scandal raiſed on a Peer reflects on him through the whole Kingdom.

401, 420. Barnes 343. 2 Stra. 807. 2 Ld. Raym. 1418. Andr. 198. Barnard. K. B. 60. 1 Lev. 56, S. P. For the King himſelf is Party to the Suit; but in my Lord *Shaftſbury*'s Caſe, who brought *Scandalum Magnatum*, and laid it in *London*, the Venue was changed. Vent. 364. 2 Jones 192. but *note*, That was by Reaſon of the great Influence he had in the City; and the eſtabliſhed Doctrine is, that the Venue cannot be changed in an Action of *Scandalum Magnatum*. 2 Salk. 668. pl. 3. It was refuſed by *B. R.* in Lord *Sandwich* and *Miller*. *Eaſter Term* 1773.

Alſo a Serjeant at Law, Barriſter, Attorney, or other Privileged Perſon, whoſe Attendance is neceſſary at *Weſtminſter-Hall*, may lay his Action in * *Middleſex*, though the Cauſe of Action accrued in another County; and the Court, on the uſual Affidavit, will not change the Venue.

* Page 36 Vide Head of Privilege,

2 Salk. 668. pl. 1. 670. pl. 9. 2 Show. Rep. 176. pl. 172, 242. pl. 239. S. P. Though the Plaintiff, who was a Barriſter, had diſcontinued his practice for ſome Time before.

But

But if a Privileged Perſon be ſued, and the Action brought againſt him in the right County, his Privilege will not intitle him to have it tried in *Middleſex*. Carth. 128. 2 Ld. Raym. 1053. Biſſe *verſ.* Harcour. 2 Salk. 668. pl. 1. And. 381. 2 Stra. 1049. *cont per Dolben* J. who remembered a Cauſe where the Venue was altered, though an Attorney was Plaintiff, becauſe the Matter did ariſe, and all the Witneſſes lived in remote Parts. Carth. 126. So where the Plaintiff was an Attorney, but had not declared in Perſon, but by *N. C.* his Attorney. Barnes 334. So where Plaintiff ſued Defendant by *Capias*, and not by Attachment of Privilege. Barnes 335. Pract. Reg. C. P. 419. Rep. & Caſ. Pract. C. P. 132 So where he ſued by Original. Barnes 342. Rep. & Caſ. Pract. C. P. 145. Pract. Reg. C. P. 420.

So if an Attorney lays (*a*) his Action in *London*, the Court will change the Venue on the uſual Affidavit; for by not (*b*) laying it in *Middleſex*, he ſeems regardleſs of his Privilege, and is to be conſidered as a Perſon at large. Vent. 47. Caſ. Temp. Holt. 712. pl. 5.

(*a*) Barnes 340. Rep. & Caſ. Pract. C. P. 134, 135. Pract. Reg. C. P. 419. (*b*) In order to prove the Venue was not laid in *Middleſex*, a Copy of the Declaration was produced, by which it was ſaid it appeared the Venue was laid in *London*, but the Court ſaid an Affidavit ought to be annexed, that it may appear to be a true Copy, and that they did not require this Affidavit but in the Caſe of an Attorney.

If material Evidence may be given in two Counties, the Plaintiff may elect to bring his Action in which he pleaſes; as, if *A.* draws a Bill of Exchange in *Briſtol*, payable in *London*, the Action accrues by the Refuſal to pay the Money in *London*, and therefore the Plaintiff not obliged to change the Venue. 2 Salk. 669. pl. 4. Comb. 84. Lutw. 215. 7 Co. Bulwer's Caſe.

So where an *aſſumpſit* was brought for Goods ſold and delivered, and the Action laid in *London*, and a Motion was made to change the Venue upon Affidavit that the Sale was in *Kent*; but it appearing that the Delivery was in *London*, the Court held that where the Matter conſiſts of two Parts in ſeveral Counties, the Plaintiff ſhall have his Election. Vent. 344.

So an Action againſt a Lighterman for not delivering Goods was laid in *London*, where they were to be carried to; it was moved to change the Venue, becauſe the Damages and Neglect were in *Kent*; *ſed non allocatur*; for the Neglect is tranſitory, and not material where it was; and the Court will never change a Venue for a Carrier, which is the ſame Caſe. 2 Salk. 670. pl. 8. Not the Courſe to change the Venue in an Action of Eſcape: per Holt Ch. Juſt.

If the Action be grounded on a Specialty, the Court will not change the Venue; for not being dated at any particular Place, it may be preſumed to be omitted, that it may charge the Defendant at any Place. 2 Mod. 228. That the Court will not change the Venue in an Action of *Covenant*. Lev. 307.

* Page 37

* ACTIONS Qui tam.

ACTIONS *Qui tam* are (*a*) ſuch as are given by Act of Parliament, which give a Penalty, and create a Forfeiture for the Neglect of ſome Duty, or Commiſſion of ſome Crime, to be recovered by Action or Information, at the Suit of him who proſecutes as well in the King's Name as in his own. As moſt Penal Statutes direct, that the Penalty may be recovered by Action or Information, we will conſider both Matters together, and therefore we ſhall ſhew

(*a*) It is ſometimes called a Popular Action, when the Penalty, or Part of it, is given to any one who will ſue for the ſame.

In theſe Actions or Informations the Party who proſecutes has, by commencing his Suit, ſuch an Intereſt in the Penalty, that the King cannot diſcharge or ſuſpend the Suit, as to the Part he (the Plaintiff) is intitled to. *Vide* 2 Hawk. P. C. 275. and Head of *Prerogative*.

(A) In what Caſes they lie. 37.
(B) What ought to be the Form of them. 38.
(C) In what Courts they may be brought, and where laid. 39.
(D) Of the Proceedings and Pleadings in ſuch Actions or Informations. 40.
(E) Of the Judgment on ſuch Actions or Informations. 42.
(F) In what Caſes there ſhall be Coſts. 42.
(G) Whether the Penalty of a Penal Statute may be compounded or granted over. 43.

Within what Time the Proſecution muſt be on a Penal Statute, *vide* Head of *Limitations of Actions*. (3 V. 504.)

(A) In what Caſes they lie.

Co. Ent. 375. Lutw. 133, 138. Dyer 95. Pl. 36, 346. Pl. 9. And. 139.

WHerever a Statute prohibits a Thing, as being an immediate Offence againſt the public Good in general, under a certain Penalty, and the Penalty, or Part of it, is (*b*) given to him who will ſue for it, any Perſon may bring ſuch Action or Information, and lay his Demand *Tam pro Domino Rege quam pro ſeipſo*.

(*b*) But without ſuch Penalty be given, no Perſon can ſue. 2 And. 127. 2 Jones 234. 2 Hawk. P. C. 265. for the whole Penalty goes to the King.

Vide 2 Hawk. P. C. 265. 4 Co. 13.

Alſo where a Statute prohibits or commands a Thing, the Doing or Omiſſion whereof is both an immediate Damage to the Party, and alſo highly concerns the Good of the Public, the Honour of the King, &c. the Party grieved may, and, as ſome ſay, ought to bring his Action on ſuch

ſuch Statute *Tam pro Domino Rege quam pro ſeipſo*, eſpecially if the King be intitled to a Fine.

*(B) What ought to be the Form of them.

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IT is agreed, that an Action or Information on a public Statute need not recite the Statute on which it is grounded, whether the Offence be ſuch only becauſe prohibited, or be an Evil in its own Nature, and whether it be prohibited by more than one Statute, or by one only; for the Judges are bound *ex officio* to take Notice of all public Statutes. 5 H. 7. 17. b. 2 Rol. Abr. 79. Plow. 1. 79. 4 Co. 48. Cro. Eliz. 236. Cro. Car. 229. Dyer 155, 159. Moor 468, 699. Show. 337. 2 Hawk. P. C. 245.

But if the Proſecutor take upon him to recite the Statute, and materially varies from a ſubſtantial Part thereof, this is fatal, becauſe it does not judicially appear to the Court that there is ſuch a Foundation for the Proſecution, as that whereon it is expreſſly grounded. For this vid. 2 Hawk. P. C. 246.

But if an Information contain ſeveral Offences againſt a Statute, and be well laid as to ſome, and defective as to others, the Informer may have Judgment for what is well laid; as where the Words of the Statute are fully purſued in the Deſcription of ſome of the Offences, and not of others; or where the Time is in Part certain, and in Part uncertain. Cro. Jac. 104. Sid. 368. 2 Keb. 366, 367. 2 Rol. Abr. 696. 2 Hawk. P. C. 378. Doug. 377, 730. 1 Term Rep. 151. 2 Term Rep. 758.

Alſo an Action or Information *qui tam*, need not conclude *contra pacem*, or *in contemptum Domini Regis*; as an Indictment muſt. Cro. Jac. 529. Cro. El. 835.

He who brings an Action on a Penal Statute, which gives one Moiety of the Forfeiture to the King, and the other to the Informer, may either have a Writ againſt the Defendant *Quod reddat Domino Regi & A. B. qui tam, &c. quas eis debet*, or *Quod Reddat* A. B. *qui tam, &c. quas ei debet*; and in either Caſe the Writ is well purſued by a Declaration in the Name of the Plaintiff only. 2 Hawk. P. C. 266. Jones 261. Cro. Car. 256. 1 Com. Dig. 228. Plow. 77. Dyer 95. 3 Lev. 374. Dal. 66.

But it ſeems doubtful whether there be any Neceſſity that either the Writ or Count, in any ſuch Action, do expreſs, that it is brought by or for the King as well as the Party*. Quære. Vide 2 Hawk. P. C. 266.

* The uſual Form of declaring is, that the Party ſues as well for the King, as for himſelf. It is the ſafeſt Method, and perhaps is neceſſary.

But it ſeems agreed, that every Information muſt be in this Form, *viz.* that the Informer *Tam pro Domino Rege quam pro ſeipſo ſequitur*, even where it is brought upon a Statute which gives one Third of the Penalty to a third Perſon; but there is great Variety in the Form of ſuch Informations in other Reſpects; for ſometimes they ſay that the Action accrues to the Informer, to demand the Forfeiture for the King and himſelf; ſometimes that it accrues to the King and to the Informer; ſometimes that it accrues to the King and to the Informer and to *J. S. viz.* where it is divided into three Parts; ſometimes they have no Clauſe at all of this Kind; ſometimes a Proceſs is prayed to bring in the Defendant to anſwer the Informer; ſometimes to anſwer as well the King as the Informer; and ſometimes to anſwer concerning the Premiſes, without ſaying to whom. Vide Hawk. P. C. 266. 267. and the other Authorities there cited.

Such Information may demand what is due to the Informer, without mentioning what is due to the King; alſo, if the *Quantum* depend on what ſhall be found by the Jury, a Blank* may be left for the Sum; but if 2 Hawk. P. C. 267.

* Qu. As to the Blank if it would not be bad?

if it demand more or leſs for the Party than his Due, it is inſufficient as to him; but even in ſuch Caſe, it may be ſufficient as to the King's Share.

Bro. Action Popular 2. 2 Hawk. P. C. 267.

If the Action be Popular, *i. e.* ſuch as any Perſon may bring, it may conclude *ad grave damnum*, without adding, of the Plaintiff; becauſe every Offence, for which ſuch Action is brought, is ſuppoſed to be a general Grievance to every Body.

* Page 39 Show. 337.

* It is ſaid that the Fact is ſufficiently alledged after a *Quod cum* in an Action on a Statute, but not in an Information*.

* Qu. If this Rule will hold univerſally? and if it muſt not rather depend on the particular Circumſtances of each Caſe?

Lutw. 162. 2 Hawk. P. C. 266.

Where the Penalty is given for continuing ſuch a Practice for a certain Time, or for not doing ſuch an Act within ſuch a Time, the Information muſt be very particular in bringing the Offence within the Time preſcribed †.

† The King *v.* Tayor, *Lent Aſſiſes* for *Surry* 1776, before Mr. J. *Blackſtone*, an Information againſt Defendant for following the Buſineſs of a Tanner, not having ſerved an Apprenticeſhip. The Evidence did not ſpecify the Time, as laid in the Information, the Judge therefore directed the Jury to acquit Defendant, and he was acquitted accordingly; and the Proſecutor having cloſed his Evidence, the Judge very properly refuſed to let him ſupply the Defect. It being a Proſecution that was not to be encouraged.

2 Hawk. P. C. 267. 268.

(*a*) Made perpetual by 27 El. c. 10.

By the (*a*) 18 *Eliz. cap.* 5. *None ſhall purſue againſt any Perſon on a Penal Statute, but by way of Information, or Original Action, except where the Penalty is limited to a certain Perſon*, &c. yet popular Actions in the *King's Bench* or *Exchequer* ſeem not within the Meaning of this Statute; for it doth not reſtrain the Suit to Original Writs, but only to Original Actions, and ſuch Actions by Bill are properly original ones in the Courts in which they are commenced; and therefore it ſeems a reaſonable Conſtruction, that the Meaning of the Statute was only to reſtrain Suits commenced in inferior Courts, and afterwards removed into ſuperior.

(C) In what Courts they may be brought, and where laid.

Vide 31 El. c. 5. to this Purpoſe, and the Expoſition thereof. 2 Hawk. P. C. 268, 269.

" BY the Statute 21 *Jac.* 1. *cap.* 4. all Offences againſt Penal Sta-
" tutes, for which any common Informer may ground any Popular
" Action, Bill, Plaint, Suit, or Information, before Juſtices of Aſſiſe, or
" *Niſi prius*, or of General Gaol-Delivery, or of *Oyer*, &c. or of Peace,
" &c. (except Offences concerning Recuſancy or Maintenance, or the
" King's Cuſtoms, or tranſporting Gold, or Silver, or Munition, or
" Wool, or Leather, &c.) ſhall be commenced, ſued, tried, recovered
" and determined by Action, Plaint, Bill, Information or Indictment,
" before the Juſtices of Aſſiſe, of *Niſi prius*, of *Oyer*, &c. or Gaol-Deli-
" very, or before Juſtices of Peace of every County, City, Borough or
" Town Corporate, or Liberty, having Power to enquire of, hear and
" determine the ſame, and not elſewhere, ſave only in the ſaid Counties,
" or Places uſual for thoſe Counties, or any of them; and the like
" Proceſs in every Popular Action, Bill, Plaint, Information or Suit,
" ſhall be as in Actions of *Treſpaſs vi & armis* at Common Law; and
" all Informations, Actions, Bills, Plaints and Suits whatſoever, either by
" the Attorney General, or by any other Officer whatſoever, in any of
" the Courts of *Weſtminſter*, for or concerning any the Offences afore-
" ſaid, ſhall be void.

" And

"And in all Suits on Penal Statutes, the Offence ſhall be laid in the "proper County; and if, on the General Iſſue, the Offence be not "proved in the ſame County in which it is laid, the Defendant ſhall "be found Not Guilty.

"And no Officer ſhall receive, file, or enter of Record, any Informa- "tion, Bill, Plaint, Count or Declaration, on the ſaid Statutes, which "by this Act are appointed to be heard and determined in their proper "Counties, till the Informer or Relator hath taken an Oath before a "Judge of the Court, that the Offence was not committed in any "other County than where, by the Information, &c. the ſame is ſup- "poſed to have been committed, &c. the ſame Oath to be there entered "of Record *."

* This Section of the Statute ſeems now to be diſregarded. See *infra*.

In the Conſtruction of this Statute it hath been holden, that no Action of *Debt*, or *Information*, or other Suit whatever, (*a*) can be brought on any Penal Statute made before 21 *Jac.* 1. in any of the Courts of *Weſtminſter-Hall*, for an Offence not excepted by the Statute, and for which the Offender *may be proſecuted in the Country, (*b*) unleſs ſuch Offence ſhall be committed in the ſame County in which ſuch Court ſhall ſit; and as to the Objection, that by this Reſtraint of Suits on Penal Statutes, to the ſaid Courts, the Offence would become diſpuniſhable by the Offender's removing from the County; it may be (*c*) anſwered, that he may be ſued to an Outlawry in the ſame Manner as in an Action of Treſpaſs *,

* Page 40

(*a*) Salk. 372. pl. 13. Carth. 465. 5 Mod. 425. 2 Lev. 204. 3 Inſt 192. adjudged cont. Vent. 8. Lev. 249. 3 Lev. 71. 2 Keb. 401. 447. Sid 303. 400. and *vide* Vent. 304. 2 Lev. 204. Latch 192. Sid. 359. Ld. Raym. 370. (*b*) Jon. 193. (*c*) Salk. 373. pl. 14. Salk. 372. pl. 13. * See Com. Dig. 1 V. 245. (D) *Note*, Actions of this Kind are frequently brought in the Courts of *Weſtminſter*; but the Venue laid in the Count where the Cauſe of Action ariſes, otherwiſe how could an Action be tried by a Juſtice of Aſſize, which is one of the Modes mentioned in the Statute.

That where a ſubſequent Statute gives an Action of Debt, or any other Remedy for the Recovery of a Penalty in any Court of Record generally, it ſo far impliedly repeals the Reſtraint of 21 *Jac.* 1. and conſequently leaves the Informer at his Liberty to ſue in the Courts of *Weſtminſter-Hall*.

But *per* Holt, it comes within the Equity of the Statute.

That the Statute gives no Juriſdiction to the Courts therein mentioned, over any Offences, in Relation to which they had none before; and therefore that Suits for ſuch Offences muſt be brought into the Courts of *Weſtminſter* in the ſame Manner as before.

Cro Car. 119. Lit. Rep. 163. Hutt. 98. Vent. 8. Keb. 106. Jones 193. 2 Hawk. P. C. 271.

That the ſaid Statute hinders not the Removal of any Cauſe into the *King's Bench* by *Certiorari*, after which it may be either tried there or in the County by *Niſi Prius*.

Alſo where a Statute limits Suits by an Informer *qui tam* to other Courts, yet any one may, by Conſtruction of Law, exhibit an Information in the Exchequer for the whole Penalty, for the Uſe of the King.

And. 127. Cro. Jac. 178. 2 Hawk. P. C. 267.

That on the laſt Clauſe of the Statute it cannot be aſſigned for Error, that an Information, &c. was filed without ſuch previous Oath as the Statute requires, for it was only directory to the Officer.

Cro. Car. 316. vide 4 Inſt. 272. 2 Hawk. P. C. 383 to 385. 2 Inſt. 193. But Q. Whether for want of ſuch Oath, the Court will not, on Motion, ſet aſide the Proceſs. Salk. 367. pl. 19. Ld. Raym. 416. Carth. 503. Qu. If this hath ever been done in the Caſe of an Action?

That no Suit by a Party grieved is within the Reſtraint of the Statute.

Show. 354.

(D) Of the Proceedings and Pleadings in such Actions and Informations.

" BY the 18 *Eliz. cap.* 5. every Informer on any Penal Statute shall " exhibit his Suit in proper Person, and pursue the same either by " himself, or by his Attorney in Court, and shall not use any Deputy."

(c) Co. Lit. 139. Bro. Nonsuit 68. (d) Bro. Nonsuit 35. Vide Sid. 420.

Any (c) Informer *qui tam*, or (d) Plaintiff in a Popular Action, may be nonsuit, and thereby determine the Suit, as to himself at least; and though the King cannot be nonsuit, the Attorney General may enter a *Nolle Prosequi* to an Information by the King only. Salk. 21. pl. 11.

" By the 29 *Eliz. cap.* 5. and 31 *Eliz. cap.* 10. if any Natural-born " Subject or Denizen, shall be sued on any Penal Law in the *King's* " *Bench*, *Common Pleas*, or the *Exchequer*, where he is bailable, or by " Form of the Court may appear by Attorney, in every such Case he " may, at the Time contained in the first Process, appear by Attorney, " and not be urged to Personal Appearance, or to put in Bail."

Rol. Rep. 49, 134. Bridg. 115. that he cannot wage his Law, or take Advantage of a Protection. 2 Hawk. P.C. 274.

If the Defendant plead a Special Plea, he must take Care to set it forth with all convenient Certainty, and to answer the whole Time laid in the Information; and if he plead the General Issue, he must depend upon it, for he cannot plead together with it a Special Plea, either to the Whole, or to Part of the Charge.

* Page 41 Co. Ent. 165. Hob. 327. Vent. 122. 3 Lev. 375. Vide Cro. Car. 10, 11.

* If the Defendant plead *Nil debet*, it is safest to say expressly that he owes nothing to the Informer, nor to the King; for if he only plead that he owes nothing to the Informer, it may be objected that the whole Declaration is not answered.

2 Hawk. P. C. 276.

If there be more than one Defendant, they ought not to plead jointly, that they are not guilty, but severally, that neither they nor any of them are guilty, &c.

2 Hawk. P. C. 277.

If the Suit be grounded on the Breach of a Statute appearing by Matter of Record, *Nil debet* is no good Plea.

Cro. Eliz. 261. Rol. Rep. 49, 134. Hob. 209, 138. (e) When the Suit shall be said to be pending. Vide 2 Hawk. P. C. 275. and Q. Whether from the Time of the Purchase or Return of the Writ. Salk. 89. From the Time of the Purchase of the Writ. The Day of suing it forth is the Commencement of the Suit. 3 *Bur.* 1423, and *Combet Pitt.*

Wherever a Suit on a Penal Statute may be said to be (e) depending, it may be pleaded in Bar of a subsequent Prosecution, being expressly averrred to be for the same Offence, as it may, though it be laid on a Day different from that in the former; and it is said that the Mistake in such a Plea of the Day whereon such prior Suit was commenced, will not be fatal on the Issue of *Nul tiel Record*, if it appears in Truth to have been prior, &c. and if two Informations be exhibited on the same Day, they may mutually abate one another, because there is no Priority to attach the Right of Suit in one Informer more than in the other.

2 Rol. Abr. 683. Vide 2

If the Defendant be within the *Proviso* of a Penal Statute, he may take Advantage of such *Proviso* on the General Issue, in a Suit on such Statutes; but

but it hath been holden (even ſince the Statute of 21 *Jac.* 1. *c.* 4.) that if he have Matter in his Diſcharge depending on a ſubſequent Statute, he muſt plead it ſpecially. Hawk. P. C. 277. Who thinks he may take Advantage of it by Virtue of the Statute, without pleading of it ſpecially; but as to thoſe Matters to which the Statute doth not extend. Q.

As to Replications to ſpecial Pleas to Informations *Qui tam* in the Courts of *Weſtminſter-Hall*, they are properly made in the Name of the Attorney General only; and ſuch Replications in Suits at Aſſizes are proper in the Name of the Clerk of Aſſizes only; alſo Replications to General Iſſues, on ſuch Informations in the *King's Bench* or *Exchequer*, may be in the Name of the Attorney General only; but generally the Plaintiff only replies in Actions *Qui tam*; and a Demurrer to a Plea in Bar to an Information *Qui tam* in the Informer's Name only has been received. 2 Hawk. P. C. 277.

Wherever a Plaintiff may declare *tam pro Domino Rege quam pro ſeipſo*, he may continue the ſame Form of Words both in the joining of Iſſue and in the *Venire*; but is not bound to do it unleſs the King be (*c*) intitled to Part of the Penalty. 2 Hawk. P. C. 278. (*c*) Hawkins leaves it a *Quære*, Whether he be bound to do it in this Caſe; for there are Precedents to the contrary. The uſual Form in the Plaintiff's Replication is "*and the Plaintiff who ſues as aforeſaid*, doth ſo likewiſe, &c. "where Defendant offers Iſſue. If the Plaintiff, then, *and of this the ſaid A. who ſues as aforeſaid*, "*puts himſelf on the Country*, &c.

Where ſeveral Perſons are jointly charged for an Offence againſt a Statute, which in its own Nature may be committed by a ſingle Perſon, without the Concurrence of any other, ſome of them may be acquitted and others found guilty; for though the Words of the Information be joint, yet in Judgment of Law the Charge is ſeveral againſt each Defendant; but if one only be informed againſt, as having offended oftener, or in a higher Degree than is proved, as for having been abſent from Church ten Months, where he has been abſent but eight; or for having ingroſſed 1000 Quarters of Wheat, where he has ingroſſed but 100; he may be found Guilty as to what is proved, and Not guilty as to the Reſidue, for ſuch Offences are in the Nature of Treſpaſſes, which it is ſufficient to prove for any Part; but if the Offence conſiſt in making a Contract contrary to the Purview of a Statute, as in the Caſe of Uſury, it muſt be proved as it is laid. 2 Rol. Abr. 707. Lane 19. 59.

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* (E) Of the Judgment on ſuch Actions or Informations.

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WHERE by Statute the Offender is to forfeit ſuch a Sum, to be divided into three Parts, whereof one ſhall go to the King, one to the Informer, and the other to the Poor, and to be committed if he do not pay it within ſuch a Time, the Judgment may be general, that the King and Informer ſhall recover the Whole, without mentioning how it ſhall be diſtributed, or that the Party be committed for Non-payment; but if it mention only that the Informer only ſhall recover, without ſaying any Thing of the King, it is erroneous; yet if on ſuch Information, as it is laid, the Informer appear to have no Right to any Part, but the King ought to have the Whole, and the Judgment be, that the Defendant forfeit the Whole, and that the King ſhall have one Part, and the Informer another, &c. it is erroneous only as to ſuch laſt Clauſe, which And. 139. Stile 329. 2 Rol. Abr. 102. 2 Keb. 820. 2 And. 128.

which distributes the Forfeiture, but shall stand for the first Clause, that the Defendant shall forfeit the Whole; (a) also if there be no Clause at all concerning the Forfeiture, in a Conviction on a Penal Statute, but only a Judgment *quod convictus*, it is sufficient, for the Forfeiture is implied.

(a) 2 Hawk. P. C. 279. Adjudged Mich. 3 G. 1. The contrary held *Hil.* 3 G. 2. Fitzgib. 124. Barnard K. B. 212.

(F) In what Cases there shall be Costs.

2 Keb. 781. Rol. Abr. 574. Lutw. 200. Vent. 133. Salk. 206. pl. 4. *cont.* Moor 65. 3 Lev. 374. 2 Inst. 288.

AN Informer on a popular Statute shall in no Case whatsoever have his Costs, unless they be expressly given him by such Statute, for the Common Law gives Costs in no Cases; and the Statute of *Gloucester* gives the Demandant Costs only in Cases wherein he shall recover his Damages, which supposes some Damages to have been done to the Demandant in particular, which cannot be said in any popular Action.

2 Hawk. P. C. 274. Vide the Authorities *supra*.

But wherever a Statute gives a certain Penalty to the Party grieved, he is intitled to his Costs by the Statute of *Gloucester*, which gives the Demandant his Costs in all Cases wherein he shall (b) recover his Damages; for otherwise it would be in vain for him to sue, since in many Cases the Costs would exceed the Penalty.

(b) Also where a Statute, introductive of a new Law, gives a Remedy in a point not remediable at the Common Law, but no certain Penalty, the Jury may consider the Costs, so as to give Damages accordingly. 2 Hawk. P. C. 214.

(c) Extends only to a common Informer, and not to a Party grieved; yet if a Party grieved brings his Action, and such Action be for any Offence or Wrong Personal, immediately supposed to be done to the Plaintiff or Plaintiffs, or whatsoever the Nature of the Action may be; if the Plaintiff might have Costs in Case Judgment should be given for him, he shall pay them on a Nonsuit, or Verdict against him, by Virtue of 23 *H.* 8. *cap.* 15, and 4 *Jac.* 1. *cap.* 3. *Vide* 2 Hawk. P. C. 274. and the Authorities there cited. (d) And it is no Objection against paving the Costs, That the Court had no Jurisdiction of the Cause, or that the Statute on which it is grounded is discontinued. 2 Keb. 106. *Vide* Hutt. 35.

By the 18 *Eliz. cap.* 5. made perpetual by 27 *Eliz. cap.* 10. "If (c) "any Informer or Plaintiff, on a Penal Statute, shall willingly delay his "Suit, or discontinue, or be nonsuit, or shall have the Trial or Matter "passed against himself therein by Verdict or Judgment of Law, he (d) "shall pay to the Defendant his Costs, Charges and Damages, to be "assigned by the Court in which the Suit shall be attempted," &c.

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* Page 43 * (G) Whether the Penalty of a Penal Statute may be compounded or granted over.

(a) Extends only to common Informers. 2 Hawk. P. C. 279. (b) Extends as well to subsequent Penal Statutes,

BY the 18 *Eliz. cap.* 5, "No (a) Informer or Plaintiff shall compound "or agree with any that shall offend, or shall be surmised to offend "against (b) any Penal Statute, for an Offence committed, or pretended "to be committed, but after Answer made in Court to the Suit, nor "after Answer, but by Consent of the Court in which the Suit shall be "depending; on Pain, that whoever shall offend contrary to the true "Intent of this Statute, or shall by Colour or Pretence of Process, or "without Process, on Colour of any Offence against any Penal Law, "make

" make any Compoſition, or take any Reward, or Promiſe of Reward, " for himſelf, or to the Uſe of any other, without Conſent of ſome of " his Majeſty's Courts at *Weſtminſter*, and ſhall be thereof convict, ſhall " ſtand in the Pillory, &c. and ſhall be diſabled to ſue on any popular " or penal Statute, and ſhall forfeit 10*l.* &c."

as to thoſe which were in Being when it was made. Hutt. 35.

Alſo it extends to the Compounding of Suits commenced in Courts which have no Juriſdiction, as much as if they had a Juriſdiction. Keb. 106. Sid. 311.

By the 21 *Jac.* 1. *cap.* 3. " It is declared that all Commiſſions, Grants, " Licences, Charters, or Letters Patent, of Power, Liberty or Faculty, " to diſpenſe with, or to give Licence or Toleration to do any Thing " againſt the Tenor or Purport of any Law, or to give or make any " Warrant for any ſuch Diſpenſation, &c. or to agree or compound for " any Forfeitures limited by any Statute; or of any Grant or Promiſe of " the Benefit of any ſuch Forfeiture, before Judgment thereupon, and " all Proclamations, &c. tending to the Furthering of the ſame, are " contrary to Law, and void: *And it is enacted*, That all ſuch Commiſſi- " ons, &c. ſhall be examined, heard, tried and determined by, and ac- " cording to the Common Laws of this Realm, and not otherwiſe; *but* " *it is provided that this Act ſhall not extend* (*c*) to any Warrant or Privy " Seal from the King to the Juſtices of either Bench, or the Exchequer, " or of Aſſize, or of *Oyer* or *Terminer*, and Gaol-delivery, or Peace, or " other Juſtices having Power to hear and determine Offences againſt " any Penal Statute, to compound for the Forfeitures of any Penal " Statutes depending in Suit before them, after Plea pleaded. *Alſo it is* " *further provided*, That the ſaid Act ſhall not extend to any Grants, " &c. that had been granted concerning the Licenſing of Taverns, or " ſelling, uttering or retailing Wines to be ſpent in the Houſe of the " Party ſelling the ſame, or concerning the making of Compoſitions for " ſuch Licences, ſo as the Benefit thereof be reſerved to the Uſe of the " King, &c."

That this Statute is in Affirmance of the Common Law. Vide 2 Hawk. P. C. 280.

(*c*) Such Juſtices by ſuch Warrant can make ſuch Compoſition for the Uſe of the King only; per L. Coke, 3 Inſt. 178. But by the 18 El. *ſupra*, they may give Leave to an Informer to compound with a Defendant after Plea pleaded. 2 Hawk. P. C. 280.

* Actions on the Caſe.

* Page 44

IT has been obſerved, that for every Right, and for every Injury done a Man in his Perſon, (*a*) Reputation or Property, the Party hath a Remedy, but this Remedy he muſt take according to the Methods laid down and Rules preſcribed by the Law; for which Purpoſe there are Writs framed, and ſettled Actions, to which he muſt apply; as Debt upon a Contract, Treſpaſs on a manifeſt and open Invaſion of his Property, &c. but where the Law has made no Proviſion, or rather where no general Action could well be framed before-hand, the Ways of injuring, and

Co. Lit. 56. a. 6 Mod. 53, 54.

(*a*) For Actions on the Caſe for Words, vide Head of Slander.

and Methods of Deceiving being ſo various, every Perſon is (*b*) allowed to bring a ſpecial Action on his own Caſe, which is a liberal (*c*) Action.

(*b*) Nor is it any Objection that ſuch Action was never brought before; as where the Leſſor coming to view the Lands, to ſee if any Waſte was committed, being hindered by a Stranger from entering the Premiſes, brought an Action on the Caſe againſt him; and it was held to lie, though ſuch Action had never been brought before. Cro. Jac. 478. 1 Stra. 624. Doug. 747. Rol. Abr. 108, 109. Rol. Rep. 311. *Vide* 6 Mod. 53. and Lit. Sect. 108. Where *per* Littleton, no Action having been brought on the Statute of *Merton*, it is to be preſumed no Action will lie: And Co. Lit. 81. b. *per* Ld. *Coke*, Non-uſage is a good interpreter of a Law. But *per* Holt Ch. Juſt. Wherever an Act of Parliament gives a Right, the Common Law gives a Remedy; ſo where the Common law gives a Right, or makes a Thing an Injury, the ſame Law gives a Remedy or Action. Salk. 20, 21. 6 Mod. 54. (*c*) 2 Bur. Rep. 906, 1011, 1012.

Theſe Actions are founded on ſome Fraud or Deceit in Contracts, or ſome ſecret Injury to a Man's Right or Property, and are ſaid to riſe from a Non-feaſance, Male-feaſance or Miſ-feaſance; but as this Diviſion ſeems too general, I ſhall chuſe the following, as more proper to include the moſt material Caſes that fall under this Head, referring to others for a more full Diſcuſſion of ſeveral Particulars relating to them.

* Page 45 * (A) What Perſons, with reſpect to the Injury, may bring an Action on the Caſe. 45.

(B) Againſt whom ſuch Action lies. 46.

(C) For what Injuries an Action on the Caſe will lie; and herein of thoſe Caſes where a Man may be ſaid to ſuffer Damnum abſque injuria. 48.

(D) At what Time the Right of Action ſhall be ſaid to have accrued. 49.

(E) Of Actions on the Caſe for Fraud and Deceit in Contracts, on an implied or expreſs Warranty. 50 & 52.

(F) Of Actions on the Caſe for Injuries to a Man's Perſon, Property, Right or Privilege: And herein, 53.

1. Where an Action on the Caſe will lie againſt Officers and Miniſters of Juſtice. 57.

2. Where Caſe will lie for Torts and Injuries committed by Perſons contrary to the Duty of their Trades and Callings. 60.

(G) Where an Action on the Caſe will lie for a Nuiſance, and therein of the Inconvenience of multiplying of Actions. 60.

(H) Where an Action on the Caſe will lie for a Conſpiracy, and oppreſſive Proceedings in Proſecutions and Suits at Law. 61.

(I) Where Caſe will lie though the Party injured has another Remedy. 63.

(K) Where Caſe will lie though the Wrong-doer be puniſhable criminally. 64.

(A) What

(A) What Perſons, with reſpect to the Injury, may bring an Action on the Caſe.

IF *A.* delivers Goods to *B.* to deliver over to *C.* and *B.* does not deliver them over accordingly, but converts them to his own Uſe, either *A.* or *C.* may have an Action againſt *B.* but both ſhall not have an Action, but he that firſt begins his Action ſhall go on with the ſame. Bulſt. 68. Hard. 321. S. P. And ſaid they could not join.

If *A.* is ſeiſed in Fee of the Reverſion of a Cloſe, expectant upon a Term for Years, and *B.* is poſſeſſed of another Cloſe adjoining thereto, between which ſaid Cloſes there runs a Rivulet, and *B.* ſtops it, *per quod* the Cloſe of *A.* is ſurrounded, ſo that the Timber-Trees, *&c.* became rotten; *A.* in Reſpect of the Prejudice to the Reverſion, and the Termor, in Reſpect of the Poſſeſſion, and of the Shade, Shelter, *&c.* may each (*a*) have an Action; and Satisfaction given to one is no Bar to the other. 3 Lev. 209. Vide 2 Rol. Abr. 55. (*a*) So if A. leaſes a Houſe to B.

for Years, and this is burnt down through the Neglect of a Neighbour, A. may have an Action for the Damage to his Inheritance, and B. to his Poſſeſſion. 3 Lev. 360. But ſee 6 *Ann. cap.* 31. *ſect.* 6. made perpetual by 10 *Ann. c.* 14. *ſect.* 1. this Remedy taken away.

If a Maſter of a Ship brings an Action on the Caſe, and declares that the Ship was laden with Corn in ſuch a Harbour, ready to ſail for *Dant-*zick*, and that the Defendant entered and ſeized the Ship, and detained her, *per quod impeditus & obſtructus fuit in viagio*; this Action well lies, for the Maſter has not the Property of the Ship, but the Owners; and he is only a particular Officer, and can only recover for his particular Loſs; yet he might have brought Treſpaſs, as a Bailiff of Goods may, and then as Bailiff he could only have declared on his Poſſeſſion, which is ſufficient to maintain Treſpaſs. * Page 46 Salk. 10. pl. 4. Ld. Raym. 558. Pitts and Gaince.

If a Servant is coſened of his Maſter's Money, the Maſter may have an Action on the Caſe againſt the Coſener*. Rol. Abr. 98. Cro. Jac. 223.

So if a Surgeon, in Conſideration of a Sum of Money, undertakes to cure my Servant of a Hurt, and he applies unwholeſome Medecines thereto, on Purpoſe to make the Wound worſe, by which I loſe the Service of my Servant for a long Time, I may have an Action on the Caſe againſt the Surgeon. Rol. Abr. 98. Rol. Rep. 124. S. C. *Adjorn.* 2 Bulſt. 332. S. C. and *quoad* the Point of Law, the Court inclined for the Plaintiff, but for Default in the Pleadings adjourned. And after it was ended by Compoſition. Rol. Abr. 88. *The Maſter may maintain an Action for Money had and received againſt any one, obtaining from the Plaintiff's Servant his Money, without legal Conſideration. 1 Bl. Rep. 427. 3 Term. Rep. 51.

If a Bailiff Errant takes *J. S.* in Execution upon a *Capias ad Satisfaciendum*, at the Suit of *J. D.* and after *J. S.* eſcapes by a Reſcue of himſelf, the Sheriff may have an Action upon the Caſe againſt him for this Eſcape, for he is thereby chargeable (*b*) over for this to *J. D.* and this Eſcape made to his Bailiff was an Eſcape to himſelf. Rol. Abr. 97, 98. Cro. El. 349. Cowp. 403. Doug. 40. 1 Term. Rep. 418.

S. P. admitted *per Cur.* (*b*) But if ſuch a Priſoner, taken by a Bailiff of a Franchiſe, eſcape from a Bailiff, the Sheriff ſhall not have an Action upon the Caſe againſt him, becauſe he is not chargeable over; but the Bailiff only is chargeable. For this *vide* Rol. Abr. 97, 98, 99. Cro. Eliz. 26, 349. Moor 432. and Tit. *Eſcape in Civil Caſes.*

If a Man gives Money to his Servant to carry to ſuch a Place, and he is robbed, the Maſter cannot bring Caſe againſt him, for a Servant only undertakes for his Diligence and Fidelity, and not for the Strength and Security of his Defence. 8 Co. 84. Vide Head of Maſter & Servant.

But if *A.* is employed by *B.* to ſail from *England* to the *Indies*, and *A.* covenants, that he or his Servants will not thence import any *Callicoes*, *&c.* Sid. 298. Huſſey and Pacey. Lev. 188.

2 Keb. 88. S. C. Rol. Abr. 105. S. P.

*This must suppose the Master to have been injured by the Servant's Conduct.

&c. and *A.* retains *C.* as his Servant in this Voyage, and acquaints him with the Covenant; and notwithstanding *C.* falsly and fraudulently brings thence certain *Callicoes*, &c. *A.* shall have an Action against *C.* for though no Action lies by a Master for the bare Breach of his Command, yet if a Servant does any Thing falsly and fraudulently to the Damage of his Master, an Action will lie*.

(B) Against whom such Action lies.

9 H. 6. 53. Rol. Abr. 95. S. C.

(*b*) But no Action lies against the Servant. Rol. Abr. 95. So if an Attorney in Action of Debt, knows of, and was a Witness to a Release of the Debt made before the Action brought for it, yet no Action lies against the Attorney, for he acted only as Servant, and in the Way of his Calling. 1 Mod. 209. *per Curiam*, (*c*) If a Servant sells an unsound Horse, or other Merchandize in a Fair, no Action lies against the Master, unless he commanded him to sell to a particular Person. 9 H. 6. 53. Rol. Abr. 95. S. C. Poph. 143. S. C. cited. 2 Rol. Rep. 6. S. C. cited. But if by the Command and Covin of the Master he sells to a particular Person, an Action lies against the Master, for it is then his own Sale. 9 H. 6. 53. *Fitz. Action sur le Case* 5. S. C. Rol. Abr. 95. Bridgm. 128. S. C. cited. *Sed. Qu.* In the former Case, if the Servant warrant the Horse sound when he is unsound, and receive a sound Price of the Buyer, whether the Master is not bound by the Warranty of the Servant, and liable to an Action?

IF the Servant of a Taverner sells Wine to another which is corrupted, an Action upon the Case lies against the (*b*) Master, though he did not (*c*) command the Servant to sell it to any particular person.

Vide Cro. Jac. 471. &c. 2 Rol. Rep. 28.

So if a Goldsmith makes Plate, wherein he mingles Dross, so that it is not according to the Standard, and by his Servant sells it; an Action lies against the Master, because it fails in the Price of Silver.

* Page 47

Bridg. 125, 126. Southern and How, adjudged. 2 Rol. Rep. 5, 26, 27. S. C. adjudged. Poph. 143. S. C. adjudged. Cro. Jac. 469. S. C. and there said the Court inclined against the Plaintiff, principally because *A.* did not order *B.* to conceal their being counterfeit.

*But if *A.* being possessed of certain artificial and counterfeit Jewels, of the Value of 168*l.* and knowing them to be such delivers them to *B.* his Servant, commanding him to transport the said Jewels into *Barbary*, and them to sell to the King of *Barbary*, or such other Person as would buy them, but gives *B.* no Charge to conceal their being counterfeit; and thereupon *B.* goes into *Barbary*, and knowing these Jewels to be counterfeit, shews them to *C.* for good and true Jewels, and affirming to *C.* that they were worth 810*l.* desires *C.* to sell them to the said King for 810*l.* which Money *C.* pays *B.* and *B.* thereupon immediately returns to *England*, and pays the 810*l.* to *A.* his Master; and after the Jewels being discovered to be counterfeit, *C.* is imprisoned by the said King till he repays the 810*l.* out of his own effects; of all which Matter *C.* gives Notice to *A.* and demands Satisfaction, &c. yet no Action lies against *A.* for Jewels are in themselves of an uncertain Value, and *B.* was not by *A.* particularly directed to *C.* and all that was done *quoad C.* was the voluntary Act of the Servant, for which the Master is not bound to answer.

Salk. 289. pl. 27. Ruled by Holt on Evidence at Nisi Prius; but for this vide Tit. Merchant and Merchandize.

In an Action on the Case for Deceit, the Plaintiff set forth that he bought several Parcels of Silk for ——Silk, whereas it was another Kind of Silk; and that the Defendant, well knowing this Deceit, sold them to him for —— Silk; on Trial, upon Not guilty, it appeared that there was no actual Deceit in the Defendant, who was the Merchant; but that it was in his Factor beyond Sea: And the Doubt was, If this Deceit could charge the Merchant? And *Holt* Ch. Just. was of Opinion, That the Merchant was answerable for the Deceit of his Factor, though not *Criminaliter* yet *Civiliter*; for seeing some Body must be a Loser by this

this Deceit, it was more reaſonable that he, that employs and puts a Truſt and Confidence in the Deceiver, ſhould be a Loſer, than a Stranger; and upon this Opinion the Plaintiff had a Verdict. Salk. 282. pl. 11. Ruled by Holt at Niſi Prius, and Plaintiff nonſuit.

If *A.* brings Caſe againſt the Maſter of a Stage-Coach, on the Cuſtom of the Realm, for a Trunk loſt by his Negligence, &c. and on Evidence it appears that the Trunk was delivered to the Servant who drove the Coach, who promiſed to take Care of it, and that the Trunk was loſt out of his Poſſeſſion; the Action does not lie againſt the Maſter, for a Stage-Coachman is not within the Cuſtom as a (*a*) Carrier is, unleſs he takes a diſtinct Price for the Carriage of Goods as well as Perſons; and though Money be given to the Driver, yet that is a Gratuity, and cannot bring the Maſter within the Cuſtom; for no Maſter is chargeable with the Acts of his Servant, but when he acts in Execution of the Authority given by his Maſter, and then the Act of the Servant is the Act of the Maſter.

(*a*) That if a Carrier's Porter receives Goods, the Carrier ſhall be liable. Comb. 118. per Dolben Juſtice. Salk. 17. pl. 8. 143. Carth. 487. Lane v. Sir Robert Cotton and Sir Thomas Frankland. 5 Mod. 455. 2 Mod. Ent. 108. Ld. Raym. 646. 12 Mod. 472.

If two are conſtituted Poſt-maſters General, by Letters Patent, purſuant to the Stat. 12 *Car.* 2. *cap.* 35. and in the Patent there is a Power to make Deputies, and appoint Servants at their Will and Pleaſure, and to take Security of them in the Name and to the Uſe of the King, and that they the Poſt-maſters General ſhould obey ſuch Orders as from Time to Time ſhould come from the King; and as to the Revenue, ſhould obey the Orders of the Treaſury; and it is farther granted to them, that they ſhould not be chargeable for their Officers, but only for their own voluntary Faults and Miſbehaviours, and this is granted with a Fee of 1500*l.* *per Annum*, and *A.* having Exchequer-Bills, incloſes them in a Letter directed to *B.* at *Worceſter*, and delivers it at the Poſt-Office at *London*, into the Hands of *J. S.* who was appointed by the Poſt-maſter General to receive Letters, and had a Salary. By three Judges againſt *Holt* Ch. Juſt. the Poſt-maſters General are (*b*) not liable.

(*b*) Vide Carth. 487. S. C. with the Arguments *pro* and *con.* at large; and Salk. 17, 18. *Holt*'s Reaſons, who held alſo, That *J. S.* was chargeable, but not as an Officer, but as a Wrong-doer. *Qu.* In the Caſe above, if Ch. Juſt. *Holt*'s Opinion was not the moſt rational?

* If one ſlanders my Title, whereby I am wrongfully diſturbed in my Poſſeſſion, though I have a Remedy againſt the Treſpaſſer, yet I may have an Action againſt him that cauſed the Diſturbance. * Page 48 Alleyn 3. per Hale.

If I deliver my Horſe to a Smith to ſhoe, and he delivers him to another Smith who pricks him, I may have an *Action on the Caſe* againſt him, though I did not deliver the Horſe to him. Rol. Abr. 90. So if I deliver Goods to *A.* who delivers them to *B.* to keep to the Uſe of *A.* and *B.* waſtes them, I may have an *Action upon the Caſe* againſt *B.* though I did not deliver them to him. Rol. Abr. 90. In this Caſe Trover would lie without a Doubt.

(C) For what Injuries an Action on the Caſe will lie; and herein of thoſe Caſes wherein a Man may be ſaid to ſuffer Damnum abſque injuria.

UNDER this Diviſion various Caſes may be comprehended; but, as ſeveral of them fall under others, I ſhall here only obſerve, that though in ſome Caſes an Injury happens to a Man in his Property, by the

Neglect of another; yet if by Law he was not obliged to be more careful, no Action will lie.

Leon. 223. Owen 141. Cro.El. 219. Stra. 60, 123, 576, 813.

As if a Man finds Butter, and by his negligent Keeping it putrifies, yet no Action will lie.

Cro.El. 219. 2 Bulſt. 21. *cont.* 1 Term. Rep. 12.

Or if a Man finds Garments, and by negligent Keeping they are Moth-eaten, no Action lies.

Rol. Abr. 5. Leon. 224. Cro.El. 219. Goulſ. 155. Stile 261. Bulſt. 38.

So if a Man finds Goods, and loſes them again; or if he finds a Horſe, and gives him no Suſtenance, no Action lies; for in theſe Caſes the Law has laid no Duty on the Finder; for it would be too rigorous to oblige him to be charitable in Behalf of a careleſs Owner.

But if he makes Gain and Advantage of the Things he finds; as if he rides a Horſe, or if he abuſes the Things; as by putting Paper into Water, or if he kills Sheep, *&c.* he ſhall anſwer for them.

2 Lev. 196. Virtue and Bride. Vent. 310. S. C. 3 Keb. 766. S. C. adjudged.

If *A.* hires *B.* to carry a Load of Timber from one Town to another to be unloaded there, at ſuch a Place as *A.* ſhould appoint, and *B.* gives Notice to *A.* that he will bring it ſuch a Day, and requeſts him to appoint a Place where he ſhall lay it, and he brings it accordingly, but *A.* will not appoint any Place where it ſhall be laid, ſo that the Horſes of *B.* are kept ſo long in the Cart, that being hot they catch cold and die; yet *B.* ſhall have no Action againſt *A.* for he might have taken his Horſes out of the Cart and walked them, or put them in a Stable, or if *A.* would not have appointed a Place, as ſoon as he came there, he might have unloaded in any convenient Place, ſo that the Injury the Horſes received was through his own Default.

(*a*) *Damnum abſque injuria*, or *vice verſa*, will not bear an Action. 6 Mod. 46.

If it be *Damnum abſque injuria*, no *Action on the Caſe* lies (*a*); as if a School be ſet up in the ſame Town where an ancient School has been Time out of Mind, by which the old School receives Damage, yet no Action upon the Caſe lies, becauſe it is lawful for a Man to teach where he pleaſes; and this is for the Eaſe of the People.

per Gould Juſtice. 11 H. 4. 47. 22 H. 6. 14. b. *Fitz. Action ſur le Caſe* 28. S. C. Brd. 42. S. C. Noy 184. S. C. cited. Rol. Abr. 107. Mod. 69. S. P. *per Twiſden arguendo.*

11 H. 4. 47. Rol. Abr. 107. S. C.

So if I retain a Maſter in my Houſe to inſtruct my Children, though this be to the Damage of the common Maſter, yet no Action lies.

* Page 49 Rol. Abr. 107. Hard. 162. Brownl. 57. Noy 184.

* So if I have a Mill, and my Neighbour builds another Mill upon his own ground, *per quod* the Profit of my Mill is diminiſhed, yet no Action lies againſt him; for every one (*b*) may lawfully erect a Mill on his own Ground.

(*b*) But if I have had a Mill by Preſcription in my own Land, if another erects a new Mill upon his own Land, if this draws away the Stream from my Mill, or ſtops it, or makes too great a Quantity of Water run to my Mill, by which I receive Damage, ſo that my Mill cannot grind as much as it was uſed to do, I ſhall have an *Action on the Caſe* againſt him. 22 H. 6. 14. Dyer 248. Rol. Abr. 107.

22 H. 6. 14. b. Rol. Abr. 107. But if I had a Houſe by

If a Man hath a Houſe upon his own Ground by Preſcription; yet if I build a Houſe upon my own Ground next adjoining, no Action lies againſt me.

Preſcription upon my Ground, another cannot erect a Houſe upon his own Ground, ſo near to it as to ſtop the Light of my Houſe. 22 H. 6. 15. 9 Co. 59. Bland's Caſe. Bulſt. 115. Hut. 136. Rol. Abr. 107. 2 Rol. Abr. 143. 3 Leon. 93.

22 H. 6. 14. Noy 184. Rol. Abr. 107.

If I have 100 Acres of Paſture in a Town, and before this Time no Man hath ever had any Paſture within the ſame Town, and thoſe of the Town have uſed to agiſt their Cattle in my Paſture, and another that has Freehold within the Town, converts his Arable Land into Paſture, ſo that thoſe of the Town agiſt their Cattle there, *per quod* this is a Damage

to

to me, yet I cannot have any Remedy againſt him; for it is lawful for him to make the beſt Advantage he can of his own Land.

(D) At what Time the Right of Action ſhall be ſaid to have accrued.

IF *A.* ſells Sheep to *B.* affirming them to be his own, whereas they belong to *C.* *B.* may have an Action againſt *A.* for this Deceit, before *C.* hath ſeiſed the Sheep, or interrupted him; becauſe they are Things Tranſitory, and therefore the Action lies before interruption; for if he ſhould ſtay till *C.* interrupted him, he may be dead before, or other Diſadvantage may happen. Rol. Abr. 98. Cro. Jac. 474. S. C. 3 Term. Rep. B. R. 57.

If *A.* recovers a Debt againſt *B.* and thereupon a *Capias ad Satisfaciendum* is directed to *C.* the Sheriff of *N.* to take *B.* in Execution, which is accordingly done, and after *B.* reſcues himſelf, *per quod C.* becomes liable to anſwer for the Debt; now *C.* may have an Action againſt *B.* before *A.* ſues *C.* for the Reſcue and Eſcape was a Wrong to *C.* and he is always chargeable to *A.* for it; and if *C.* muſt ſtay till ſued by *A.* *B.* may die in the Interim, or fly his Country. Cro. El. 53. adjudged. Cro. El. 123. S. P. adjudged. 3 Wils. 238. Cowp. 63. 2 Term. Rep. 5.

A. brings an Action againſt *B.* in which *C.* is Attorney for *A.* and after Verdict for *A.* *C.* enters Judgment before the Rules (according to the Courſe of the Court) are out, *per quod B.* is prevented from moving in Arreſt of Judgment, and whether *B.* may have an Action againſt *C.* was doubted; and *Twiſden* thought it hard the Attorney ſhould be ſued after the Judgment is ſet aſide; but *note*, it does not appear in the Caſe, as reported by *Raymond*, otherwiſe than from what *Twiſden* ſaid, that the Judgment was ſet aſide before the Action brought. Raym. 194. Goodyar and Banks. 2 Keb. 688. S. C. adjourn. Keb. 716. S. C. adjourn. it appearing the Judgment was ſet aſide before *B.* brought his Action. An Action brought againſt the Plaintiff's Attorney, for entering Judgment againſt the Defendant, when the Court ordered a *Non Proſs.* Hut. 125. and yet it appears the Judgment was ſet aſide before the Action brought. We ſhould conceive an Action would not lie againſt the Attorney; there's in ſuch Caſe a ſummary Remedy—to move the Court to ſet aſide the Judgment, and for Leave afterwards to move in Arreſt. And probably the Court would compel the Attorney who occaſioned the Expence of the Application (if he had previouſly refuſed to wave his Judgment) to pay the Coſts.

*If a Man forges a Bond in my Name, it is poſſible I may be damnified by it, but till it be put in Suit againſt me I cannot bring an Action againſt the Forger. * Page 50 Hob. 267. 6 Mod. 46.

S. C. cited, where by the Plaintiff's own ſhewing he had no Right of Action at the Time of bringing it. *Vide* Carth. 113. and Title *Error*.

(E) Of

(E) Of Actions on the Case for Fraud and Deceit in Contracts, on an express or implied Warranty.

1. On an implied Warranty in Law.

Rol. Abr. 90. Cro. Jac. 474. S. C. 3 Term Rep. B. R. 57.

IF there be a Communication between *A.* and *B.* for the buying of certain Sheep, and thereupon *B.* the Vendor (*a*) says they are his own Sheep, when in Truth they are the Sheep of another; but thereupon *A.* buys them of *B.* though *B.* made not any express Warranty of the Sheep, yet an *Action upon the Case*, in Nature of Deceit, lies against *B.*

(*a*) In an Action for fraudulently selling to the Plaintiff an Horse that was not the Defendant's own proper Horse, the Plaintiff must prove that the Defendant knew him not to be his own Horse. Allen 91. Keb. 523. but *Quære*; & *vide* Carth. 90, and Salk. 210. that the having Possession of any Personal Chattel, and affirming it to be his, amounts to a Warranty; and an Action lies on the Affirmation. *Per Holt* Ch. Just. * This seems the most rational Doctrine.

Rol. Abr. 91.

So if the Vendor affirms that the Goods are the Goods of a Stranger, his Friend, and that he had an Authority from him to sell them to him, and thereupon *B.* buys them, when in Truth they are the Goods of another; yet if he sold them fraudulently and falsly, upon this Pretence of Authority, though he did not (*b*) warrant them, and though it is not averred that he sold them, knowing them to be the Goods of a Stranger, yet *B.* shall have an *Action upon the Case* for this Deceit.

(*b*) Salk. 211. where per Holt Ch. Just. that if the Seller is out of Possession, there is Room to question his Title; and *Caveat Emptor* in such a Case to have either an express Warranty, or a good Title.

Rol. Abr. 91. Stile 310. S. C. Keb. 523. S. C. cited.

In an *Action upon the Case* by *A.* against *B.* if the Plaintiff declares that the Defendant craftily intended, &c. and offering to sell a Gelding to the Plaintiff, affirmed that he brought up that Gelding from a Colt, and that the said Gelding was then his own, which the Plaintiff believing, afterwards, that is to say, upon the same Day and Year, and at the Place aforesaid, did buy the said Gelding, &c. the Action lies upon this Declaration, though there was no Warranty upon the Sale; for this was an apparent Deceit, contrary to his own Knowledge; and though it is not averred that he sold him at the same Time when he affirmed he bred him up of a Colt, but that he *postea* the same Day and Place bought him, giving Credit thereunto, this shall be intended immediately after the speaking the Words; for all the Words could not be spoke together.

So in *Case*, in which the Plaintiff declared, that there being a *Colloquium* between him and the Defendant, concerning the buying and selling of two Oxen, which the Defendant then had in his Possession, that he (the Defendant) *adtunc & ibidem falsè & malitiosè affirmabat*, that these Oxen were his; to which he giving Credit, bought them of the Defendant for so much Money; when in Truth the said Oxen were the proper Goods of *J. S.* and that he the said *J. S. postea*, &c. lawfully recovered the said Oxen from the Plaintiff, &c. and it was held after Verdict, that the Action lay on the bare Affirmation, without an express Warranty; *and

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though objected, that it was not set forth that he (*c*) *sciens* that the Oxen were the Oxen of *J. S.* nor that he he did it *deceptive*.

Carth. 90. Crosse and Gardner. 3 Mod. 261. S. C. Comb. 142. S. C. Show 68. S. C. 10 Mod. 142. 12 Mod. 245. Ld. Raym. 284, 593, 1118, 1120. Salk. 210. pl. 20. Stra. 414. (*c*) *Falsè & fraudulenter vendidit*, & after Verdict, imports that it was *scienter*, and supplies the Want thereof. Stile 310. 3 Keb. 807. *vide* Keb. 309.——So *sciens &c.* implies that it was *fraudulenter*. Sid. 146.—— So where the Plaintiff declares *quod improvide & incaute, absque consideratione inaptitudinis loci*, he drove his Horses over the Plaintiff, though not said *sciens* that they were unruly. 2 Lev. 172.

So

So where the Plaintiff declared, that the Defendant being poſſeſſed of a certain Lottery-Ticket, ſold it to him, affirming it to be his own, whereas in Truth it was not his, but another's; Defendant pleaded, he bought it *bona fide*, and ſo ſold it: On Demurrer, *Holt* Ch. Juſt. held, where one having the Poſſeſſion of any Perſonal Chattel, ſells it, the bare affirming it to be his, amounts to a Warranty, and an Action lies on the Affirmation; for his having Poſſeſſion is a Colour of Title, and perhaps no other Title can be made out; *aliter* where the Seller is out of Poſſeſſion; for there may be Room to queſtion the Seller's Title, and *Caveat Emptor* in ſuch Caſe to have either an expreſs Warranty, or a good Title: So it is in the Caſe of Lands, whether the Seller be in or out of Poſſeſſion; for the Seller cannot have them without a Title, and the Buyer is at his Peril to ſee it.

Salk. 210. pl. 2. Medina *verſ.* Stoughton, for ſelling falſe Bills of Credit. Vide Stile 343, 346, Cro. Jac. 197.

If the Plaintiff declares, That whereas Queen *Elizabeth* was ſeiſed in Fee of the Advowſon of the *Vicarage* of *S.* whereto the Tithes in *S.* did belong, and that the Defendant, upon the ninth of *June*, did affirm himſelf to be lawful Incumbent thereof, and that he had Right to the Tithes from the Death of *J. N.* and after, upon the ſixteenth of *June*, the Plaintiff having a Communication with the Defendant about his buying of the Defendant the ſaid Tithes till *Michaelmas* following, the Defendant *adtunc ſciens* that he had no right thereto (the Defendant not having been inſtituted, &c.) *yet falſe & deceptive* ſold them to the Plaintiff for 30*l.* and alledges *in facto*, that *J. N.* was after preſented, &c. and took the Tithes, &. the Action does not lie; for there was no Warranty that the Plaintiff ſhould enjoy them; and this Affirmation alſo was in Time precedent to the Sale.

Cro. Jac. 196. Rolwel and Vaughan. Moor 467. S. C. Stra. 414. 4 Burr. 1012 3 Term. Rep. 51.

So if the Plaintiff declares, that upon a Communication between the Plaintiff and the Defendant, for the Purchaſe of a certain Term for Years, which the Defendant then had in certain Lands, the Defendant *aſſeruit* to the Plaintiff, that the ſaid Term was worth 150*l.* to be ſold; to which the ſaid Plaintiff *fidem adhibens* did give the Defendant 150*l.* for the ſame, and that after, the Plaintiff offering the ſaid Term to Sale, could not get ſo much for the ſame; the Action does not lie; for here was only a naked Affirmation of the Defendant, that the Term was worth ſo much; and it was the Plaintiffs Folly to believe him.

Yelv. 20. Harvey and Young.

But if on a Treaty for the Purchaſe of a Houſe, the Defendant affirms the Rent to be 30*l. per Ann.* whereas in Truth it is but 20*l.* and thereby the Plaintiff is induced to give ſo much more than the Houſe is worth, the Action (*b*) lies; for the Value of the Rent is Matter that lies in the private Knowledge of the Landlord and Tenant; and if they affirm the Rent to be more than it is, the Purchaſer is cheated, and (*c*) ought to have a Remedy for it*.

Salk. 211. pl. 3. Riſney and Selbey. (*b*) Lev. 102. Sid. 146. Keb. 510, 518, 522. S. P. reſolved. (*c*) But if *A.* poſſeſſed of a Term for Years, offers to ſell it to *B.* and ſays that a Stranger would have given him 20*l.* for this Term, by which Means *B.* buys it, though in Truth *A.* was never offered 20*l.* no *Action on the Caſe* lies, though *B.* is hereby deceived in the Value. Rol. Abr. 91, 101. Sid. 146. S. P. * The moſt eligible may be, an Action for Money had and received: A liberal Action, and almoſt equal to a Bill in Equity, in Extent and Utility. See on this Occaſion, 2 *Burr.* 1012, &c.

* 2. Where Caſe will lie for a Fraud on an expreſs Warranty.

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If *A.* being a Goldſmith, and having Skill in Jewels and precious Stones, hath a Stone which he affirms to be a Bezoar-Stone, and ſells it to *B.* for 100*l.* *ubi revera* it was no Bezoar-Stone, no Action lies againſt *A.* for every one in ſelling his Wares will affirm that his Wares are

Cro. Jac. 4. Adjudged between Chandler & Lopus, upon a Writ

of Error in *Cam' Scacc'*, and the firſt Judgment reverſed accordingly by all the Juſtices and Barons, *cont. Anderſon*, *Vide* Dyer 75. in *Margin*, S. C. cited as adjudged in *B. R.* and they ſaid, that the Opinion of *Popham* was, That if I have any Commodity (be it victuals, &c.) that is corrupt, and knowing it to be ſo, ſell it for good and affirm it to be ſo, an Action lies for this Deceit; but though it be corrupted, if I know not, though I affirm it to be good, yet no Action lies, unleſs I warrant it to be ſo. Cro. Jac. 469. S. C. cited, as adjudged in *B. R.* 2 Rol. Rep. 5. S. C. cited, and ſaid that the Judgment was reverſed, becauſe it was not pleaded that he knew it to be falſe at the Time of the Sale. *Vide Poſtea* Letter (F) where the Victuallers, &c. acting contrary to the Duty of their Calling, ſhall be charged, and the Heads of *Inn-keepers*, *Carriers*, &c.*

are good, or that the Horſe which he ſells is ſound; yet if he does no warrant them ſo, if falſe, no Action lies. (But *ſee the End of the following Note.*)

* *Qu.* If there can be any Doubt as to an Action lying againſt a Man knowingly, falſely, and fraudulently ſelling me a Commodity of little Value, whereof I am not a Judge as and for another Commodity of much greater Value, where the Price paid is a valuable Conſideration for the Article I am ſuppoſed to have purchaſed.

11 H. 6. 18. F. N. B. S. P. Poph. 143. S. P. cited. *A.* ſells Sheep, and warrants that they are ſound, and ſhall continue ſo for a Year after, this is good, and ſhall bind him. *Vide* Danv. Abr. 188. 96. (*a*) This Action lies, though he hath not paid for it; for the other may have Debt for his Money. Bro. Guarranty 59. (*b*) In Caſe, the Plaintiff declared upon a Promiſe to deliver to him ten Pots of good and merchandiſable Pot Aſhes, and that the Defendant had delivered ten Pots not merchandiſable, but mixed with Dirt, &c. Further, that the Defendant *vendidit* to the Plaintiff ten other Pots of Aſhes, *warrantizando*, &c. that they were good and merchandiſable, but had delivered them bad, and not merchandiſable, knowing them to be naught; on Demurrer, that Matters of Fraud and Contract could not be joined, the Court inclined for the Plaintiff. Vent. 365. *adjornatur*. *Note*; It ſeems now ſettled, that an Action for a Fraud on the Sale of Goods, and on a Warranty of the ſame Goods, may be joined. *Vide* Title *Actions in General*.

But if a Man (*a*) ſells a Tun of Wine, and warrants it to be ſound, and not corrupted, if it be corrupted, an *Action upon the Caſe* (*b*) lies.

(*c*) 11 H. 6. 18. 3 Rol. Abr. 96. S. C. 127. S. P.

So (*c*) if a Man ſells a Horſe, and (*d*) warrants him to be ſound of his Wind and Limbs, if he be not, an *Action upon the Caſe* lies.

(*d*) But without ſuch Warranty no Action lies. 20 H. 6. 35. F. N. B. 94. S. P. Bridg. Rol. Abr. 90. S. P.

Rol. Abr. 96. Cowp. 814, 818. Doug. 18, 21. 1 Term Rep. 345. 2 Term Rep. 745. Godb. 31.

If a Man, knowing his horſe to be lame and foundered, offers him to me to buy, and warrants him to be ſound, &c. relying upon which I buy him, by which I am deceived, (*e*) though the Warranty here was before the Sale, yet becauſe this was the Cauſe of the Sale, an *Action upon the Caſe* lies thereupon.

(*e*) But *Quære*, For it is a general Rule, that the Warranty muſt be made at the Time of the Sale. *Vide* Cro. Jac. 4, 196, 197, 630. nor can it be made after; *per* Bridg. 12; *vide* Salk. 211. pl. 4.

Rol. Abr. 97. adjudged. 2 Rol. Rep. 168. S. C. adjudged.

If *A.* ſells a Horſe to *B.* and warrants him to be ſound of Wind and Limb, and clean of Legs, whereas he well knows that he is ſhoulder-pitch'd, and has Splints upon his Legs, an Action lies againſt him upon this Warranty; (*f*) for theſe Imperfections are not ſubject to the View of an unſkilful Perſon.

(*f*) But *Quære* of the Warranty of a Horſe that is blind. 2 Rol. Rep. 5. Bridg. 128. ‡ Diverſity where he has no Eye, and where a Counterfeit, falſe and bright Eye; and *vide* Cro. Jac. 387. 3 Bulſt. 95. 3 Keb. 101. Bro. Deceit 29. Fitz. Deceit 23.

‡ *i. e.* Where he is evidently ſo to any unſkilful Perſon.

Salk. 211. pl. 4. Butterfield *v.* Burroughs.

The Plaintiff declared, that the Defendant ſold him a Horſe ſuch a Day and Place, & *adtunc & ibidem warrantizavit equum prædict'* to be ſound Wind and Limb, whereupon he paid his Money, and avers the

* Horſe

* Horſe had but one Eye, &c. on Plea *Non warrantizavit*, the Plaintiff had a Verdict; and it was objected in Arreſt of Judgment, 1. That the Want of an Eye is a viſible Thing, whereas the Warranty extends only to ſecret Infirmities; but to this it was anſwered and reſolved by the Court, that this might be ſo, and muſt be found to be ſo, ſince the Jury have found that the Defendant did warrant. 2. As the Warranty is here ſet forth, it might be at a Time after the Sale, whereas it ought to be Part of the very Contract; and therefore it is always alledged *warrantizando vendidit*; *ſed non allocatur*; for the Payment was afterwards, and it was that compleated the Bargain, which was imperfect without it. * Page 53

(F) Of Actions on the Caſe for Injuries to a Man's Perſon, Property, Right or Privilege.

IF *A.* rides an unruly Horſe in *Lincoln's Inn-Fields*, (being a Place much frequented by the King's Subjects, and unfit for ſuch Purpoſe) to break and tame him, and the Horſe breaks from *A.* and runs over *B.* and grievouſly hurts him, &c. *B.* ſhall have an Action againſt *A.* for though the Miſchief was done againſt the Will of *A.* yet ſince it was his Fault to bring a wild Horſe into ſuch a Place, where Miſchief probably might enſue, *A.* muſt anſwer for the Conſequence of ſo ill an Act. Vent. 295. 2 Lev. 172. 3 Keb. 65. S. C. and ſeveral Caſes cited of Actions brought for Injuries done to a Man's Perſon by wild and ungovernable Animals. An Action for keeping a mad Bull which gored the Plaintiff, &c. Lutw. 90. and ſee 2 Salk. 638. Ld. Raym. 38. 4 Mod. 404.

So if a Man lays Logs of Wood croſs a Highway, though a Perſon may with Care ride ſafely by, yet if by Means thereof my Horſe ſtumbles, and thereby I am wounded or hurt, I ſhall have an *Action on the Caſe*. Rol. Abr. 88. and vide Head of Nuſances and Letter G. (*poſt.* 60.)

For an Injury accruing to a Man in his (*a*) real Eſtate of Freehold or Inheritance, Caſe will lie; as if *A.* levies a Fine, ſuffers a Recovery, acknowledges a Judgment, Recognizance, Statute Merchant or Staple, in my Name, I may have an Action. Rol. Abr. 100.

(*a*) If my Feoffee in Truſt for me refuſes to execute the Truſt, I have no Remedy but in Chancery; but if he infeoffs another, an *Action on the Caſe* lies. Rol. Abr. 108. 2 Vent. 27. So if the Officer refuſes to inrol a Bargain and Sale. Sid. 209. 2 Bulſtr. 336.

If a Pariſhioner ſets out his Tithes of Hay duly, and requires the Parſon to carry them off his Land, but he does not carry them off in a convenient Time, *per quod* his Graſs where the Hay lies is impaired by the Hay's lying upon the Graſs, an *Action upon the Caſe* lies againſt the Parſon. Rol. Abr. 109. Com. Rep. 22, 187, 189. The Parſon is not obliged to take Tithe of Graſs the Day it is cut, but may let it lie there long enough to make it into Hay. Stra. 245. † *Vide* for this Head of *Tithes*, and for Treſpaſſes on Land, Title *Treſpaſs*.

† But it muſt not lie an unreaſonable Time.

If a Man that ought to incloſe againſt my Land does not incloſe, *per quod* the Cattle of his Tenants enter into my Land and do Damage to me, I may have an *Action on the Caſe* againſt him *. Rol. Abr. 105. * Or the Cattle of any other If Perſon.

Cro. Jac. 567. Rol. Rep. 362. S. C.

If *A.* being a Maſon, and uſing to ſell Stones, is poſſeſſed of a certain Stone Pit, and *B.* intending to diſcredit it and deprive him of the Profit of the ſaid Mine, impoſes ſo great Threats upon his Workmen, and diſturbs all Comers, threatening to maihem and vex them with Suits if they buy any Stones, ſo that ſome deſiſt from working, and others from buying, &c. *A.* ſhall have an *Action upon the Caſe* againſt *B.* for the Profit of his Mine is thereby impaired *.

* See the Note to the next Caſe.

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* If a Man menaces my Tenants at Will of Life and Member, *per quod* they (*a*) depart from their Tenures, an *Action upon the Caſe* lies againſt him.

Rol. Abr. 107, 108.

(*a*) But the Threatning, without their Departure, is no Cauſe of Action. Rol. Abr. 108. Where a Copyholder may have Caſe againſt his Lord for cutting the Tops of Trees; for not admitting on a Surrender: or for not holding a Court, *vide* Head of *Copyhold.*

But for this vide Head of Common, and Danv. 174. Lutw. 74, 101.

If a Commoner, who hath a Right by Grant or Preſcription, be diſturbed by the Lord or a Stranger, in the Enjoyment thereof, he may have an *Action on the Caſe.*

4 Mod. 175. 6 Mod. 19. Ld. Raym. 1225. Salk. 170. pl. 3. 364. pl. 5. Skin. 214.

For this *vide* Cuſtoms, and Rol. Abr. 107. Danv. Abr. 5, 6. and Carth. 117. Comb. 9. Skin. 175. pl. 5. 316. pl. 3. p. 389. pl. 25.

If *A.* hath a Mill by Preſcription which he hath uſed to repair, and at which all the Tenants of the Manor, Time out of Mind, have ground their Corn and Grain ſpent in the Houſes of the Tenants of the ſaid Manor, if one of the Tenants grinds his Corn elſewhere, *A.* ſhall have an *Action on the Caſe* againſt him. So if *A.* by his Preſcription has a Mill on his own Land, and *B.* erects a Mill on his own Land, if by this *A.*'s Mill receives any Prejudice by having the Water ſtopped or drawn away, or having too great a Quantity of Water run on his Mill, by which it cannot grind as much as it uſed to do, *A.* ſhall have an *Action on the Caſe* againſt him.

Keil. 98. b. F. N. B. 127. 2 Leon. 95. So A. may enforce B. to ſupport his under

For Injuries to a Man's Houſe or Habitation *, an *Action on the Caſe* will lie; as if *A.* hath the upper Room, and *B.* the under Room, and *A.* neglects to cover his upper Room, *B.* may have an *Action on the Caſe* againſt *A.* and thereby compel him to cover his upper Room for the Preſervation of the Timber of the under Room.

Room for the Preſervation of the upper Room of A. Kelw. 98. * A conſequential Injury mediate not immediate.

Poph. 46. Edwards and Halinder, adjudged in the Court of Exchequer, and affirmed in *Cam' Scac'*, 2. Leon. 93, 94, S. C.

If the Plaintiff declares that *J. S.* being ſeiſed of a Meſſuage in Fee, 23 *April* 32 *Eliz.* did demiſe to the Plaintiff a Cellar from Week to Week, &c. and that after, *viz.* 29 *July* 32 *Eliz. J. S.* did demiſe to the Defendant a Warehouſe, being right over the ſaid Cellar, to hold from Week to Week, &c. and that the Plaintiff being poſſeſſed of the Cellar, and the Defendant of the ſaid Warehouſe, and the Plaintiff then having in the ſaid Cellar three Butts of Sack, of the Value of 40*l.* &c. the Defendant 30 *July* 32 *Eliz.* did place ſo great a Weight of Goods in the ſaid Warehouſe, and thereby did ſo over-burden the Floor of the ſaid Warehouſe, that by Force and Weight of the ſaid Burthen, the ſaid Floor on the ſaid 30 *July* broke, and the ſaid Goods did fall upon the ſaid Butts, and broke the ſame, &c. and the Defendant pleads that a ſhort Time before, the Floor did ſuſtain as great Weight as this, and the Warehouſe was let to him to lay in thirty Tun Weight, and that he had placed there but fourteen Tun; and that what Damage had happened to the Plaintiff, was by Reaſon that the Floor at the Time, as alſo before the Leaſe to him made, was rotten, and the Wall whereupon the Floor lay ſo decayed,

ayed, that the ſaid Floor broke, &c. for Want of Reparations before the Leaſe to him made; the Plaintiff ſhall have his Judgment, for it is expreſsly alledged that the Floor, by the Weight of the ſaid Merchandiſe did break, and that is not traverſed but anſwered argumentatively only, *viz.* that it did bear more before, *ergo*, &c. and though it was ruinous when the Defendant took it, yet if it fell by Reaſon of any Weight by the Defendant placed there, he muſt anſwer for the Conſequence.

* It was formerly held, That if a Fire broke out accidentally in a Man's Houſe, and raged to that Degree as to burn his Neighbour's, that he in whoſe Houſe the Fire firſt happened, was liable to an *Action on the Caſe* on the general Cuſtom of the Realm, *Quod quilibet ignem ſuum ſalvo*, &c. * Page 55

For the Caſes on this Head, *vide* Danv. Abr. 10, 11. and Salk. 13. pl. 4. 19. pl. 9. Carth. 425. Lutw. 33.

" But now by the 6 *Ann. cap.* 31. *ſect.* 6, 7. it is enacted, That no Action, Suit or Proceſs whatſoever ſhall be had, maintained or proſecuted againſt any Perſon in whoſe Houſe or Chamber any Fire ſhall accidentally begin, or any Recompence be made by ſuch Perſon for any Damage ſuffered or occaſioned thereby, &c, *Provided* that nothing contained in the Act ſhall extend to defeat or make void any Contract or Agreement made between Landlord and Tenant."

This Section made perpetual by 10 Ann. c. 14. ſ. 1.

If the Plaintiff declares that he was and is yet poſſeſſed of a Leaſe for ſeveral Years *adtunc et adhunc ventur'* of and in a Houſe, and that he demiſed the ſame to the Defendant for ſix Months, and that after the ſix Months expired, the Defendant being permitted to occupy the ſaid Houſe for two Months longer, pulled down the Windows, &c. this Action does well lie, in Regard that the Plaintiff is chargeable over in an Action of *Waſte*.

Cro. Car. 187. Jones 124. S. C. adjudged. 2 Wils. 145. 1 Term Rep. 12, 430, 480, 535. 2 Term Rep. 166, 232.

If a Man hath an ancient Houſe, and another builds a Houſe ſo near that his Windows are darkened, he may have an (*a*) *Action on the Caſe* againſt him.

9 Co. 58. *Vide* for this Title, Nuiſances, and Danv. 203. Carth. 454. Comb. 481. 6 Mod. 116, 313. See Lord Raym. 392. 713. 2 Salk. 459. pl. 4. 460. pl. 6. 12 Mod. 63. (*a*) So if a Man builds a Houſe ſo near mine as to cauſe the rain to fall upon my Houſe †. Rol. Abr. 107. 2 Leon. 93. S. P.

† If Plaintiff's Houſe thereby ſuſtains an Injury.

As to the Torts and Injuries affecting a Man's Perſonal Property, and for which an *Action on the Caſe* is the proper Remedy, they are ſo many and ſo various in their Kinds, that they cannot well be laid together; I ſhall ſet down only ſome of them here, and ſuch as may govern in like Caſes.

If a Man razes the Name of the Obligor out of an Obligation, and in the Room thereof puts in the Name of *J. S.* and after ſues him upon his Obligation, *J. S.* may have an *Action on the Caſe* *.

Rol. Abr. 100. For cheating with knowing him

Vide Cro. Eliz. 90. Co. Ent. 8. F. N. B. 95. Moor 776. For keeping a Dog, knowing him to be accuſtomed to bite Sheep. Danv. Abr. 19. For uſing the ſame Mark which the Plaintiff hath uſed to ſet to his Cloths. Poph. 144. Cro. Jac. 471. 2 Rol. Rep. 28. Salk. 289. * *Qu.* If an Action would lie in this Caſe, unleſs *J. S.* was held to Bail?

If *A.* takes my Cattle and drives them into *B.*'s Cloſe, where they do me ſuch a Prejudice as ſubjects me to *B.*'s Action, I may have an *Action on the Caſe* againſt *A.*

Rol. Abr. 100. Lane 67.

If a Man lend or hire another's Horſe, and for Want of ſafe keeping the Horſe dies, the Owner may have an *Action on the Caſe* to repair the Damage ſuſtained by the Negligence of the Borrower. So if a Man lend another Sheep to fath his Land, and by the Negligence of the Borrower they are drowned. So if a Man lends another a Horſe, who puts him into

Cro. Eliz. 777, 784. Owen 52. 5 Co. 14. Dyer 121. Godb. 74.

Doct. & Stud. 128. Lutw. 98. Doug. 680.

into a ruinous Stable, that tumbles in upon him and kills him, or if he over-rides a Horſe lent or hired to him, in all theſe Caſes an Action will lie; but if the Stable had fallen by a violent Tempeſt, or the Horſe died of any Diſeaſe, then had the Hirer or Borrower been excuſed.

Godb. 285. 2 Rol. Rep. 312. Mod. 286. This Authority maintains the contrary. And *qu.* If

If *A.* obtains a Judgment in Debt againſt *B.* as Executor to his Father, and thereupon *A.* takes out a *Fieri facias*, but before the Sheriff can execute it *B. ſecrete et fraudulenter* ſells, removes and diſpoſes of all the Teſtator's Goods, ſo that the Sheriff is forced to return *Nulla bona*, &c. an *Action upon the Caſe* lies againſt *B.* for the Sheriff could not return a *Devaſtavit*; and if this Action does not lie, the Party is without Remedy.

an Action will lie in ſuch Caſe? It might as well be ſaid an Action would lie againſt a Man for avoiding the being taken in Execution.—In the principal Caſe, an Action would lie againſt the Executor, ſuggeſting a *Devaſtavit*, and on Proof Judgment would be obtained againſt him *de bonis propriis*

* Page 56

Carth. 3, 4. Smith and Tonſtall, adjudged on Demurrer in B. R. and affirmed in the Houſe of Peers.

* If *A.* declares that he had obtained Judgment againſt *J. S.* for 100*l.* and that 100*l.* more was due to him for Rent Arrear, that he intending to take out Execution, and alſo to bring an Action of Debt for the Rent in Arrear, (the ſaid *J. S.* being then poſſeſſed of Goods and Chattels ſufficient to diſcharge the Whole) which being very well known to *B.* (the Defendant) he, by Covin conſpiring with the ſaid *J. S*, to defeat him of his Execution, and of recovering of the Money for Rent Arrear, procured the ſaid *J. S.* to confeſs a Judgment for 160*l.* (of ſuch a Term) to one *J. N. ubi revera* the ſaid *J. S.* did not owe any Thing to the ſaid *J. N.* and that he ſued out Execution on this feigned Judgment, by Virtue whereof he ſeiſed all the Goods and Chattels of the ſaid *J. S.* which he eſſoined to Places unknown, and converted to his own Uſe, by Reaſon whereof the Plaintiff loſt his Debt; the Action well lies.

Leon. 240. Noy 10, 106. Kelw. 180. 2 Lev. 63.

Alſo for Injuries done to a Man with Reſpect to his Wife, as by having criminal Converſation with her; with Reſpect to his Child, as by inticing him away, or by inticing away his Servant; or if my Servant without Cauſe or Licence departs from my Service, and *J. S.* knowing him to be my Servant, retains him in his Service, and ſo keeps him; an Action lies *.

* *Qu.* If in the laſt Caſe the Servant ſhould not be previouſly demanded, and if an Action would lie for any retaining of the Servant, previous to the Demand?

Rol. Abr. 88. 2 Bulſt. 334. Rol. Rep. 124.

So if a Man digs a Ditch in the Highway, into which my Servant falls and breaks his Thigh, by which I loſe his Service for a long Time, I ſhall have an *Action on the Caſe* againſt him (*a*) for the Loſs of his Serivce.

(*a*) So for digging a Pit *per quod. J. S.* for whoſe Life I hold Lands, was drowned. Keb. 847.

Vide Aſſumpſit. Rol. Abr. 196.

Alſo *Actions on the Caſe* are proper for Injuries in diſturbing one in the Enjoyment of any Right or Privilege he is intitled to; as if the Beadle of an Hundred ought by Virtue of his Place to have by Preſcription certain Gallons of Beer of every Brewer at a certain Price, if the Brewers will not ſuffer him to have it accordingly, an *Action upon the Caſe* lies †.

† *Qu.* If ſuch an Action would now be adjudged to lie?

7 H. 4. 44. b. 9 H. 6. 45. b.

If a Man ought to have Toll upon the buying of Cattle in a Market, if one buys Cattle and does not pay the Toll, an *Action on the Caſe* lies againſt him.

Fitz. Action ſur le Caſe 26. S. C. Bro. 37. S. C. Rol. Abr. 106. S. C. So if Perſons coming to Market, are diſturbed, by which I loſe my Toll, an Action on the Caſe lies. 11 H. 4. 47. b. Rol. Abr. 106. Vent. 26, 28. or if upon a Sale in a Fair a Stranger diſturbs the Lord in taking the Toll, an Action upon the Caſe lies. 9 H. 6. 45. Rol. Abr. 106.

If

If my Tenants within a certain Seniority, ought Time out of Mind to go free to every Market and Fair to ſell and buy Goods without Payment of Toll, and one takes Toll of my Tenants in his Fair or Market, an *Action on the Caſe* lies againſt him. 43 E. 3. 30. Rol. Abr. 106, 107.

If a Man diſturbs my Steward in holding my Leet, an *Action on the Caſe* lies againſt him. 38 H. 6. 16. So if the Lord's Servants are diſturbed in collecting his Tithes, 19 R. 2. 52. Rol. Abr. 107. So if a Stranger who has no Right, holds a Court in my Manor, and by Diſtreſſes, &c. ſo impoveriſhes my Tenants that they cannot pay their Rents, an Action on the Caſe lies. 13 H. 4. 11. Rol. Abr. 106*.

* Would not Treſpaſs by each Perſon injured be a more certain and effectual Remedy?

If a Man hath the Aſſiſe of Bread and Beer, Fines, Amerciaments, and other Matters of Frankpledge, by the King's Grant, and he diſtrains *for an Amerciament, and a Stranger makes a Reſcue, an *Action upon the Caſe* lies againſt him. * Page 57 38 H. 6. 9. b. Rol. Abr. 106. If in an Action on the Caſe the Plaintiff declares that Q. *Elizabeth* did grant to him the Office of Steward of the Manor of *D.* and that the Defendants *eundem* the Plaintiff *ad exercend' dictum officium, & vadia, feoda, commodo & proficua* thereto belonging *habere & percipere, vi & armis impediverunt &c.* this is a good Declaration, notwithſtanding the *Cauſa Cauſans*, viz. the Interruption of the Plaintiff to exerciſe the Office, is laid to be done *Vi & Armis*, for the *Cauſa Cauſata*, viz. the Loſs of the Fees is the Point of the Action. 9 Co. 50. 4 Leon. 243. Hob. 180. Palm 46. 2 Brownl. 332. Cro. Car. 377. 2 Rol. Rep. 139.

If the Sheriff of the County, or his Bailiff, executes a Writ in a Franchiſe or Liberty of one, who by Grant or Preſcription hath the Execution and Return of Writs, an *Action on the Caſe* lies. 9 Co. 28. Vent. 399. Show. 17. Comb. 198.

We are next to inquire for what Wrongs and Injuries committed by Officers and Miniſters of Juſtice, and others, acting contrary to the Duty the Law lays on them, with reſpect to their Trades and Callings, an *Action on the Caſe* will lie. And therefore,

1. Where an Action on the Caſe will lie againſt Officers and Miniſters of Juſtice.

It ſeems agreed, that (*a*) no Action on the Caſe lies againſt a Judge of a Court of Record for a wrong Judgment, and that if it appears to have been an (*b*) Error of his Judgment, he is ſubject to no Proſecution whatſoever. 9 H. 6. 60. b. Rol. Abr. 92. Palm. 243. *Vide* Hawk. P. C. 192.

2 Hawk. P. C. 4. 85. (*a*) Not againſt a Judge of an inferior Court for taking inſufficient Bail. Hutt. 120. An Action lies againſt a Judge of the Stannary Court, for refuſing a Plea which by Law he ought to have accepted. 2 Rol. Rep. 498. *per Jones* Juſt. *cæteris abſentibus*; but for this *vide* Title *Bills of Exceptions*. (*b*) But for Corruption they are puniſhable, the Judges in *Weſtminſter Hall*, properly by Impeachment in Parliament. 1 Hawk. P. C. 192. Inferior Judges by Information, Attachment, &c. for which *vide* the Heads, alſo the Head of *Offices and Officers*; and 1 Salk. where *per Holt*, the Mayor of *Hereford*, for giving Judgment for his own Leſſee in Ejectment, was committed*.

* As to the Immunity of the Judges from Proſecutions *vide* 31 Ed. 3. ſt. 4. c. 17.

If the Plaintiff declares that he affirmed a Plaint of Debt in the Court of *B.* againſt *C.* and thereupon cauſed *C.* to be arreſted, and that the Defendant (being the Mayor, Town-Clerk and Gaoler of *B.*) did conſpire to delay the Plaintiff in his Suit; and in Peril of his ſaid Debt had let *C.* go at large, without taking any Bail; this Action does lie, for the not taking of Bail is not the Cauſe of the Action, but the Conſpiracy. Leon. 189.

If the Bailiffs in *Ancient Demeſne* hold Plea after the Record is removed in *Bank*, by which the Tenant loſes his Land there, by Recovery, he may have an *Action upon the Caſe* againſt him. 14 E. 3. 39. F. N. B. 93. Like Point. Rol. Abr. 92. S. P. Action againſt the Under Steward of a Court-Baron, for proceeding after a *Corpus cum Cauſa* delivered. 3 Leon. 99. adjudged. Againſt a Clerk that had the Cuſtody of a Record, and ſuffered it to be altered. Raym. 53. Sid. 77. Keb. 28, 346. *Vide* Lev. 64.

If

4 Inſt. 226. 9 H. 6. 60. Rol.Abr.92. Leon. 323.

If an Eſcheator returns a falſe Office, contrary to what was found by the Jury, in Prejudice of the Party, an *Action upon the Caſe* lies againſt him; for in this he is barely an Officer, and not a Judge.

If my Servant is robbed and he goes to a Juſtice of Peace and prays to be examined touching the Robbery, and the Juſtice refuſes to examine him, ſo that I am thereby damnified, and cannot proceed againſt the Hundred, I ſhall have an Action againſt the Juſtice; for the Examination by him in this Caſe is not as a Judge, but as a particular Miniſter by the (*a*) Act appointed for this Purpoſe*.

(*a*) *Viz.* Stat. 27 Eliz. c. 13. But for this *vide* Title *Juſtices of the Peace.* * The beſt Method would be, to go to another Juſtice, and move the Court of *K. B.* againſt the firſt for an Information.

(*b*) If a Summoner of the Eccleſiaſtical Court falſly and maliciouſly *colore Officii ſui* of a Summoner, to the Intent to ſcandalize *J. S.* with the Fame of Incontinency with *A.* and to put him to Expence in the Eccleſiaſtical Court, cites *J. S.* to appear for Incontinency with *A.* upon which *J. S.* appears, and is there charged by the Judge with it, and upon his anſwer diſcharged, by which he is put to Expence; *J. S.* may have an Action upon the Caſe againſt the Summoner upon ſuch a Declaration, though he be an Officer of the Eccleſiaſtical Court, in as much as it is alledged that he cited *him falſly and maliciouſly, & *colore Officii*, it ſhall be intended that he did it without Proceſs.

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Rol.Abr.94. Carlian and Mill. Cro. Car. 291. S. C. Doug. 629. 1 Term Rep. 473. 4 Term Rep. 247. Jones 312. S. C.

(*b*) Like Point in an Action againſt Churchwardens for ſuch a Preſentment. Cro. Car. 285. Jones 305. S. P. Rol. Abr. 112. pl. 9. Like Point againſt Churchwardens. 2 Mod. 52. Like Point. Vent. 86. Sid. 463. Lev. 92. Like Point adjudged. 1 Hawk. P. C. 13. Cowp. 424. 2 Term Rep. 473.

(*c*) 3 Bulſt. 212. *per Cake Dictum* Ch. Juſt. Moore 432.

(*c*) If a Miniſter of Juſtice hath a Warrant to (*d*) attach (*e*) the Goods of another, and can do it and does it not, an *Action upon the Caſe* lies againſt him.

Like Point *per Curiam.* (*d*) So if I ſhew *J. S.* to the Sheriff, and give him a Writ to arreſt him, and he does not. Cro. Eliz. 873. *per* Walmſly. (*e*) But if upon a *Capias Utlagatum* before Judgment, the Sheriff neglects to extend or ſeize Goods, &c. this is the King's Loſs, and the Party ſhall have no Action, though it was objected, the Sheriff extending, &c. would have been a Means to force the Defendant to appear; but it was ſaid, That if it had been ſhewn that the Sheriff might have taken his Body, &c. there would have been more Reaſon to ſupport the Action. Vent. 90.

For this *vide* Head of Sheriff and Bail in Civil Actions.

If a Sheriff makes a falſe return, as if he return a *Cepi Corpus* and *Parotum habeo*, or *Languidus*, when the Party is at large without Bail, an *Action on the Caſe* lies againſt him for the falſe Return; but if he had taken Bail, though the Party does not appear at the Return of the Writ, yet no Action lies againſt the Sheriff; for by the 23 *H.* 6. *c.* 9. the Sheriff is obliged to take Bail.

26 Aſſ. 48. Rol.Abr.92.

If the Sheriff returns the Tenant ſummoned in a Real Action, where he was not by which he (*f*) loſes by Default, an Action lies againſt him for this.

But to what Actions the Sheriff is liable, *vide* Head of *Sheriff.* (*f*) For the Judgment ſhould ſtand, and the Party is put to his Remedy againſt the Sheriff. Moor 349. *Bro. Action ſur Caſe* 5. Gouldſ. 128.*

* I take it for granted the Court would now, on Motion ſet a Judgment, ſo obtained, aſide, Notwithſtanding which the Action might lie againſt the Sheriff.

2 Rol. Rep. 47. But for this *vide* Head of Bankrupts, and Gaol and Gaoler.

If at the Petition of *A.* and the reſt of the Creditors of *B.* a Commiſſion upon the Statute againſt Bankrupts is iſſued out againſt *B.* and thereupon the Commiſſioners ſit, and offer Interrogatories to *C.* and he refuſes to be examined, and by them thereupon is committed to Priſon, and the Gaoler ſuffers him to eſcape, *A.* may have an Action againſt the Gaoler for this Eſcape.

If

If a Warrant upon a *Fieri Facias* to levy a Debt at the Suit of *J. S.* be directed to an Under-Bailiff of a Livery, and he by Virtue thereof levies the Debt, and after conceals the Writ and makes not any Certificate thereof, an *Action on the Case* lies againſt the Under-Bailiff, becauſe he has done a Perſonal *Tort*. Rol. Rep. 78. Rol. Abr. 94. *Vide* Head of Attachment and Bailiff.

So if a Diſtreſs at the Suit of *A.* iſſues out of the Court of *C.* directed to *J. S.* (who is not the uſual Officer) to diſtrain the Cattle of *B.* &c. or that *B.* ſhould find Pledges to appear the next Court; and thereupon *J. S.* diſtrains the Cattle of *B.* and after re-delivers them to *B.* without taking ſufficient Security, &c. and *B.* does not appear, &c. an Action lies againſt *J. S.* notwithſtanding he is no known Officer, but *hac vice* only. Latch 159. Adjudged upon a Writ of Error upon a Judgment in Cheyney Court.

If a Summoner of the Eccleſiaſtical Court, upon a Premonition directed to him by the Eccleſiaſtical Court, to warn *J. S.* to pay certain Coſts awarded againſt him by the Court, returns to the Court, That he hath warned the ſaid *J. S.* by which the ſaid *J. S.* is excommunicated, where in Truth he never warned him; *J. S.* may have an *Action on the Caſe* againſt him for this falſe Return, though he be an Eccleſiaſtical Officer; for the Excommunication is a Temporal as well as a Spiritual Diſadvantage, as during its Continuance he cannot bring an Action, and is liable to an *Excommunicato Capiendo*. Rol. Abr. 93. 2 Bulſt. 266. Moor 835. 12 Co. 127. Rol. Rep. 63. S. C. adjudged between Powle and Godfrey.

If a *Fieri Facias de bonis Eccleſiaſticis* of *J. S.* be directed to the Biſhop of *E.* and he returns *Quod nulla habet bona Eccleſiaſtica*, which is falſe, an *Action on the Caſe* lies againſt the Biſhop for this falſe Return. Sid. 276. Keb. 947.

If upon a *Mandamus* to reſtore *J. S.* to his Place of a Burgeſs of *P. vel cauſum nobis ſignif.* the Mayor, &c. return a good Cauſe, the Matter of which is falſe, an Action lies for the falſe Return. 11 Co. 99. James Baggs's Caſe, *per Curiam.* So an Action lies againſt the Mayor and Commonalty of *L.* for making a falſe Certificate of a Cuſtom. Hob. 87. So againſt the Surrogate of a Biſhop, who makes a falſe Return as to the Cuſtom of chuſing of Churchwardens. 3 Lev. 362. *Vide* Carth 227. 2 Salk. 428. pl. 1. 430. pl. 5. Ld. Raym. 391. *Vide* Tit. *Mandamus.* And *Note*, That regularly an Action on the Caſe is the proper Remedy for all falſe Returns.

* If the Plaintiff declares, that within the City of *London* there is an ancient Bridge, and that by Cuſtom of the ſaid City two Officers to look after it, called *Bridge-Maſters*, by the Citizens at a Common Hall aſſembled have been yearly, choſen or continued; and that if one of them within the Year hath died, another for the Remainder of the Year hath always been choſen as aforeſaid, and that there are certain Fees and Profits belonging to the ſaid Office; and that *A.* and *B.* were elected to this Office; that *A.* during his ſaid Year died, and upon a Hall, by the Defendant (being then Lord Mayor) called for the Election of a Bridge-Maſter in the Place of *A.* then and there, the Plaintiff, and one *J. S.* as Competitors, ſtood for the ſaid Office; and thereupon the Queſtion did ariſe, Who had the greater Number of Electors? And the Plaintiff did aver his Number to be the greater; and thereupon did requeſt the Defendant, that according to the Cuſtom they might go to the Poll, but the Defendant did refuſe to number the Polls, and made Proclamation that the Electors ſhould depart, and diſcharged the Court, and *J. S.* was ſworn; *per quod* the Plaintiff loſt the Profit of the Place, &c. this Action lies as well for this (*a*) injurious Prevention of him in obtaining the Office, as for an Hindrance of him in the Execution thereof; for *qui deſtruit medium deſtruit finem.* * Page 59 Vent. 25, 26. between Turner and Sir Samuel Sterling, adjudged *per totam Curiam cont'* Vaughan, and Vent. 206. S. C. upon a Writ of Error in B. R. affirmed *per totam Curiam.* 2 Lev. 56. S. C. And there the Cuſtom was laid, that if the Electors were ſo divided, that the Plurality could not be known by the View, the Mayor ought to grant the Poll, and that the Electors were ſo divided, &c. And adjudged *per Cur' prater Vaughan*, that the Action lay; though it was not averred that he had been elected if the Poll had been granted; for the Mayor did not his Duty, and that the *per quod* he loſt the Profits of his Place is ſufficient after Verdict. (*a*) If upon a Writ *de Coronatore eligend'* the Sheriff will not return him Coroner that is choſen by the major Part, an Action lies. 2 Vent. 26. *Vide* 2 Sid. 168, 169, &c. 3 Keb. 764, 859. Diverſity between an Office of Government and an Office of Profit.

A. de-

Salk. 20, 21. &c. Lord Raym. 938, &c. 3 Salk. 17. pl. 8. St. Tri. 89. *Caſ. Temp.* Holt 524. 6 Mod. 45. &c. Aſhby, *v.* White & *al'*, adjudged by three Judges *cont'* Holt Ch. J. who held, That for every Injury an Action lay; that this was an Injury done the Plaintiff,

A. declares that the King's Writ iſſued, and was delivered to the Sheriff of *Bucks*, for Election of Members of Parliament in his County; that the Sheriff made out his Precept to the Defendants, being Conſtables of the Borough of *Ayleſbury*, for the Election of two Burgeſſes for that Borough, which was delivered, and the Burgeſſes duly aſſembled to chuſe, &c. and that the Plaintiff being duly qualified, &c. and ready to give his Voice for *L.* and *M.* to be Burgeſſes, &c. the Defendants, knowing the Premiſſes, maliciouſly obſtructed him, and would not allow or receive it, and that without his Voice two Burgeſſes were choſen; it was adjudged after a Verdict for the Plaintiff in *B. R.* by three Judges againſt *Holt* Ch. Juſt. That the Action did not lie; their chief Reaſons were, That this was a Parliamentary Offence, and properly (*a*) inquirable theee; that to determine it here, might occaſion a claſhing of Juriſdictions; that it did not appear that the Party had ſuffered any Injury; that to allow of ſuch Actions would create a multiplicity of Actions, to the great Prejudice of Officers! And *per Gould* Juſtice, the Officer is a Judge, and therefore not liable to an Action; and *per Powis* Juſtice, he is *quaſi* a Judge, and therefore has a diſtinguiſhing Power who to admit and who to refuſe,

as it deprived him of the greateſt Privilege a Subject has, which is that of conſenting to thoſe Laws by which he is to be bound; that the Parliament's having a Juriſdiction is no Objection, eſpecially in this Caſe, where the Grievance is, that the Party is not repreſented; that the Officer is neither a Judge, nor *Quaſi* a Judge, that the Multiplicity of Actions is no Objection; for if a Man will multiply Wrongs, it is but reaſonable that Actions ſhould be multiplied, &c. And *nota*; The Judgment was reverſed in the Houſe of Lords, according to *Holt*'s Opinion: *Trevor* Ch. Juſt. and *Price*, and 16 Lords concurred with the Judges of *B. R.* the reſt of the Judges and 50 Lords concurred with *Holt*. See Ld. Raym. 907, 908. 10 Mod. 54. 12 Mod. 26. (*a*) *Vide* Lutw. 88. Fareſt. 13. 2 Salk. 502. pl. 1. 504, pl. 1. 505. That no Action on the Caſe will lie for a falſe Return of a Member of Parliament; but for this *vide Court of Parliament*, *p.* 572†.

† The Caſe at large of *Aſhley and White* is publiſhed in a ſmall Volume, and is a valuable Book.

* Page 60 * 2. Where Caſe will lie for Torts and Injuries committed by Perſons contrary to the Duty of their Trades and Callings.

Rol. Abr. 2. *Vide* for this Tit. Carrier, and Head of *Trover and Converſion.*

If a Man (*b*) delivers Goods to a (*c*) common Carrier, to carry them to a certain Place, if he loſes them, an *Action upon the Caſe* lies againſt him; for by the common Cuſtom of the Realm he ought to carry them ſafely,

(*b*) An Action lies againſt a Ferryman that refuſes to carry Paſſengers. Hard. 163. *Vide* a ſpecial Declaration againſt a Letter-Carrier, for the Non-delivery of a Letter delivered out to him at the General Poſt-Office. Rol. Ent. 103. (*c*) So againſt a Lighterman, Maſter of a Ship, or Owners. Rol. Abr. 2. 2 Lev. 69. Hob. 25. That the Undertaking makes him a common Carrier. Cro. Jac. 262. Sid. 245. *Vide* Head of *Bailment*. So if they are damaged. Palm. 523. So if he be robbed of them. 4 Co. 84. 2 Sand. 380.

Rol. Abr. 3, 4. But for this *vide* Head of Inns and Inn-keepers.

So if an Inn-keeper refuſes to entertain a Gueſt, on Pretence that his Houſe is already full, an *Action on the Caſe* lies againſt him; ſo if the Goods of his Gueſt are ſtolen or loſt in his Houſe, &c.*

* *Sed qu.* If the Gueſt takes Charge of the Goods himſelf, and does not leave them to the Care of the Landlord, if an Action will lie?

(*d*) Kelw. 50. Rol. Abr. 91. Sand. 312.

If a Smith (*d*) refuſes to ſhoe my Horſe, or if he pricks him, an *Action on the Caſe* lies againſt him,

Rol. Abr. 10. 92. 19 H. 6. 49.

So if a Farrier kills my Horſe with bad Medicines, or by Neglect in curing of him; an *Action on the Caſe* lies, without any expreſs Promiſe.

That an Action lies againſt a *Barber* for barbing the Plaintiff *negligenter & inartificialiter*. 2 Bulſt. 333. *Vide* Hob. 211. 11 Co. 54. Sand. 312. Before 5 *Eliz. cap.* 4. no Man was reſtrained from exerciſing any Trade, but he that performed it falſly and inſufficiently was anſwerable in an Action.

If

If a Client receives an Injury by the Neglect or Fraud of his Attorney, an Action lies; (*d*) as if an Attorney ſuffers Judgment to go againſt his Client by *Nil dicit*, when he had a Warrant to plead the General Iſſue: (*e*) So if in a Plea of Land he makes Default; (*f*) or if an Attorney by Colluſion with *J. S.* and without any Warrant from me appears for me in an Action of Treſpaſs at the Suit of *J. S.* and ſuffers the Inqueſt to paſs againſt me by Default, whereupon *J. S.* recovers againſt me, I may have an *Action on the Caſe*.

Vi. e Tit. Attorney.
(*d*) Winch. 90.
(*e*) Rol. Abr. 95.
(*f*) F. N. B. 96. Cro. Jac. 695. Dyer 362.

Stile 426. 2 Sid. 171. Comb. 2. And Q. Whether the Judgment ſhall not be vacated. Cro. Jac. 344, 695. 3 Inſt. 122. Keb. 89. 2 Rol. Abr. 724*. Where Caſe will lie againſt a Counſellor, *vide* Rol. Abr. 10, 91.

* The Courts have diſcretionary Power over their Judgments, and if Parties have juſt Cauſe to complain, and come in due Time, the Court will give Relief.

(G) Where an Action on the Caſe will lie for a Nuiſance, and therein of the Inconvenience of multiplying of Actions.

IT is clearly agreed, that for a common Nuiſance, which is an Offence againſt the Public, either by doing a Thing which tends to the Annoyance of all the King's Subjects, or by neglecting to do a Thing which the common Good requires, no *Action on the Caſe* will lie; for this would create a Multiplicity of Actions, one Man being as well intitled to bring an Action as another; and therefore in ſuch Caſes the Remedy muſt be by Indictment at the Suit of the King.

Vide Head of Nuiſances. Co. Lit. 56. a. Rol. Abr. 88, 110. 2 Rol. Abr. 140, 141. Moor 180. 4 Co. 18.

9 Co. 113. 2 Brownl. 147. Vaugh. 341. Cro. Eliz. 664. 3 Mod. 294. Carth. 191, 451. Ld. Raym. 486. Salk. 15. pl. 17.

* But if by ſuch a Nuiſance I ſuffer a particular Damage, as if by ſtopping up a Highway with Logs, &c. my Horſe throws me, by which I am wounded or hurt, an Action lies.

* Page 61
Co. Lit. 56. Cro. Jac. 446.

Keb. 847. 2 Jones 157. *Vide* the Authorities *ſupra*. *Vide* Carth. 191, 451. Salk. 15. pl. 17. What ſhall be ſuch a ſpecial Damage as will maintain the Action. 2 Com. Dig. 398. 4 Com. Dig. 471. 1 Burr. 142, 260.

Alſo an Action lies for continuing a Nuiſance, as where for erecting a Nuiſance 2 *Die Febr.* the Defendant pleaded a prior Action brought for erecting a Nuiſance 20 *Die Martii*, and a Recovery thereupon, and averred theſe to be the ſame Nuiſance and Erection; and on Demurrer the Plaintiff had Judgment; for tho' he cannot have a new Action for the ſame Erection, yet he may for the continuing the ſame Nuiſance*.

Salk. 10. pl. 3. Carth. 455. Lord Raym. 370.

* This means where the Nuiſance is of a private Nature.

(H) Where an Action on the Case will lie for a Conspiracy, and oppressive Proceedings in Prosecutions and Suits at Law.

Rol. Abr. 112. Several Cases to this Purpose.

IT seems agreed, that for (*a*) a false and malicious Prosecution for any Crime, whether Capital or not, by which the Party may be put in Peril of his Life, suffer in his Liberty, Reputation or (*b*) Property, an Action on the Case in the Nature of a Writ of Conspiracy lies; whether the Prosecutor proceeded so far as actually to exhibit an Indictment, on which the Party was acquitted, or not.

(*a*) How far the Prosecution must be false and malicious, and without probable Cause of Suspicion, *vide* Cro. Eliz. 70, 134. Leon. 107. Kelw. 81. Mod. 600. Danv. 212. and Salk. 15. where *per* Holt Ch. Just. That this Action is not to be favoured, because it deters Men from prosecuting; and therefore, if the Grand Jury find the Bill, the Defendant shall not be obliged to shew a probable Cause, but it shall lie on the Plaintiff's Side to prove an express Rancour and Malice. *Quære*, how far the modern Practice of granting a Copy of the Indictment upon an Acquittal, makes it necessary that such Copy should be produced, in order to prove it a false and malicious Prosecution. And *vide* Carth. 416. Ld. Raym. 374. 12 Mod. 208, 211. 5 Mod. 394, 405, 408.* (*b*) It has been held, that for exhibiting an Indictment, which only affected a Man's Property, no Action lay, if the Indictment were insufficient, or the Bill found *Ignoramus* by the Grand Jury. *Vide* Danv. 208, 209. Several Cases put *Pro* and *Con.* And Salk. 15. *in Margine*, that in an Action on the Case for maliciously procuring *H.* to be indicted for exercising the Trade of a Badger without Licence, *per quod* he was put to great Expence; in which it was agreed, that the Indictment was insufficient: It was resolved by *Parker* Ch. Just. and the whole Court, upon great Consideration, That there was no Reason for this Diversity between a malicious Prosecution upon a good Indictment and upon a bad one; and that this Action will lie as well for Damage by Expence, as by Scandal or Imprisonment, though the Indictment be insufficient. *Hil.* 12 *Ann. Jones* and *Gwin.* 10 Mod. 148, 214. Gilb. Case 185.

* The Declaration should state the Indictment, and then of Course, it is necessary to produce and prove the Copy.——The granting the Copy, as not, nor is the Indictment itself any Proof of Malice, that must be proved from the Conduct, Expressions, &c. of the Prosecutor.

Leon. 187. Cro. Eliz. 130. S. C. Cowp. 172. Doug. 360. 2 Hawk. P. C. 132. 1 Term Rep. 535.

If a Justice of Peace *malitiose & invide machinans J. S. de bonis, nominis famæ & vitæ deprivare*, directs his Warrant to several Constables to apprehend *J. S.* alledging, in his said Warrant, that *J. S.* was accused before him for stealing of an Horse; whereupon he is arrested, and detained till he enters into Bond for his Appearance; whereas he was not accused, nor stole such Horse; an Action will lie; for tho' the (*c*) Justice is excused when upon a false Accusation he sends out his Warrant, yet it is otherwise where he makes it out without any Accusation at all.

(*c*) If a Justice of Peace procures some Witnesses to appear and give Evidence upon an Indictment, that is but his Duty; and though his Name was indorsed upon the Indictment to give Evidence, yet this made him no Prosecutor, and so no Action lies against him for a malicious Prosecution. Vent. 47. 2 Keb. 572. †

† But if he was the principal Instigator of the Prosecution, and acted maliciously, an Action would lie against him.——I mean where there was not a reasonable or probable Cause for the Prosecution.

Vide Rol. Abr. 112. and 2 Bulst. 343. where Case will not lie for an ecclesiastical Scandal. *Sed Qu.* If it will not lie for the Expence, Trouble and Vexation, attending Defence?

An Action on the Case lies against Church-wardens, for that they falsly and maliciously, to the Intent to draw the Plaintiff within the Censures of the Ecclesiastical Court for Adultery, presented him there, upon a Fame of living in Adultery with *A. S.*

* Page 62 * If *A.* was Church-warden of *B.* and at the End of the Year gave up his Accounts to his Successor, and yet *A.* is falsly and maliciously cited by *D.* into the Ecclesiastical Court to render an Account, and at the Request

queſt of *D.* he is excommunicated for not rendering up his Account, an Action lies againſt *D.* notwithſtanding this Sentence was given by the Judge. Raym. 418. 2 Jones 132. S. C. adjudged; the

Plaintiff declaring that the Defendant knowing the Plaintiff had before had made up his Accounts, which were approved by the Pariſh, &c. *Vide* Hard. 194, 195. S. C. and a long Argument ‡.

‡ *Qu.* If the *Sciens* is not, in ſuch Caſe, abſolutely neceſſary to ſupport the Action?

But it muſt be obſerved, that there is a great Difference between a falſe and malicious Proſecution by way of Indictment, and bringing a Civil Action; for in the latter, the Plaintiff aſſerts a Right, and ſhall be amerced *pro falſo clamore*; alſo the Defendant is intitled to his Coſts; and therefore, for commencing ſuch an Action, tho' without ſufficient Grounds, no Action on the Caſe lies*. Salk. 14. 3 Lev. 200. Hob. 266. 3 Leon. 138. Cro. Jac. 432. Bull. N.P. 6. 2 Burr. 807.

1 Term Rep. 110. * But if the Party hath been held to Bail, a ſpecial Action will lie.

But if the Plaintiff declares, that he being arreſted in *Middleſex* at the Suit of the Defendant, and the Defendant intending to detain him in Priſon, *falſo & malitioſe dixit* to the Sheriff of *Middleſex*, that the Plaintiff owed him 500*l.* requiring him to take Bail accordingly, *per quod* he was detained in Gaol ſeveral Days; this Action lies, becauſe of the ſpecial Damage ſuſtained by the Party on this falſe Affirmation †. Sid. 424. 2 Keb. 546. Mod. 4. Lev. 275. 3 Lev. S. C. cited, Salk. 14. S. C. cited,

and agreed; but it is not enough to declare generally that he brought an Action againſt him *ex malitia & ſine cauſa, per quod* he put him to great Charge, &c. but he muſt ſhew the Grievance ſpecially; for this *vide* Style 379. Saund. 228. Vent. 12, 19, 86. Danv. 196. *Vide* 1 Salk. 15. pl. 6. See Lord Raym. 503. 12 Mod. 273. 2 Salk. 456. 6 Mod 262. Sand. 228. 2 Lev. 275. Hob. 267. Yelv. 117. 5 Mod. 223, 224. 10 Mod. 145. Stra. 114, 219. 12 Mod. 648, 654. † This was before the Statutes relative to Bail. See 13 Car. 2. ſt. 2. c. 2. 12 Geo. 1. c. 29. 2 Geo. 2. c. 3.

If a Stranger brings an Action againſt *A.* in the Name of *J. S.* without the Conſent of *J. S.* an Action on the Caſe lies (*a*) againſt him. 7 H. 6. 43. Rol. Abr. 101. S. C.

Lucas 200. 10 Mod. 219. Gilb. Caſ. 214. T. Raym. 503. March 47. S. P. Cro. Eliz. 629. (*a*) Or there may be Remedy upon the 8 Eliz. c. 2. But *Q.* Where there are ſeveral Plaintiffs and one of them gives his Conſent. Cro. Eliz. 236. 2 Sid. 162. If upon an Iſſue between *A.* and *B.* a Stranger, that was not returned of the Jury, cauſes himſelf to be ſworn in the Name of one that was returned of the Jury, and a Verdict is given for *B. A.* may have an Action upon the Caſe againſt the Stranger. March 81. Palm. 315.

If *A.* exhibits a Petition to a Committee of Parliament, appointed for the Examination of Public Grievances, and therein charges *B.* being a Doctor of Law, and Vicar General to the Biſhop of *L.* with ſeveral great Offences, as Extortion, &c. in his Office; and for the better Manifeſtation of theſe Grievances, cauſes the ſaid Petition to be printed, and to be delivered to ſeveral of the Members of the ſaid Committee; yet no Action upon the Caſe lies; for this printing and delivering of the Caſe as aforeſaid, is according to the Order and Courſe of Proceeding in Parliament. Sand. 131. Lake and King. Mod. 58. Fitzgib. 47, 57, 65, 122, 253. Ld. Raym. 341, 417, 486. 11 Mod. 99.

12 Mod. 218. 2 Keb. 361, 462, 466, 659, 664, 801, 832. Lev. 240. Sid. 414. S. C. *Vide* Godb. 405. If a Man brings a Writ of Forgery againſt a Peer, &c. and the Defendant by the Jury is found not guilty, yet ſhall he not have *Scandalum Magnatum*, and lay the Charge contained in the Writ to be a Scandal. Rol. Abr. 34. Moor 38. Hetl. 55. Hob. 266. No Action lies againſt a Witneſs for Perjury, in giving his Evidence in a Cauſe. *Vide* Danv. 195.

In *Caſe*, the Plaintiff declared that the Defendant maliciouſly levied a Plaint in *London*, and proſecuted the Plaintiff thereon, *ubi revera* the Cauſe of Action did ariſe in *D.* in *Kent*, out of the Juriſdiction of the Court of *London*; after Verdict for the Plaintiff, the Court inclined that the Carth. 189. Temple v. Killingworth. Show. 194, 254.

*Page 63 the Action *would not lie; for the Plaintiff might have pleaded to the Juriſdiction, and if they had refuſed his Plea, he might have applied for a Prohibition.

Caſes B. R. 4. S. C.

But no Reſolution, and there ſaid, that it was fit to have the Opinion of all the Judges; for that ſuch Action was never held to lie till *North's* Time. *Vide* Vent. 669. 2 Jones 214. Hob. 205. Cro. Jac. 667. Sid. 463. Sand. 221. 4 Co. 14. No Action lies for ſuing an Attorney in an inferior Court; for who knows whether he will inſiſt on his Privilege, and if he does, he may plead it. Mod. 209, 210. *per Cur'*. 10 Mod. 41, 45, 263. 12 Mod. 4. Barnes 32, 35, 36, 302. Barnes 4, 34, 36, 290. 3 Wms. 104.

(I) Where Caſe will lie, though the Party injured has another Remedy.

Allen 3. IF one ſlanders my Title, whereby I am wrongfully diſturbed in my Poſſeſſion, though I have Remedy againſt the Treſpaſſer, yet I may have an Action againſt him that cauſed the Diſturbance.

Dyer 250. in Margine. Leon. 237. If a Man ſtops a Water-courſe, *per quod* his Neighbour's Ground is ſurrounded, he may have an Aſſize, or Action on the Caſe, at his Election.

So if he diverts *totum Curſum aquæ* from my Watercourſe to my Mill, though I may have an Aſſiſe for this, yet I may have an Action upon the Caſe, at my Election. Rol. Abr. 104.

3 Lev. 130. by Pemberton and Levinz *cont'* Windham and Charlton. If a Copyholder in Fee ſurrenders a Meſſuage to the Uſe of one for Life, the Remainder to another in Fee, and the Defendant (the Huſband of the Tenant for Life) pulls down Part of the Meſſuage, &c. he in the Remainder may have an Action on the Caſe againſt him.

And *per Pemberton* and *Levinz*, where *Coke* ſays, That before the Statute of *Glouceſter*, the Leſſor was without Remedy for Waſte done by his Tenant; that muſt be intended according to the Subject Matter of which he was ſpeaking, *ſcilicet*, that he had no Remedy by Action of Waſte: And *Pemberton* ſaid, That without Doubt at this Day the Leſſor may wave his Remedy by Action of Waſte, and bring an Action on the Caſe*.

* Where the Eſtate of any one in Remainder or Reverſion is injured by the Tenant in Poſſeſſion or any other Perſon, an *Action on the Caſe*, in the Nature of an Action of Waſte, may be maintained.

Rol. Abr. 108. 2 Bulſt. 336. If *Ceſtui que uſe* at Common Law had requeſted his Feoffees to make a Feoffment to *J. S.* and they had refuſed, no Action on the Caſe lay againſt them, but his Remedy was in Chancery only.

Rol. Rep. 125. 2 Vent. 27. Carth. 224. 3 Lev. 268. If a Parſon is guilty of Dilapidations, and after takes another Benefice, by which his former becomes void, his Succeſſor may have an Action on the Caſe againſt him; though it was objected, that his proper Remedy was in the Spiritual Court.

S. C. Lutw. 116. where an Action on the Caſe lay for a Legacy in *Cromwell's* Time. Raym. 23. 2 Sid. 21, 85. Keb. 116.

Rol. Abr. 110. *Secus* if it were a public Chapel. Rol. Abr. 110. If *A.* and his Predeceſſors have uſed Time out of Mind to find a Chaplain to ſing Divine Service, and to perform the Sacraments and Sacramentals in the Chapel of *B.* within his Manor of *D.* for *B.* his Servants and Family; and he does not find a Chaplain according to the Cuſtom, *B.* may have an Action on the Caſe againſt him.

Cro. Eliz. 664. Sid. 34. An Action on the Caſe lies againſt a Parſon for refuſing to give *J. S.* the Sacrament, becauſe a Man is bound to receive upon a Penalty. *Per.* Keb. 947. Sid. 34 *dubitatur*. Againſt a Biſhop for not taking Caution of a Party excommunicated. Raym. 226. 2 Inſt. 623. Againſt an Ordinary for refuſing to grant Adminiſtration. Carth. 126.

(K) Where

(K) Where Case will lie though the Wrongdoer be punishable criminally.

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IT seems by the better Opinion of the Books, that a Person guilty of Felony, and pardoned, or burnt in the Hand, may be proceeded against in a Civil Action at the Suit of the Party injured; for when the Party is prosecuted there can be no (*a*) Inconvenience in allowing the Action, and the Criminal Prosecution ought to be no Bar to it; for why should he not answer in Damages to the Party whom he hath injured, as well as be made an Example of for the Sake of the Public, whom he hath offended,

Stile 346. Yelv. 99. Jones 147. Latch 144.

(*a*) But no Action can be brought whilst the Party is under Indictment for the same Crime, for if that were allowed it might hinder all exemplary Punishment. Stile 346.

In Case against Husband and Wife, the Plaintiff declared that the Wife *malitiosè, &c.* affirmed herself to be unmarried, *& strenue requisivit* him to marry her; to which Affirmation he giving Credit, married her, being then the Defendant's Wife, by which he was put to great Charge, injured in his Reputation, and greatly troubled in his Conscience; and the Court held, That the Ground of this Action being the Conversation and Contract of the Wife, could not bind the Husband.

Sid. 275. Cooper and Witham. Lev. 247. S. C. Keb. 399. And note; *per* Twisden, this Action does not lie; because the marrying of the second Husband is Felony.

But where the Plaintiff declared that she was a Virgin of good Name and Fame, and sought to for Marriage by *J. S.* that the Defendant, pretending himself to be a single Person, made Love to her, and married her; when in Truth he was married to another Woman, &c. whereby she became of less Credit and lost, &c, And the Court held that the Action lay.*

Skin. 119.

* This is a Case very different from the former: And *Qu.* If *Twisden*'s Reason for th Action not lying, is a good one?

After a Man has been indicted, convicted and punished for an Assault and Battery, an Action will lie for Damages; but if the Prosecutor of such Indictment will not engage to relinquish his Right of Action, the Court, unless in particular Cases, will not give a severe Judgment.

AFFIDAVIT.

AN Affidavit is an Oath in Writing, signed by the Party deposing, sworn before, and attested by him who has Authority to administer the same. As most Motions and Orders of Court are grounded on Affidavits, it seems impracticable, and indeed unnecessary, to instance in what Cases they are to be made use of, or when they

they may be ſaid to be defective, ſhort, or evaſive; this being a Matter of Practice, and few Things relating thereto being thought worth reporting.

We ſhall, however, under this Head, ſet down what we find relating to

(A) The taking and filing of Affidavits. 65.
(B) Where an Affidavit is neceſſary. 65.
(C) Where it may be ſaid to be ſhort and defective. 66.

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* Page 65

* (A) The Taking and Filing of Affidavits.

Style Pract. Reg. 78.

AFfidavits were only to be taken by ſome Judge of that Court in which they were to be made uſe of. But now,

By the 16 & 17 Car. 2. c. 9. the Chancellor of the Dutchy of Lancaſter may impower Perſons to take Affidavits.

" By the 29 *Car.* 2 *cap.* 5. the Chief Juſtice, and other the Juſtices of " the Court of *King's Bench*, or any two of them, whereof the Chief " Juſtice to be one for that Court; the Chief Juſtice of the Common " Pleas, and the Reſt of the Juſtices there, or two of them, whereof the " Chief Juſtice to be one for that Court; and the Lord Treaſurer, " Chancellor and Barons of the Exchequer, or two of them, whereof " the Lord Treaſurer, Chancellor or Chief Baron, to be one for that " Court, may by Commiſſion or Commiſſions under the Seal of the ſaid " reſpective Courts from Time to Time, as Need ſhall require, impower " Perſons in the ſeveral Counties to take Affidavits concerning any " Thing depending or concerning any Proceedings in the ſaid Courts, " as Maſters in Chancery Extraordinary uſe to do; and any Judge of " Aſſize, in his Circuit, may take Affidavits concerning any Thing de- " pending, &c. as aforeſaid; which Affidavits ſhall be filed in the ſeve- " ral Offices of the ſaid Courts, and be made uſe of as other Affidavits " taken in the ſaid Courts; And all Perſons forſwearing themſelves in " ſuch Affidavits ſhall incur the ſame Penalties as if they had been taken " in open Court; the Perſons taking ſuch Affidavits ſhall receive only " 1*s.* for ſo doing, beſides the King's Duty, which Duty ſhall be " paid to the proper Officers in the ſaid Courts, before ſuch Affidavit " be there filed or made uſe of."

2 Salk. 461. pl. 2.

If Affidavits taken before Commiſſioners in the Country, according to the above Statute, be expreſſed to be in a Cauſe depending between *A.* and *B.* and there is no ſuch Cauſe in Court, they cannot be read, becauſe the Commiſſioners have no Authority to take them, and there can be no Perjury; otherwiſe if there be a Cauſe in Court, and this concerns ſome collateral Matter.*

* This muſt mean where the Title of a Cauſe is miſtaken; for many Affidavits are made, properly intitled, before Suits are inſtituted. But See Letter C. p. 66. a Note.

(B) Where an Affidavit is neceſſary.

Vide the ſeveral Heads. See 5 Geo. 2. c. 27. where-

THE Law and Practice of the Courts require, that on all Motions for an Information, Attachment, Complaint againſt any Officer for an Offence not committed in the Face of the Court, for a new Trial, relating

relating to the ſerving and returning of Writs of Proceſſes, &c. Oath or Affidavit be made of what is affirmed, that the Judges may be ſatisfied, as well of the Truth thereof, as of the Reaſonableneſs of granting Relief when made out.

by the above Act is explained and amended; both which Acts are made perpetual by 21. Geo. 2. c. 3.

Alſo by Acts of Parliament Affidavits are made neceſſary, as 4 *Ann. cap.* 16. *ſect.* 11. enacts, "That no dilatory Plea ſhall be received unleſs "on Oath, and probable Cauſe ſhewn to the Court; by the 12 *Geo.* 2. "*cap.* 29. Affidavit muſt be made of the Cauſe of Action, and that the "Sum amounts to 10*l.* otherwiſe the Defendant is not to be held to ſpe-"cial Bail."

If a Perſon exhibits a Bill for the Diſcovery of a Deed, and prays Relief thereupon, he muſt annex an Affidavit to his Bill, that he has not ſuch Deed in his Poſſeſſion, or that it is not in his Power to come at it; for otherwiſe he takes away the Juriſdiction of the Common Law Courts, without ſhewing any probable Cauſe why he ſhould ſue in Equity.

Chan. Ca. 11, 231. Vern. 59, 180, 247, Chan. Rep. 51. Gilb. Hiſt. Ch. 51. Eq. Abr. 13. 2 Eq. Abr. 13. 2 Freem. 71. 2 Will. Rep. 541. Prec. Ch. 536.

But if he ſeeks Diſcovery of the Deed only, or that it may be produced at a Trial at Law, he need not annex ſuch Affidavit to his Bill; for it is not to be preſumed that in either of theſe Caſes he would do ſo abſurd a Thing, as exhibit a Bill, if he had the Deed in his Poſſeſſion.

Vern. 180, 247. * Page 66

Alſo, if he ſets forth the whole Circumſtances of his Caſe, and prays general Relief, the Prayer of Relief ſhall be applied to the Diſcovery only.

Abr. in Eq. 14. Preced. in Eq. 536. Gilb. Hiſt. Ch. 52.

In Interpleading Bills, the party who prefers it muſt make Affidavit that he does not collude with either of the other Parties.

He who moves for a *Ne Exeat Regnum* againſt another, muſt make Affidavit of the Loſs he is like to ſuſtain by the Party's going out of the Kingdom, and that thereby the Debt may be loſt, and that the Party is actually going out of the Kingdom.

A Peereſs by her Anſwer owned that ſhe had ſeveral Deeds in her Power, but did not ſet them forth; and on Motion ſhe was ordered to produce them on Oath, but that Order was changed, and ſhe to produce them on Honour only, being in Supplement to her Anſwer, which was on Honour,

Preced. in Eq. 93. Duke Hamilton and Lady Gerrard; but Q. Whether an Order that a Peer or Peereſs ſhould produce Writings on Affidavit, or be examined on Oath, as to any Thing in his Anſwer, is not good.

(C) Where it may be ſaid to be ſhort and defective.

AN Affidavit muſt ſet forth the Matter poſitively, and all material Circumſtances attending it, that the Court may judge whether the Deponent's Concluſions be juſt or not.

And therefore, on Motion to put off a Trial for want of a material Witneſs, it muſt appear that ſufficient Endeavours were made uſe of to have him at the Time appointed, and that he cannot poſſibly be preſent, though he may on further Time given.

Fareſ. 121. Comb. 422.

Upon a Rule to ſhew Cauſe, the Plaintiff offered ſeveral new Affidavits, and this Diverſity was taken, *viz.* where they contain new Matter, and where they tend only to confirm what was alledged and ſworn when the Rule was made; in the latter Caſe they may be read, not in the former.

2 Salk. 461, pl. 1.

If

Comb. 399. But this is Matter discretionary in the Court. If there be Affidavit againſt Affidavit, the proper Method is to have it tried by an Iſſue at Law. *Vide* 3 Mod. 108. 2 Will. Rep. 406. where an Action on the Caſe was brought for ſcandalous Matter inſerted in an *Affidavit*; that the Party is to put nothing in the *Affidavit* but what is material to the Point, and therefore not to ſet forth the Merits of his Cauſe on Motion. Stile Prac. Reg. 79. where the *Affidavit* of one who ſtood in the Pillory was read. 2 Salk. 461. But for this *vide* Tit. *Evidence*. Affidavits to ſupport Motions for Informations muſt not be intitled at all, but thoſe of the Defendant on ſhewing Cauſe may be intitled, becauſe then there is a Proceeding between the Parties in Court. Stra. 704. Andr. 313. What Affidavits ſufficient to hold to Bail, ſee 2 Stra. 1157, 1219, 1226, 1270. 2 Barnard. K. B. 256, 284. Hardw. 114, 131. Andr. 71. ſuch Affidavits allowed. 2 Stra. 1209. Barnard. K. B. 111.†

† It is of great Conſequence to Attornies, to take Care that their Affidavits are not too long. They ſhould only contain a fair, conciſe, plain State of the Facts.——Long Affidavits, containing a Variety of Matter foreign to the Queſtion, cannot be duly attended to in the Hurry of Buſineſs, they give Offence to the Court, as putting the Parties to unneceſſary Expences, obſcuring the Matter, and taking up the Time of the Court, improperly; and the Attorney is ſometimes compelled to pay the Coſts himſelf.

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* AGREEMENTS.

(a) An Agreement is defined *aggregatio mentium in re aliqua facta vel faciendâ.* Plowd. 17. a. Though a Contract executed with all the Solemnity required by Law, may properly be

AN (a) *Agreement* is the Conſent of two or more Perſons concurring, the one in parting with, and the other in receiving ſome Property, Right or Benefit; the Notion of contracting or entering into Agreements aroſe from the Increaſe of Commerce, and the Neceſſity Men were under of Bartering their Superfluities for Things of real Uſe, and which lay out of the Way of their acquiring; that Men ſhould execute their Agreements and perform their Promiſes, tho' made without Writing or Conſideration, is enjoined by the Law of Nature, but in Civil Societies, and in ours in particular, Circumſtances are required which protect the Weak, and thoſe who are under the Power of others; alſo Proviſion is made againſt Fraud and Circumvention, and that no Man ſhould be injured in his Property by the Turn of an unwary Expreſſion.

called an Agreement, yet in the more common Acceptation of the Word, Articles, Minutes and Eſcrow, &c. containing ſomething preparatory to a more ſolemn and formal Execution, are called *Agreements*.

Under this Head we will conſider,

(A) Who are capable of contracting and binding themſelves or others by their Agreements. 67.

(B) Of Agreements which are good in Law, and will be decreed in Specie in Equity: And herein, 69.

1. Of unreaſonable Agreements, and ſuch as may be ſaid to be obtained by Fraud or Circumvention. 69.

2. Of

2. Of voluntary Agreements. 70.

3. Of the Manner in which they are to be performed. 71.

(C) Of Parol Agreements, or such as may be said to be within the Statute of Frauds and Perjuries. 72.

(A) Who are capable of contracting and binding themselves or others by their Agreements.

A Person *Non Compos* is not capable of entering into any Agreement, for an Agreement is an Act of the Understanding which such Persons are incapable of, and therefore are to be under the Care of their Curators or Guardians, by a Commission from the Public.

But for this *vide* Head of Ideots and Lunaticks.

Also an Infant for the same Reason is incapable of contracting.‡

Vide also Head of Infancy and Age.

‡ If Infants make beneficial Contracts, the Law will compel the Parties contracting with them, to perform those Contracts, or give an adequate Satisfaction in Damages.

* A Wife during the Intermarriage is (*a*) incapable of entering into any Agreement *in Pais*, being under the Power of her Husband.

* Page 68 *Vide* Tit. Baron and Feme.

(*a*) But it is said, that if a Feme Covert, by Agreement made with her Husband, is to surrender a Copyhold or levy a Fine, though the Husband die before it be done, Equity will compel her to perform the Agreement. 2 Vern. 61. pl. 52. Eq. Cas. Abr. 25. pl. 6. Upon looking into the Register's Book it appeared, that the Court made no Decree in it; but it was by Consent referred to Mr. Serjeant *Rawlinson* for his Arbitration, Eq. Cas. Abr. 62. pl. 2. *per Curr'*.

The Ancestor seised in Fee may by his Agreement bind his Heir; therefore if *A.* agrees to sell Lands, and receives Part of the Purchase Money, but dies before a Conveyance is executed, and a Bill is brought against the Heir, he will be decreed to (*b*) convey, and the Money shall go to the Executor, especially if there are more Debts due than the Testator's Personal Estate is sufficient to Pay.

2 Vern. 215.

(*b*) But if a Man for 100*l.* assumes to make a Lease for 21 Years, and dies, his Heir is not compellable in a Court of Equity to make the Lease, for this is against the Common Law, *Quære*, Eq. Cas. Abr. 265. pl. 4.

So if a Father conveys to a younger Son by a defective Conveyance, and dies, the Heir at Law in two Cases shall be compelled to make it good. 1. Where there is a (*c*) Covenant for further Assurance, binding the Heir, because the Heir is bound by the Covenant. 2. Where there is a Provision made by the Father in his Life-time for the Heir, or he hath such a Provision by Descent from the Father.

Vide infra of voluntary Agreements.

(*c*) J. S. upon a Marriage Treaty was to settle 500*l. per Annum* as a Jointure in Consideration of a Marriage Portion; *J. S.* was intrusted with the drawing of the Settlement, which was never read by the Wife; the Jointure settled was but 400*l. per Annum*, of which the Husband took Notice, and talked of making it up so much, but dying before it was done, his Heir was decreed to make it up, although there was no Covenant by which he bound his Heir to make it up so much. Vern. 16.

If

Hob. 203. Chan. Ca. 171. Lev. 239. 2 Vent. 350.

If Tenant in Tail agrees to convey, or bargains and ſells the Lands for valuable Conſideration, without Fine or Recovery, and dies before the Fine or Recovery be levied or ſuffered, the Iſſue is not (*a*) bound either in Law or Equity, for Equity cannot ſet aſide the Statute *de donis*; which ſays, That *voluntas donatoris obſervetur*; nor can the Court ſet up a new Manner of Conveyancing, and thereby ſuperſede Fines and Recoveries; for thereby the King would loſe the Perquiſites by Fines on the Writs of Entry and Fines for Alienation.

(*a*) So tho' there be a Decree againſt the Tenant in Tail to levy a Fine and ſuffer a Recovery, and he dies in Contempt and in Priſon for not executing of it, yet the Iſſue ſhall not be bound. *Vide* Eq. Abr. 25. pl. 4. 265. pl. 2. 2 Vern. 306.

Chan. Ca. 171. Roſs and Roſs.

A. ſeiſed of Lands in Tail, agrees with *B.* that he and his Heirs ſhall enjoy the intailed Lands, if *A.* and his Heirs may enjoy his Fee-ſimple Lands; this Agreement is executed accordingly, and *B.* had a Decree againſt *A.* to levy a Fine and ſettle it, purſuant to the Agreement; but *A.* died without doing it, though it was decreed that *A.* himſelf was bound by this Agreement to convey, yet ſince he died before he executed the Fine, his Iſſue was not bound by the Agreement; but if the Iſſue in Tail had approved of his Anceſtor's Agreement, as he did in this Caſe by entering on the Land of *B.* then it becomes his own Agreement, and conſequently in Equity he ſhall be (*b*) obliged to perform it.

(*b*) So if the Iſſue in Tail had recovered Part of the Purchaſe Money in his Father's Life-time, or after his Death, or if he had joined in the Deed with the Father, or covenanted for further Aſſurance, &c. Chan. Ca. 171. Lev. 238.

Chan. Ca. 234. 2 Chan. Ca. 64 2 Vent. 350. Vern. 13. pl. 8, 440.

If there be Tenant in Tail in Equity as of a Truſt, or under an equitable Agreement, and he for valuable Conſideration bargains and ſells the Land without Fine or Recovery, this ſhall bind his Iſſue, becauſe the Statute *de donis* doth not extend to it, being an Intail in Equity and a Creature of the Court.

pl. 412. 2 Vern. 133, 583. pl. 525, 702. pl. 625.

* Page 69 Bro. Contract 26. 11 Co. 50. Pop. 194. (*c*) *Qu.* Whether he may not have Relief in Equity; or rather *Qu.* If an Action for Money had and received would not lie againſt the Repreſentative?

* As Tenant in Tail is reſtrained from alienating the Eſtate without Fine or Recovery, ſo he is from charging of it, or diſpoſing of the laſting Improvements after his Death; therefore if Tenant in Tail ſells the Trees growing on the Inheritance, the Vendee muſt ſever them during the Life of Tenant in Tail, for if he dies before they are cut down, his Iſſue ſhall have them as Part of the Inheritance, and the Vendee though (*c*) obliged to pay the whole Sum contracted for, yet ſhall not be allowed to cut down one Tree after the Death of Tenant in Tail; for as the Tenant in Tail has Power over the Inheritance but during his own Life, ſo he cannot delegate that Power to another but for the ſame Time; and conſequently, whatever remains Part of the Inheritance at the Death of Tenant in Tail, at which Time his Power over it ceaſes, muſt neceſſarily go to the Heir, to whom the Inheritance belongs.

(B) Of Agreements which are good in Law, and will be decreed in Speceie in Equity: And herein,

1. Of unreaſonable Agreements, and ſuch as may be ſaid to be obtained by Fraud or Circumvention.

IN many Caſes the Party injured by Breach of an Agreement, may have a Remedy either by Action at (*b*) Common Law, or by recourſe to a Court of Equity; but here a general Rule muſt be obſerved, that wherever the Matter of the Bill is merely in Damages, there the Remedy is at Law, becauſe the Damages cannot be aſcertained by the Conſcience of the Chancellor, and therefore muſt be ſettled by a Jury.

(*b*) *Vide* Tit. Actions Aſſumpſit and Covenant. *Vide* Abr. Eq. 16.

But if there be Matter of Fraud mixt with the Damages, as if *A.* ſues *B.* on a Covenant at Law for Damages, and *B.* files a Bill for an Injunction upon this equitable Suggeſtion, That the Covenant was obtained by Fraud, if *A.* files his Croſs-Bill for Relief upon that Covenant, the Court will retain it, becauſe the Validity of the Covenant is diſputed in that Court, and on a head properly cognizable there; and therefore, if the Validity of the Deed be eſtabliſhed, the Court will direct an Iſſue for the *Quantum* of the Damages.

Chan. Rep. 158. Abr. Eq. 17.

So where the Agreement is to do ſomething in *Specie*, as to convey Lands, execute a Deed, &c. there it will be proper to apply to a Court of Equity for a ſpecific Execution, to which the Party is intitled, if the Agreement be good and ſufficiently proved, when otherwiſe he could only recover Damages at Law.

Chan. Ca. 42. An Agreement in Nature of a Wager decreed in Specie.

The Plaintiff aſſigned ſome Shares of the Exciſe to the Defendant, who thereupon covenanted to ſave him harmleſs, and to ſtand in his Place touching all Payments to the King; the Plaintiff being ſued by the King, brought his Bill to have the Agreement performed in *Specie*, and although it was inſiſted that the Plaintiff might recover Damages at Law, and that this was not a Covenant for any Thing certain; and by this Means a Maſter in Chancery was to tax Damages inſtead of a Jury; yet it was decreed, that the Defendant ſhould perform his Covenants; and it was directed to a Maſter, that, as often as any Breach ſhould happen, he ſhould report it ſpecially; that the Court, if Occaſion ſhould be, might direct a Trial in a *Quantum Damnificat'*.

Vern. 189. pl. 190. Lord Ranelaugh *verſ.* Hays. 2 Chan. Ca. 146. S. C.

So if a Jointreſs brings her Bill to have an Account of the real and perſonal Eſtate of her late Huſband, and to have Satisfaction thereout for a Defect of Value of her Jointure Lands, which he had covenanted to be and to continue of ſuch Value; and the Defendant inſiſts, that this is a Covenant which ſounds only in Damages, and properly determinable at * Law; though it be admitted that a Court of Equity cannot regularly aſſeſs Damages; yet in this Caſe a Maſter in Chancery may properly enquire into the Value and Defect of the Lands, and report it to the Court, which may decree ſuch Defect to be made good, or ſend it to be tried at Law, upon a *Quantum Damnificat'*.

Abr. Eq. 18. pl. 7.

* Page 70

The Condition of a Bond was to ſettle certain Lands in ſuch a Manor, by ſuch a Day; and the Obligor died before the Day; ſo that the Bond was ſaved at Law, yet the Court decreed a ſpecific Execution.

Abr. Eq. 18. pl. 8.

But

Abr. Eq. 17. But here it must be observed, that Agreements, out of which an Equity can be raised for a Decree in Specie, ought to be obtained with all imaginable Fairness, and without any Mixture tending to Surprize or Circumvention; and that they be not unreasonable in themselves.

2 Chan. Ca. 17. As where by a Marriage Agreement the Son's intended Wife was to have more than would have been left for the Father (though indebted), his Wife and two Daughters unpreferred, the Court would not decree it; principally, by Reason of the Extremity of it, but left the Party to his Remedy at Law.

Vern. 227. pl. 225. So where *A.* articled for the purchase of *B.*'s Estate, pretending he bought it for one whom *B.* was willing to oblige, and thereby got it somewhat cheaper, when in Truth he bought it for another, Equity would not decree an Execution of this Agreement.

Bromley & Jefferies. So where *A.* on a Marriage of his Daughter to *B.* covenanted that *B.* should have his Lands at his Death cheaper than any other Person, and he lived twenty Years after, and devised to *B.* 1000*l.* and to his Daughtar, *B.*'s Wife, 500*l.* and he devised the Lands to his Grandson; the Court refused to decree an Execution of the Agreement, because of the Uncertainty of it; and it not being mutual; *B.* not being bound to take it at any Price.

2 Vern. 632. Green and Wood. An Agreement for a Purchase being obtained by an Attorney from an old Woman of ninety, and several suspicious Circumstances appearing, the Court would neither decree it to be carried into Execution against the Heir at Law, nor to be delivered up upon a Cross Bill exhibited for that Purpose; but left the Parties to their Remedies at Law.

(*a*) As where Bargains are obtained from Heirs at Law, in the Life-time of their Ancestors. 2 Chan. Ca. 136. Vern. 271. But as these Cases, and all others on this head, depend so much upon (*a*) Circumstances, and are to stand or fall according to the Degrees of Fraud and Circumvention attending them, and proved in the Cause, or by what appears unreasonable on the Face of them; I shall only observe, that a Court of Equity will much easier be prevailed on to dismiss a Bill which prays a specific Execution of an unreasonable Agreement, than set aside an Agreement, though not strictly fair, on a Bill for that Purpose; for this deprives the Party of what he had a Right to by Law; and that where such Agreements are set aside, it must be on refunding what was *bona fide* paid, making Allowances for Improvements, &c.

2 Vern. 15, 27. Where in the Year 1720, Land was sold at forty Years Purchase, Rep. in Equ. 365. Where a Bill was brought for a specific Execution of an Agreement, after a great Length of Time. 2 Vern. 127. Where the Party was imposed upon, and knew nothing of the Value of the Lands, but what he had heard from the Purchaser. Preced. in Chan. 538. Where Lands are sold too dear, and the Seller who seeks a specific Performance, cannot strictly execute his Part of the Agreement, Preced. in Chan. 573. 2 Vern 394, 558.

2. Of voluntary Agreements,

6 Co. 18. b. As Men have a Right to their Acquisitions, so may they dispose of them at their Pleasure, and without valuable Consideration: but if a Man promises to convey Lands, or to give Goods, without valuable Consideration, or without delivering Possession of them, this alters no Property, nor has the Party any Remedy in Law or Equity, being *Nudum pactum unde non oritur actio**.

* As to *Nudum pactum*, see an excellent Account thereof, with Observations by Mr. *J.* (afterwards Ch. J.) *Wilmot*, in 3 Burr. 1670. *Pillan* and *Rose* v. *Van Mierop*. and *Hopkins*.

* Page 71 * But if it be done by Deed duly executed, under Seal, this is good in Law, though there be no Consideration, or no Delivery of Possession; because

Yelv. 196. Cro. Jac. 270. Brownl. 111. 6 Co. 18. b. Chan. Rep. 173. Cowp. 435. 2 Term Rep. 462.

becauſe a Man is eſtopped to deny his own Deed, or affirm any Thing contrary to the manifeſt Solemnity of Contracting.

Alſo in Equity voluntary Conveyances are good againſt the Parties, and cannot be revoked; nor will the Court interpoſe in Behalf of one Volunteer againſt another; but if they affect Creditors, Purchaſers or younger Children, the Court will ſet them aſide. Vern. 100. 464.

If there be a defective Conveyance, without an equitable Conſideration, a Court of Equity will not oblige the Party to make it good, tho' there be a Covenant for further Aſſurances; as if a Man makes a Feoffment to a Stranger, without Livery, the Feoffor, or Heir, ſhall not be obliged to make good that Feoffment, but it ſhall be conſtrued in Equity to be an Eſtate at Will, as it is at Law. 2 Vent. 365. 2 Vern. 40. 2 Vern. 435.

If an Annuity is granted by one to his Houſe-keeper, with a Bond for Payment of it, and the Bond is loſt, Equity will decree Payment of the Annuity; for Service is a Conſideration, and no *Turpis contractus* ſhall be preſumed, unleſs proved. Abr. Eq. 24.

3. Of the Manner in which they are to be performed.

If an Agreement be to quit the Poſſeſſion of Lands, the Court will not decree a Conveyane of the Lands themſelves; but if the Agreement was to convey the Lands, it is ſaid that the Court would have decreed the Agreement, though the Party was not apprized what Eſtate he had in the Lands. Vern. 121. How Agreements and Promiſes are to be executed at Law, *vide* Heads of *Aſſumpſit* and *Covenant*.

If one is bound to transfer 300*l*. *Eaſt-India* Stock before ſuch a Time, which he neglects to do, and the Stock is much riſen, he ſhall be obliged to transfer the Stock in *Specie*, and account for all Dividends from the Time that it ought to have been transferred. 2 Vern. 394. *Vide* Preced. in Chan. 533.

If a Creditor agrees with his Debtor to take leſs than his Debt, ſo that it be paid preciſely at ſuch a Day, and the Debtor fails of Payment, he cannot be relieved, for *Cujus eſt dare ejus eſt diſponere*. Vern. 210. Chan. Ca. 110.

If Money be lent on a Mortgage, at 5 *per Cent.* and the Mortgagor covenants to pay 6 *per Cent.* if he made Default for the Space of ſixty Days after the Time of Payment; if he makes Default, the Court will not relieve, this being the Agreement of the Parties*. 2 Vern. 134.

* This was when 6 *per Cent.* was legal Intereſt.—The Caſe holds good now as to any Intereſt not exceeding 5 *per Cent.*

If a Leſſee for a long Term of Years covenants to lay out 200*l*. upon the Premiſes within the firſt ten Years, and lays out but 30*l*. and after the Expiration of thirty Years of the Leaſe, the Leſſor brings an Action of *Covenant*, and recovers 150*l*. Damages, Equity will neither relieve againſt the Damage, nor decree the Money to be now laid out in Improvements; for though the Damages ſeem exceſſive, yet the Jury were proper Judges; and to decree it to be laid out now the Leaſe is almoſt expired, is not proper; for it is probable the Leſſee would not be ſo careful in laying it out in laſting Improvements, as he would have been if laid out at firſt. Vern. 316.

* Page 72 *

(C) Of Parol Agreements, or such as may be said to be within the Statute of Frauds and Perjuries.

Ca. Lit. 48. Spelm. Gloss. 510. 9 Co. 137. Rol. Abr. 7.

THE Common Law required no other Solemnity in passing Lands or Tenements, but that of Livery and Seisin, which being a Translation of the Feud *coram paribus curtis*, and testified by them, was held an Act of sufficient Notoriety to direct the Lord of whom to demand his Services, and Strangers against whom to commence their Actions; but now

By the 29 *Car.* 2. *c.* 3. *sect.* 1. it is enacted, "That all Leases, Estates, "Interests of Freeholds, or Terms of Years, or any uncertain Interest "of, in, or out of any Messuages, Manors, Lands, Tenements or Here- "ditaments, made or created by Livery and Seisin only, or by Parol, "and not put in Writing, and signed by the Parties so making or cre- "ating the same, or their Agents thereunto lawfully authorized by "Writing, shall have the Force and Effect of Leases or Estates at Will "only, and shall not, either in Law or Equity, be deemed or taken to "have any other or greater Force or Effect; any Consideration for "making any such Parol Leases or Estates, or any former Usage to the "contrary notwithstanding.

"Except Leases not exceeding the Term of three Years from the "making thereof, whereupon the Rent reserved to the Landlord, dur- "ing such Term, shall amount unto two third Parts, at the least, of the "full improved Value of the Thing demised."

Also it is enacted, "That no Leases, Estates or Interests, either of "Freehold or Terms of Years, or any uncertain Interest, not being "Copyhold or customary Interest, of, in, to or out of any Messuages, "Manors, Lands, Tenements or Hereditaments, shall be assigned, "granted or surrendered, unless it be by Deed or Note in Writing, "signed by the Party so assigning, granting or surrendering the same, "or their Agents thereunto lawfully authorized by Writing, or by Act "or Operation of Law."

And it is further enacted, "That no Action shall be brought where- "by to charge any Executor or Administrator, upon any special Pro- "mise to answer Damages out of his own Estate, or whereby to charge "the Defendant upon any special Promise to answer for the Debt, De- "fault or Miscarriages of another Person; or to charge any Person upon "any Agreement made upon Consideration of Marriage, or upon any "Contract or Sale of Lands, Tenements or Hereditaments, or any In- "terest in or concerning them; or upon any Agreement that is not to "be performed within the Space of one Year from the making thereof, "unless the Agreement upon which such Action shall be brought, or "such *Memorandum* or Note thereof, shall be in Writing, signed by the "Party to be charged therewith, or some other Person by him thereunto "lawfully authorised."

Par. 7. it is enacted, "That all Declarations or Creations of Trusts, "or Confidences of any Lands, Tenements or Hereditaments, shall be "manifested and proved by some Writing signed by the Party who is "by Law enabled to declare such Trust."

"Provided that where any Conveyance shall be made of any Lands "or Tenements, by which a Trust or Confidence shall or may arise, or "result by the Implication or Construction of Law, or be transferred "or extinguished by an Act or Operation of Law, then, and in every "such Case, such Trust or Confidence shall be of the like Force and "Effect as the same would have been if this Statute had not been made."

"*Par.*

* "*Par.* 17. it is enacted, That no Contract for the Sale of any Goods, "Wares and Merchandizes for the Price of ten Pounds *Sterling*, or up- "wards, ſhall be allowed to be good, except the Buyer ſhall accept Part "of the Goods ſo ſold, and actually receive the ſame, or give ſomething "in Earneſt to bind the Bargain, or in Part of Payment; or that ſome "Note or Memorandum in Writing of the ſaid Bargain be made and "ſigned by the Parties to be charged, or their Agents thereunto law- "fully authorized." * Page 73

In the Conſtruction of this Statute, the following Points have been reſolved:

That if there be a Parol Agreement for the Purchaſe of Lands, and a Bill brought for a ſpecific Execution thereof, and the Subſtance of the Agreement ſet forth in the Bill, and Confeſſed by the Defendant's Anſwer, that in ſuch Caſe the Court will decree a ſpecific Execution, becauſe there is no Danger of Perjury, which was the principal Thing the Statute intended to prevent. Abr. Eq. 19. pl. 3. Gilb. Eq. Rep. 35. Prec. Chan. 208, 374. Vern. 151, 159. 2 Vern. 238, 373. Gilb. Hiſt. Chan. 237, 238.

Alſo a Parol Agreement which is intended to be reduced in Writing, but prevented by Fraud, may be decreed in Equity; as if upon a Marriage-Treaty Inſtructions are given by the Huſband to draw a Settlement, and by him privately countermanded, and afterwards he draws in the Woman by Perſuaſions and Aſſurances of ſuch Settlement to marry him. Abr. Eq. 19. pl. 4. 20. pl. 5. Prec. Ch. 526. Will. Rep. 618. Caſ. 180. Stra. 236. Gilb. Hiſt. Ch. 244. Eq. Abr. 19. pl. 4.

So where a Parol Agreement was concerning the Lending of Money on a Mortgage, and the Conveyance propoſed was an abſolute Deed from the Mortgagor, and a Deed of Defeaſance from the Mortgagee, and after the Mortgagee had got the Deed of Conveyance, he refuſed to execute the Defeaſance, yet it was decreed againſt him on the Point of Fraud. Abr. Eq. 20

So where the Defendant on a Treaty of Marriage for his Daughter with the Plaintiff, ſigned a Writing comprizing the Terms of the Agreement, and afterwards deſigning to elude the Force thereof, and get looſe from his Agreement, ordered his Daughter to put on a good Humour and get the Plaintiff to deliver up that Writing, and then marry him, which ſhe accordingly did, and the Defendant ſtood by at a Corner of the Street to ſee them go by to be married; and the Plaintiff was relieved on the Point of Fraud. Abr. Eq. 20. 2 Vern. 378. S. C.

On a Bill exhibited for a Marriage Portion, the chief Evidence to ſupport it was a Letter proved to have been written by the Father's Direction, wherein it was ſaid he would give 1500*l.* Portion with his Daughter, and that he was afterwards privy to the Marriage, and conſented to it, and the Portion was decreed the Huſband. 2 Vern. 322. Where a Letter from the Father, promiſing a Portion, and a Marriage had in Purſuance thereof, has been held ſufficient, *vide* 2 Vent. 361. 2 Vern. 110, 200. Preced. in Chan. 561. Where an Uncle in his Letter promiſed his Niece 1000*l.* Portion; but in the ſame Letter diſſuaded her from marrying the Perſon; and my Lord Chancellor would not decree the Payment, but left the Party to his Action at Law. 2 Vern. 202.

But where on a Marriage-Treaty the Lady's Father propoſed to give 4500*l.* Portion, and the Huſband was to ſettle 4 or 500*l. per Ann.* for a Jointure; the Father and intended Huſband went to Mr. *Minſhul*'s Chambers, who hearing the Propoſals on both Sides took down Minutes or Heads thereof in Writing, and the ſame Day gave them to his Clerk to draw a Settlement according to the Terms of the Agreement; the next Day the Father fell ſick ſuddenly, and died in two Hours after, and the next Morning the Marriage was conſummated; and on a Bill brought to have a ſpecific Performance of the Agreement, my Lord Chancellor decreed it to be within the Statute of *Frauds*, and ſaid he new no Caſe Abr. Eq. 21. Bawdes and Amhurſt.

where

where an Agreement, though wrote by the Party himſelf, ſhould bind, if * not ſigned or in Part executed by him; and that thoſe preparatory Heads might have received ſeveral Alterations or Additions, or the Agreement might have entirely broke off upon ſome further Enquiry of the Party's Circumſtances; and this Decree was thought very juſt by the Bar, who all agreed with my Lord Chancellor, that if the Marriage had been on the Foot of this Writing, and the Father had been privy and conſenting to it, that he ſhould afterwards have been obliged to execute his Part thereof.

* Page 74

25 Jan. 1724. On Plea and Demurrer, adjudged between Sanſum and Butter.

On the Marriage of the Plaintiff with the Defendant's Daughter, the Defendant promiſed to give her 450*l.* Portion, and accordingly paid the Plaintiff 200*l.* in Part, but took a Bond from him for it till a ſuitable Settlement ſhould be made, and the Defendant himſelf gave particular Directions concerning the Settlement, which was drawn accordingly and engroſſed; but before it was executed the Plaintiff's Wife died, and the Bill was brought to have the 200*l.* Bond delivered up, and the remaining 250*l.* paid; the Defendant pleaded the Statute of *Frauds* and *Perjuries*, the Agreement not being reduced into Writing and ſigned by the Parties; and by Way of Anſwer denied that the 200*l.* was paid in Part of the Portion, but ſaid it was lent the Plaintiff, and the Bond given for it; and the Plea was allowed; for if the Marriage ſhould be looked upon as an Execution of the Agreement on the one Side, ſo as to take it out of the Statute, it would entirely evade it; for all Promiſes of this Kind ſuppoſe a Marriage either already had or to be had.

Vern. 151, 159. Vern. 363. 2 Vern. 455. Vern. 210, 220, 472. 2 Vern. 627. Vern. 240. 2 Chan. Ca. 135. Stra. 426. Gilb. Hiſt. Chan. 239.

There are ſeveral Caſes in which it has been held, that a Parol Agreement in Part executed ſhall be performed in the Whole; but as thoſe Caſes are not exactly ſtated or well reported, it will be ſufficient to mention what ſeems to be the Senſe of them, and what with any Juſtneſs can be collected from them, That if an Agreement be made concerning Lands, tho' not in Writing, and the Party by whom it was made receives All or Part of the Money, Equity will compel a ſpecific Performance of the Whole Agreement; becauſe this is out of the Statute, which deſigned to defeat ſuch Agreements only, no Part whereof was carried into Execution, and ſet up merely by Parol; for that was the Occaſion of *Frauds* and *Perjuries*, that Perſons uſed to impoſe verbal Agreements upon others, and by ſuch falſe Oaths charge the Parties in Equity to perform ſuch Agreements, tho' they had never been made, and therefore the mere Parol Proof of ſuch Agreements concerning Lands cannot be admitted in a Court of Equity; but where the Price is paid, there it doth not ſtand upon the Parol Proof of the Agreement only, but upon the Execution of Part of the Agreement, which is Evidence that the Agreement was really made; and therefore there is the ſame Reaſon that the Plaintiff in Equity ſhould have the Land for his (*a*) Money, as it is that he ſhould deliver the Goods where he hath received the Money; but the Doubt in theſe Caſes is what ſhall be a Proof of the Receipt of the Money. Thus far it ſeems certain, that if the Defendant in his Anſwer confeſſeth the Receipt of the Money for that Purpoſe in the Bill, or if he denies the Money, and it be proved upon him by Writing, as by Letter under his Hand, or other written Evidence, he ſhall be obliged ſpecifically to perform the whole Agreement, becauſe he hath carried Part into Execution; but if the Defendant confeſſes the Receipt of the Money, but ſays that he borrowed it from the Plaintiff, and that he had it not in Execution of that Agreement, there he turns the Proof of the Agreement upon the Plaintiff, and then the Plaintiff muſt prove the Receipt of the Money by the Defendant, for the Purpoſe in the Bill, by ſome (*b*) written Agreement.

(*a*) That giving a Guinea, &c. will not bind a Bargain of Lands, tho' it will of Goods. Preced. in Chan. 560.

(*b*) For a Parol Evidence, as to the Receipt of the Money, ſeems to be as much excluded by the Statute, as Parol Evidence relating to the Agreement; *tamen Quære*, Whether Parol Evidence may not properly be applied to the Act of *Receiving*, tho' not to the Act of *Contracting*. 2 Chan. Ca. 36. Gilb. Hiſt. Chan. 231.

If

* If a Man, on a Promiſe of a Leaſe to be made to him, lays out Money on Improvements, he ſhall oblige the Leſſor afterwards to execute the Leaſe, being executed on the Part of the Leſſee, and the Leſſor ſhall not be allowed to take Advantage of his own Fraud, and run away with the Improvements made by another; but if no ſuch Expence had been on the Leſſee's Part, a bare Promiſe of a Leaſe, tho' accompanied with Poſſeſſion, would be within the Statute of *Frauds*.

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So Leſſee obliged where poſſeſſed ſix Years. 2 Stra. 783. Preced. in Chan. 561. Vern. 159. *Vide* Preced. in Chan. 519.

One that could read made an Agreement for a Leaſe of twenty-one Years; the Leſſor himſelf drew the Leaſe but for one Year, and yet read it for twenty-one Years, and after the Expiration of the Year ejected the Leſſee; on a Bill brought to be relieved upon this Matter, which was proved, the Court held it to be within the Statute of *Frauds* and *Perjuries*, and diſmiſſed the Bill with Coſts, it being the Plaintiff's own Folly, being able to read; *ſecus* if he had been unlettered. Skin. 159. pl. 6.

If a Man purchaſes Lands in another's Name, and pays the Money, it will be a Truſt for him that paid the Money, though there be no Deed executed declaring the Truſt thereof; for the Statute of *Frauds* and *Perjuries* extends not to Truſts raiſed by Operation of Law. 2 Vent. 361. Vern. 366. S. P. where it is ſaid that the Proof muſt be very clear, that he paid the Purchaſe Money; but for this *vide* Head of *Evidence*.

Alſo the following Points have been reſolved in the Common Law Courts, on the ſeveral Branches of the above-mentioned Statute.

1. That the Clauſe which enacts, that no Action ſhall be brought, &c. to charge an Executor, &c. that this extends not to Promiſes made before, though to be performed after the making of the Statute; for it would be againſt natural Juſtice, that a Promiſe made upon good Conſideration ſhould be deſtroyed by the Retroſpect of a Law which none could divine would be made. 2 Jones 108. Gilmore & Shutter. Vent. 330. 2 Mod. 310. 2 Lev. 227. 2 Show. Rep. 16. S. C.

2. That the Plaintiff in his Declaration need not ſhew any Note in Writing, but it will be ſufficient for him to produce it on the Trial; but if ſuch Promiſe is pleaded in Bar of another Action, it muſt be ſhewn to be in Writing, ſo that it may appear to the Court to be ſuch a Promiſe upon which an Action will lie. Raym. 450, 451. 2 Jones 158. S. C.

3. That the Clauſe relating to Marriage extends as well to a Promiſe to marry, as to the Payment of Marriage-Portions. 3 Lev. 65. *vide* Skin. 196. which ſeems *cont.* and Ld. Raym. 387. 2 Eq. Abr. 248. and Str. 34. are expreſs, that a Parol Promiſe of Marriage is good*.

* Actions are daily brought and ſupported for Non-performance of Marriage Promiſes; the Promiſes between the Parties to marry being mutual.

4. That the Clauſe which ſays, *That no Action ſhall be brought upon any Agreement that is not to be performed within the Space of one Year from the making thereof, unleſs it be in Writing*, extends not to a Parol Promiſe made to pay ſo much Money upon the Return of ſuch a Ship, which Ship happened not to return within two Years after the Promiſe made; for the Ship by Poſſibility might have returned within the Year; and the Clauſe extends only to ſuch Promiſes where, by the expreſs Appointment of the Party, the Thing itſelf is not to be performed within a Year. Salk. 280. and Stra. 506. Agreed by all the Judges, on a Caſe put by Treby Ch. Juſt. Skin. 326.

5. On the Clauſe, *That no Action ſhall be brought on a ſpecial Promiſe, to anſwer for the Debt, Default &c. of another*, it has been reſolved that if *A.* is about hiring a Horſe from *B.* and *C.* to encourage him to lend the Horſe, promiſes that *A.* ſhould deliver him ſafe; this is a collateral Promiſe, and an Undertaking within the Statute; for *C.* ſubjects himſelf pl. 4. 353. pl. 1. S. P. Salk. 27. pl. 15, 28. pl. 17. 6 Mod. 248, 249.

to an Action, on the Breach of the original Contract by *A.* againſt whom *Detinue* lies on the Bailment. So if two come to a Shop, and one of them contracts for Goods, and the Seller does not Care for truſting him, whereupon the other ſays, Let him have them, and I will undertake he ſhall pay you; but if the Promiſe be, I will ſee you paid, or I will be your Paymaſter, it *is otherwiſe. So if *A.* comes to *B.* and tells him, let your Horſe to *J. S.* and I will ſee you paid the Hire; there the Hiring is to *A.* and not to *J. S.* who is conſidered as Servants to *A.* So in all Caſes where the whole Credit is given to the Undertaker, he alone is liable to an Action.

*Page 76 Ld. Raym. 224. 2 Ld. Raym. 1085, 1087. See 12 Mod. 250.

ALIENS.

AN *Alien* is one born in a ſtrange Country and different Society, to which he is preſumed to have a natural and neceſſary Allegiance; and therefore the Policy of our Conſtitution has eſtabliſhed ſeveral Laws relating to ſuch a one; the Reaſons whereof are, that every Man is preſumed to bear Faith and Love to that Prince and Country where firſt he received Protection during his Infancy; and that one Prince might not ſettle Spies in another's Country; but chiefly that the Rents and Revenues of one Country might not be drawn to the Subjects of another.

7 Co. 18. Vent. 427. Molloy 368. Some have thought that the Laws againſt Aliens were introduced in the Time of H. 2.

When a Law was made at the Parliament of *Wallingford*, for the Expulſion of Strangers, in order to draw away the *Flemings* and *Picards*, introduced into the Kingdom by the Wars of King *Stephen*. Daniel 67. Others have thought that the Original of this Law was far more ancient; and that it is an original Branch of the Feudal Law; for by that Law no Man can purchaſe any Lands, but he muſt be obliged to Fealty to the Lords of whom the Lands are holden; ſo that an Alien, that owed a previous Faith to another Prince, could not take an Oath of Fidelity in another Sovereign's Dominions. Spel. Tit. *Ligantia*, 368. Cuſtumer. c. 43. We find it uſed among the *Romans*, and only the *Cives Romani* were eſteemed Freemen among them. Afterwards, when there Territories increaſed, all the *Italians* were made free, under the Name of *Latines*, only they had not the Privilege of wearing Gold Rings, which was altered by *Juſtinian*; and as the Empire increaſed, ſo all born within the Pale of the Empire were Citizens, *in orbe Romano qui ſunt ex conſtitutione Imperatoris Antonini cives Romani effecti ſunt. Vicinius* 27. *Dig. Lib.* 1. *Tit.* 5. *Fo.* 16. Lord Chief Juſtice *Hale* ſays, That the Law of *England* rather contracts than extends the Diſability of Aliens, becauſe the ſhutting out of Aliens tends to the Loſs of People, which laboriouſly employed are the true Riches of any Country. Vent. 427.

We ſhall under this Head conſider,

(A) Who are Aliens, and this either by the Common Law, or by Statute. 77.

(B) Of Naturalization and Denization, the Difference and Effect of them. 79.

(C) Of the Diſadvantage that Aliens lie under by our Law; and herein of their Incapacity to purchaſe or inherit, and of the King's Title to ſuch Purchaſes. 80.

(D) What Actions Aliens may maintain; and therein of the Difference between an Alien Friend

Friend and one whose King is at Enmity with ours. 83.
(E) Of pleading Alienage. 84.

*(A) Who are Aliens, and this either by the Common Law, or by Statute.

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ALL those are natural-born Subjects whose Parents, at the Time of their Birth, were under the actual Obedience of our King, and whose Place of Birth was within his Dominions. 7 Co. 18. a. In Calvin's Case, those which were born in *Normandy, Gascoign, &c.* while under actual Obedience to the Kings of *England*, were Subjects born. 7 Co. 20. b. Vaugh. 270. S. P. And this by the Statute 42 *Ed.* 3. *c.* 10. is declared to have been the Common Law; but those born there now are Aliens, those Places not being in the actual Possession of our King. 7 Co. 18. a.

If one of the King's Ambassadors in a foreign Country hath Issue there by his Wife, being an *English* Woman, by the Common Law they are natural-born Subjects. 7 Co. 18. a.

If the King of *England* makes a new Conquest, the Persons there born are his Subjects; but if it be retaken from him again, the Persons there born afterwards are Aliens. Dyer 224. Vaugh. 281, 282.

One born in *Ireland*, (*a*) *Scotland*, *Wales*, or any of the King's Plantations, is a natural Subject of *England*, because his natural Allegiance is due to the King of *England* at his Birth; and that Faith and Allegiance is every where due within the King's Dominions. Vaugh. 279, 301. 7 Co. 1. to 28. Molloy 375.

(*a*) The *Antenati*, or those born in *Scotland* before the Descent of the *English* Crown to King *James* I. are Aliens; for the Uniting the Kingdoms by a subsequent Descent cannot make them Subjects of that Crown to which they were born Aliens; but the *Festnati*, or such which were born after, are not Aliens: for being born within the Allegiance, and under the Protection of the King of *England*, they are his natural Subjects, and not Aliens. 7 Co. 1. to 28. *Calvin*'s Case adjudged, with the Reasons at large.

If Aliens come as Enemies into the Realm, and possess themselves of a Town or Fort, and one of them has Issue born here, this Issue is an Alien; for it is not *Cælum* nor *Solum* that makes a Subject, but the being born within the Allegiance, and under the Protection of the King. 7 Co. 18. a.

Those born on the *English* Seas are not Aliens. Molloy 370.

"By a Statute 25 *Ed.* 3. *De natis ultra mare*, it is declared, That the "King's Children, wherever born, ought to inherit; and that all Chil- "dren Inheritors, which from henceforth shall be born without the Li- "geance of the King, whose Fathers and Mothers, at the Time of their "Birth, be and shall be of the Faith and Allegiance of the King of *En-* "*gland*, shall have and enjoy the same Benefits and Advantages to have "and bear the Inheritance within the same Ligeance as other Inheritors "aforesaid, in Time to come, so always that the Mothers of such Children "do pass the Sea by the Licence and Wills of their Husbands." 25 Ed. 3. st. 2.

If an *English* Merchant goes beyond Sea, and takes an Alien Wife, the Issue shall inherit him; so it is if an *English* Woman goes beyond Sea Cro. Car. 601, 602.

Bacon *vers.* Bacon, adjudged. Lit. Rep. 22, 24. S. C. Sid. 198. S. C. cited. Vent, 427. S. C. cited. 4 Term Rep. 300: but it was held, that if Baron and Feme *English* go beyond Sea without Licence, or stay there beyond the Time limited by the Licence, and have Issue, that such Issue is an Alien, and not Inheritable. Cro. Eliz. 3. Hyde *versus* Hill; *tamen Quære*, & *vide* Lit. Rep. 27. and Bro. Tit. Denizen 6.*

* This is not now Law, *vide post* 78. and now by 11 and 12 W. 3. c. 6. and 25 Geo. 2. c. 39. Natural Subjects may inherit and make their Title by Ancestors born beyond Sea. By the last Statute the Heir must be in Being and capable to take at the Death of the Person who last dies seized. And a Descent cast upon a Daughter shall be divested in Favour of an after-born Son, &c. The first Statute relates to every Person born within any of the King's Dominions.

and takes an Alien Huſband, the Children there born ſhall inherit her; for tho' the Statute be in the Conjunctive, yet it hath been conſtrued in the Disjunctive to hinder this Diſability; and the Word *and* being taken inſtead of *or*, as ſometimes it is, it being not reaſonable that the Child ſhould not inherit the Parent that is of Ability, for the Defect of the other that is not.

* Page 78 Dyer 224. in Margine.

* Huſband and Wife dwelling in *Calais*, when it was taken by the *French*, fled into *Flanders*, where the Wife was delivered of a Son; the Iſſue adjudged a Denizen, becauſe his Parents were born in *Calais*, then reckoned Part of the King's Dominions, and becauſe he himſelf was begotten there, though to avoid the Rage of Enemies born in another Prince's Territories.

7 An. c. 5.

" By the 7 *Ann. cap.* 5. *ſect.* 3. it is enacted, that the Children of all " natural-born Subjects, born out of the Ligeance of her Majeſty, her " Heirs and Succeſſors, ſhall be deemed, judged and taken to be natural-born Subjects of this Kingdom, to all Intents, Conſtructions and " Purpoſes whatſoever.

4 Geo. 2. c. 21.

" By the 4 *Geo.* 2. *cap.* 21. the above Clauſe is confirmed with the " following Proviſo, That it ſhall not extend to any Children, ſo as to " make them natural-born Subjects of *Great Britain*, whoſe Fathers, at " the Time of the Birth of ſuch Children reſpectively, were or ſhall be " attainted of High Treaſon, by Judgment, Outlawry or otherwiſe, " either in this Kingdom or in *Ireland*, or whoſe Fathers at the Time of " the Birth of ſuch Children reſpectively, by any Law or Laws made in " this Kingdom, or in *Ireland*, were or ſhall be liable to the Penalties " of High Treaſon or Felony, in Caſe of their returning into this Kingdom or into *Ireland*, without the Licence of his Majeſty, his Heirs " or Succeſſors, or any of his Majeſty's Royal Predeceſſors, or whoſe " Fathers, at the Time of the Birth of ſuch Children reſpectively, were " or ſhall be in the actual Service of any foreign Prince or State then " in Enmity with the Crown of *England*; but that all ſuch Children " are, were and ſhall be and remain in the ſame State, Plight and Condition, to all Intents, Conſtructions and Purpoſes whatſoever, as they " would have been in, if the ſaid Act of the ſeventh Year of her ſaid " late Majeſty's Reign, or this preſent Act, had never been made; but " out of this Proviſo are excepted (other than the Children of ſuch " Perſons who went out of *Ireland* in Purſuance of the Articles of " *Limerick*) the Child of every ſuch Perſon before deſcribed, who at " any Time between the ſixteenth Day of *November* 1708, and the " twenty-fifth Day of *March* 1731, hath come into *Great Britain* or " *Ireland*, &c. and hath continued to reſide in any of thoſe Places for " the Space of two Years, and during ſuch Reſidence hath profeſſed the " Proteſtant Religion; alſo every Child whoſe Father came into *Great* " *Britain* or *Ireland*, &c. and profeſſed the Proteſtant Religion, and died " there between the Times aforeſaid; alſo every Child whoſe Father " continued in the actual Poſſeſſion of or Receipt of the Rents and Profits of any Lands, &c. for the Space of one whole Year, at any Time " between the aforeſaid Times, or hath *bona fide*, and for valuable Conſideration, ſold, conveyed or ſettled any Lands, &c. in *Great Britain* " or *Ireland*; and any Perſon claiming Title thereto under ſuch Sale, " &c. who hath been or continued in the actual Poſſeſſion or Receipt of " the Rents and Profits thereof, for the Space of ſix Months, between " the Times aforeſaid, then, &c.

5 Geo. 1. c. 27.

" By the 5 *Geo.* 1. *cap.* 27. it is enacted, That if any Manufacturer " or Artificer of or in Wool, Iron, Steel, Braſs, or any other Metal, " Clockmaker, Watchmaker, or any other Artificer or Manufacturer of " *Great Britain*, ſhall at any Time after the firſt Day of *May* 1719, go " into any Country out of his Majeſty's Dominions, there to uſe or exerciſe,

" ercise, or teach any of the said Trades or Manufactories to Foreigners;
" or in Case any of his Majesty's Subjects now being, or who hereafter
" shall be in any such foreign Country out of his Majesty's Dominions
" as aforesaid, and there using or exercising any of the said Trades or
" Manufactories herein before-mentioned, shall not return into this
" Realm within six Months next after Warning shall be given to him
" by the Ambassador, Envoy, Resident, Minister or Consul of the
" Crown of *Great Britain*, in * the Country in which such Artificer * Page 79
" shall be, or by any Person authorized by such Ambassador, &c. or by
" one of his Majesty's Secretaries of State for the Time being, and from
" thenceforth continually inhabit and dwell within this Realm; then
" and in such Case every such Person shall be deemed an Alien."

(B) Of Naturalization and Denization, the Difference and Effect of them.

ALIEN born may become a Subject of *England* two Ways, by Denization and by Naturalization; Denization is the King's Letters Patent, which receives him into the Society as a new Man, and makes him capable to purchase and to (*a*) transmit Lands by Descent, but it doth not make him inheritable to any other Relation; for tho' the King by his Charter may admit him into the Society, yet it cannot alter the Law, which denied him to inherit any Relations; but if he be naturalized by Act of Parliament, then he in all Things inherits like a natural-born Subject, because in an Act of Parliament every Man's Consent is included. 1 Inst. 8. a; 129. a. Palm. 13. Godfrey & Dixon. Cro. Jac. 539. (*a*) His Children born after such Denization shall inherit,

but not those born before, but all the Children of one naturalized shall inherit, as well those born before as after. Co. Lit. 8. Style's Rep. 139.

A Man may be made a Denizen in Tail for Life, Years, or upon Condition; also the King may make a particular Denization, as if he grants to an Alien *quod in quibusdam curiis suis Angliæ Audiatur ut Anglus, & quod non repellatur per illam exceptionem quod est alienigena.* 2 Jones 12. Cro. Jac. 539. Co. Lit. 129. a.

But one cannot be naturalized, either with Limitation for Years, Life or in Tail, or upon Condition, for it is against the Absoluteness, Purity and indebility of Natural Allegiance. Co. Lit. 129. a. 2 Hawk. P.C. 648, 649.

If a Man is naturalized in *Ireland* by the Parliament there, this is no Naturalization as to *England*, for the Parliament of *Ireland* hath no direct or consequential Power of binding *England*; and Naturalization is but a Fiction, which can only bind those that consent to it. 2 Rol. Rep. 95. Carter 185. 2 Keb. 601. 2 Jones 12. 2 Vent. 12.

But a Naturalization in *England* makes a Man a natural-born Subject of *Ireland*. Vaugh. 291. He is here made a natural Subject of the *British* Dominions.

If an Alien be made a Denizen, and the Letters of Denization have a *Proviso* (usual in such Charters) that the Denizen shall do his Liege Homage, and that he shall be obedient, and observe the Laws of this Realm; this *Proviso* is not any Condition, for though he never doth his Liege Homage, nor be obedient to all the Laws of this Realm, yet this will not make the Denization void; for if he doth not observe the Laws, he shall forfeit the Penalties appointed by them. Rol. Abr. 195. Manning's Case. Lane 58. S. C.

" By the 7 *Jac.* 1. *cap.* 2. it is enacted, That no Person or Persons of 7 Ja. 1. c.
" what Quality, Condition or Place soever, being of the Age of eighteen
" Years or above, shall be naturalized or restored in Blood, unless the
" said Person or Persons have received the Sacrament of the Lord's

" Supper

" Supper within one Month before any Bill exhibited for the Purpoſe;
" and alſo ſhall take the Oath of Supremacy and the Oath of Allegiance
" in the Parliament Houſe, before his or her Bill be twice read; which
" Oath the Lord Chancellor, or Lord Keeper, and the Speaker of the
" Houſe of Commons, have Authority to adminiſter."

Molloy 382. A Denizen is not capable of Nobility, nor to ſit in Parliament, for that to have a Power of making Laws, 'tis neceſſary he ſhould be totally received into the Society, which he cannot be without the Conſent of Parliament.

* Page 80 *" By the 12 & 13 *W.* 3. *cap.* 2. it is enacted, That no Perſon born out
" of theſe Kingdoms, (although he be naturalized or made a Denizen)
" except ſuch as are born of *Engliſh* Parents, ſhall be capable to be of
" the Privy Council, or a Member of either Houſe of Parliament, or to
" enjoy any Office or Place of Truſt, either Civil or Military; or to
" have any Grant of Lands, Tenements or Hereditaments from the
" Crown to himſelf, or to any other or others in Truſt for him.

" But this Statute by the 1 *Geo.* 1. *ſtat.* 2. *cap.* 4. is explained, So as
" not to extend to diſable or incapacitate any Perſon, who at or before
" his Majeſty's Acceſſion to the Crown was naturalized, to be of the
" Privy Council, or a Member of either Houſe of Parliament, &c. and
" by this Statute it is enacted, That no Perſon ſhall hereafter be natu-
" ralized, unleſs in the Bill exhibited for that Purpoſe there be a Clauſe,
" or particular Words inſerted, to declare that ſuch Perſon ſhall not
" thereby be enabled to be of the Privy Council, or a Member of either
" Houſe of Parliament; or to take any Office or Place of Truſt either
" Civil or Military, or to have any Grant of Lands, Tenements or He-
" reditaments from the Crown, to himſelf, or any other in Truſt for
" him; and that no Bill of Naturalization ſhall hereafter be received
" in either Houſe of Parliament, unleſs ſuch Clauſe or Words be firſt
" inſerted or contained therein."

(C) Of the Diſadvantages that Aliens lie under; and herein of their Incapacity to purchaſe or inherit, and of the King's Title to ſuch Purchaſes.

Vaugh. 227, 291. 7 Co. 16. Dyer 2. pl. 8. He ſhall take nothing by Deſcent, Curteſy, Dower or Guardianſhip. Vent. 417. Molloy 464. But he may take the Eſtate though he is not capable of holding it; therefore if in Tail, he may ſuffer a Recovery, and dock the Remainders. Co. Lit. 2. b. 2 Rol. Rep. 321. Goldſb. 102. 4 Leon. 82. Bro. Tit. Denizen and Alien 17.

AN Alien cannot purchaſe or inherit any Lands in *England*; and the Reaſon is, becauſe every Perſon is preſumed to have a natural and neceſſary Allegiance to that Society that firſt protected and preſerved him, and therefore he cannot pay any Allegiance to any other Society, unleſs he be afterwards received into it.

Sid. 193, 198. Vent. 413 to 429. Collingwood v. Pace. Hard. 224. Co. Lit. 8. *a.*

And as an Alien cannot inherit himſelf, ſo he cannot be inherited; the Grandfather born in *England*, the Son an Alien, the Grandſon born in *England*, the Grandſon ſhall not inherit the Grandfather, becauſe he muſt then repreſent the Father, who cannot be repreſented; but if the Father be an Alien, and two Brothers born in *England*, they may inherit each other, becauſe the Deſcent is immediate, and they don't take by Repreſentation of the Father.

If

If the eldeſt Son be an Alien, the younger Brother born in *England* ſhall inherit the Father; otherwiſe it were if the eldeſt Son were attainted, becauſe the eldeſt Son and all his Deſcendants are before the younger Brother, and the younger Brother cannot inherit before that Line is extinct; and it is a foreign Preſumption, to ſuppoſe that any of that Line ſhould come over and have Children in *England*: but the Perſon attainted is ſuppoſed to have all his Children reſiding in the Kingdom under the King's Allegiance, therefore there is a Line continuing before that of the younger Brother. Vent. 417. 1 Inſt. 8. a. Sid. 195.

For the ſame Reaſon, if an Alien hath four Sons, the two eldeſt Aliens, and the two younger naturalized, and one of the younger Sons purchaſe Lands and dies, the eldeſt Brother having Iſſue born within the *Realm, the younger Brother, and not the Iſſue of the eldeſt, ſhall inherit. Hard. 224. * Page 81.

If an Alien hath a Son Alien, and afterwards is made a Denizen, and hath a ſecond Son, the ſecond Son ſhall inherit, though the eldeſt Son be alive. Cro. Jac. 539. and ſo is 1 Inſt. 8. a. to be underſtood.

If an Alien hath Iſſue two Sons, *A.* born beyond Seas, and *B.* born in *England*, and *A.* is naturalized, he ſhall inherit *B.* Palm. 3. Cro. Jac. 539.

And now by the 11 & 12 *W.* 3. *cap.* 6. it is enacted, "That all and "every Perſon or Perſons, being the King's natural-born Subject or "Subjects, within any of the King's Realms or Dominions, ſhall and "may hereafter lawfully inherit and be inheritable, as Heir or Heirs to "any Honours, Manors, Lands, Tenements or Hereditaments, and "make their Pedigrees and Titles by Deſcent from any of their Anceſ-"tors, lineal or collateral, altho' the Father and Mother, or Fathers or "Mothers, or other Anceſtor of ſuch Perſon or Perſons, by, from, "through or under whom he, ſhe or they ſhall or may make or derive "their Title or Pedigree, were or was, or is or are, or ſhall be born out "of the King's Allegiance, and out of his Majeſty's Realms and Domi-"nions, as freely, fully and effectually to all Intents and Purpoſes, as "if ſuch Father or Mother, or Fathers or Mothers, or other Anceſtor "or Anceſtors, by, from, through or under whom he, ſhe or they ſhall "or may make or derive their Title or Pedigree, had been naturalized, "or natural-born Subjects." Godfrey & Dixon. See 25 G. 2. c. 39. which obviates ſome doubts that may ariſe therein.

If an Alien purchaſes Lands, the King ſhall have it upon Office found, for ſince the Freehold is in the Alien, and he is Tenant to the Lord of whom the Lands are holden, it cannot be diveſted out of him but by ſome notorious Act, by which it may appear that the Freehold is in another; but if an Alien purchaſes Lands and dies, then the Freehold is in the King without Office found, becauſe no Man can take it as Heir to the Alien, therefore the Freehold is caſt upon the King; but if an Alien purchaſe, and afterwards is made a Denizen, and then hath Iſſue, and dies, the Iſſue ſhall inherit till Office found, becauſe there is a Perſon in Being to take as Heir to the Denizen, upon whom the Law caſts the Freehold, which is not to be diveſted out of him without the Solemnity of an Office. Co. Lit. 2. Leon. pl. 61.

If an Alien and a Subject purchaſe Lands to them and their Heirs, the Survivorſhip ſhall take Place till Office found, but the Office found intitles the King, and ſevers the Jointenancy; for the Freehold is in the Alien by the Solemnity of Livery, till it is deveſted out of him by ſolemn Office found; and every Perſon is ſuppoſed a natural-born Subject that is reſident in the Kingdom, and that owes a local Allegiance to the King, till the contrary be found by Office. Cro. Eliz. 123. Croſs and Gayer. Dyer 283. pl. 31. Note, There are two Sorts of Offices, an Office of Intitling, which is under the Great Seal; and an Office of Inſtruction, which is under the Seal of the Exchequer; the Office of Intitling is an Inqueſt, which gives the King a Title, as here in the Caſe of Aliens, &c. 5 Co. 52. *Page's* Caſe. See Gilb. Hiſt. View of the Exchequer, 132, 133 134. Gilb. Hiſt. Chan. 12.

If

Rol. Abr. 194. Allen 14. Stile 20, 21, 41, 76.

If an Alien purchaſes a Copyhold in Fee in the Name of *J. S.* in Truſt for him and his heirs, tho' it be found that the Copyhold was in Truſt for the Alien, and that *J. S.* had the legal Eſtate, yet the King muſt ſue in Chancery to have the Truſt executed for his Benefit.

An Alien cannot purchaſe a Leaſe for Years of Lands, but he may, if he be (*a*) a Merchant, take a Leaſe of a Houſe for his Habitation, for Years only, and this is for the Encouragement of Commerce; for if an Alien trade he muſt have an Abode among us; but if he (*b*) depart the Kingdom, or die, it goes to the King, not to his Executors or Adminiſtrators; becauſe it was only a perſonal Privilege annexed to the Alien, as a Merchant, for the Encouragement of Commerce, and con-
* Page 82 *ſequently muſt expire with him, without going to his Executors or
(*a*) Poph. 36. Co. Lit. 2. b. Adminiſtrators.

Rol. Abr. 194. muſt be a Merchant. (*b*) Not if he goes beyound Sea, and leaves Servants in his Houſe during his Abſence. Dyer 2. b.

But by the 32 *H.* 8. *cap.* 16. *Paragr.* 13. it is enacted "That all Leaſes "of any Dwelling-houſe or Shop within this Realm, or any of the King's "Dominions, made to any Stranger Artificer, or Handycraftman born "out of the King's Obeiſance, not being Denizen, ſhall be void, and "of no Effect; and the Perſon ſo taking ſuch Leaſe forfeits 100*l.* and "the Perſon letting 100*l.* more; one Moiety to the King, and the "other to him that will ſue for the ſame."

Sand. 1, to 10. Sid. 308. S. C. 2 Keb. 102. 116. S. C. 2 Show. Rep. 135. S. C. cited and agreed to be good Law.

Upon this Statute the Caſe was, An Action of Debt was brought upon an Obligation, and upon *Oyer* demanded of the Condition, it was recited, and it referred to Indentures, which Indentures were likewiſe recited *in hæc verba*; the Indentures were upon a Leaſe of a Houſe in *Weſtminſter*, reſerving Rent with Covenants, &c. the Defendant pleaded 32 *H.* 8. *cap.* 16. and that he was an Alien, &c. and ſo would avoid the Leaſe and the Rent, and all the Security; divers Exceptions were taken to this Plea. 1. He has not ſaid where he was an Artificer, but this was over-ruled; for it is a perſonal Quality, and ſhall follow the Perſon, and is univerſal. 2. The Defendant ought to have ſet forth and pleaded the Indenture; but *per Cur'*, ſince the Plaintiff has brought it into Court, as muſt be intended, and ſet it forth, the Defendant may plead upon it without ſetting it forth again. 3. The Plea is, that *Indentura predicta vacua exiſtit*, and this was likewiſe over-ruled; for the Law is, that the Indenture and Bond make but one Security, and if the Covenant be releaſed before Breach, the Bond will ſignify nothing. 4. This appears to be a Meſſuage or Tenement, but he has not averred it to be a Manſion-houſe or Shop, according to the Statute; and upon this Point the Court at firſt were divided. *Keyling* held, that *Meſſuagium* is *Manſum, & quod clare conſtat non debet verificare. Morton:* Though *Meſſuagium* be a Word of Art, and may be applied to other Things by a large Senſe, as to a Barn or Chapel; yet in Propriety it is a Manſion-houſe, and ſhall be intended ſo. *Twiſden* and *Wyndham*, that it ought to have been averred; for he muſt bring himſelf preciſely within the Statute, eſpecially in ſuch a Caſe as this, where he would avoid his own Contract; but afterwards the Defendant had Judgment.

2 Show. Rep. 135. Pilkington *v.* Peach, but no Judgment.

A ſpecial Verdict found, that the Plaintiff made a Leaſe of a Houſe to the Defendant, who was found to be an Alien Artificer, and that this Leaſe was made by Indenture between the Plaintiff and Defendant, and that there was no other Security or Promiſe made by the Defendant; and that the Defendant entered, and enjoyed ſo long, for which the Plaintiff brought a *Quantum meruit*; to which the Defendant pleaded *Non aſſumpſit*; and the Matter being found *ut ſupra*, the Court held, that an *Aſſumpſit* would not lie. 1. Becauſe this (*c*) would evade the

(*c*) But *per Cur'*, There are other Ways to evade it; as to make an Agreement for as long as you and I pleaſe, at the Rate of 20*l. per Ann.* for an *Aſſumpſit* will lie thereon; or, you ſhall have my Houſe for ſo long as you and I pleaſe, for ſo much as it is worth.

Statute.

Statute. 2. A Promiſe in Law (*a*) never takes Place where there is an actual Agreement.

(*a*) No ſuch Thing 6 Mod. 131. 3 Mod. 94. Hil. 1 Jac. 2. Bridgham & Frontee. 9 Mod. 104. LordRaym. 283, 853. 10 Mod. 91, 94, 116, 120, 122, 136.

Debt upon an Obligation for Performance of Covenants in a Leaſe of a Houſe, *&c.* the Defendant pleaded the Statute of 32 *H.* 8. *cap.* 16. and ſets forth that he was a Vintner, and Alien Artificer; and upon Demurrer it was inſiſted upon for him, that a Vinter is as much an Artificer, and within the Meaning of the Statute, as a Mercer, Draper, or Grocer. Ch. Juſt. This ſtatute refers to another made 1 *R.* 3. *cap.* 9. *which prohibits Alien Artificers to exerciſe any Handicraft in* England, *unleſs as Servant to a Subject ſkilful in the ſame Art, upon Pain of Forfeiture of his Goods*; now the Myſtery of a Vintner chiefly conſiſts in Mingling of Wines, and that is not properly an Art, but a Cheat; ſo the Plaintiff had Judgment.

*If a Woman Alien, be ſhe Friend or Enemy, marry a Subject, ſhe ſhall not be endowed, becauſe by the Policy of the Common Law, all Aliens are diſabled from acquiring any Freehold amongſt us; alſo Dower is an Eſtate created by Act of Law, and therefore the Law, which *nil fruſtra agit*, ſhall not transfer an Eſtate to one who cannot keep it, but muſt immediately, in Reſpect of her legal Diſability, give Title to another; and there is a Diverſity between ſuch Acts of Law and the Acts of the Party himſelf; as if an Alien makes an actual Purchaſe, *&c.* ſo Aliens ſhall not be Tenants by the Courteſy, by the ſame Reaſon.

*Page 83.

7 Co. 25. Co. Lit. 31. a.

Vent. 417. But by the Law of the Crown, if the King, marry an Alien ſhe ſhall be endowed, becauſe Princes cannot marry according to their Dignity unleſs to Perſons abroad; and now by a ſpecial Act of Parliament, not printed, 8 *H.* 5, 12, 15. Women Aliens who marry with the King's Licence, to *Engliſhmen*, ſhall be endowed; ſo of *Engliſh* Women who marry Aliens by the ſame Licence: But this latter Part can only be meant where the Alien Huſbands are after made Denizens, that their Wives ſhall have Dower of Lands purchaſed before; for otherwiſe they, having no Capacity at all to hold any Lands of any Eſtate of Freehold, can derive no Title of Freehold to their Wives, and this Act never intended to put them in a better Condition for that Purpoſe than they were before; but it muſt be intended of Land purchaſed before their Denization; ſince as to Land purchaſed after, they would not want the Aſſiſtance of an Act of Parliament, being by the Common Law dowable of theſe. Rol. Abr. 675. If one marries a Woman Alien without ſuch Licence, and then ſells his Lands, and after the Wife is made a Denizen, ſhe ſhall not be endowed, becauſe her Capacity began by the Denization, and ſhe was before abſolutely diſabled to hold any Land; but if this Marriage were by the King's Licence, then it ſhould ſeem the Wife may be endowed, becauſe being married conformable to that Act, her Title to Dower began preſently, and cannot be defeated by any After-act of the Huſband's, Co. Lit. 33. a. 13 Co. 23.

Aliens ſeem not incapable of Eccleſiaſtical Benefices*, and though this Practice, ſays *Watſon*, has always prevailed, yet, ſays he, it proceeded rather from the Pope's Uſurpation, and a Submiſſion to his pretended Authority in Church Matters, than from any nice Diſtinctions made uſe of between Spiritual and Laymen; that the former would leſs diſcover the Secrets of the Realm, or tranſport the Treaſure thereof to nouriſh the King's enemies, than the latter.

Comp. Incumb. 213, 214. Parſon's Law C. 10. 2 Rol. Abr. 348. 4 Inſt. 338. Cotton. 41.

*Aliens prohibited to take Benefices without the King's Licence. 3 R. 2. c. 3. 7 R. 2. c. 12. 1. H. 5. c. 7.

(D) What Actions Aliens may maintain; and therein of the Difference between an Alien Friend, and one whoſe King is at Enmity with ours.

AN Alien Friend may have perſonal Actions, but not real; an Alien Enemy ſhall have neither real, perſonal, or mixt Action. The Reaſon why an Alien Friend is allowed to maintain perſonal Actions is, becauſe he would otherwiſe be incapacitated to merchandize, which may be as much

Co. Lit. 129. b. Andr. 25. Dyer 2. b.

much to our Prejudice as his; but as to the allowing of him to maintain real Actions, there is no Reaſon for it, becauſe there is no Neceſſity that he ſhould ſettle amongſt us; an (*a*) Alien Enemy is diſabled, from the Prejudice that may accrue to the King and Kingdom, if he were allowed to maintain any Action.

(*a*) But who ſhall be ſaid an Alien Enemy, and how it ſhall be tried. *vide* 9 Co. 31. a. That it ſhall be tried by the Record in Chancery, whether his Prince is at Peace or Enmity with ours, for every League is of Record; and Cro. El. 142. Owen 45. That open Acts done by his Prince are ſufficient, and that it is not neceſſary that a War be proclaimed: *Turks* and Infidels are not *Perpetui Inimici*, nor is there a particular Enmity between them and us; for the Difference between their Religion and ours does not oblige us to be Enemies to their Perſons. Salk. 46. pl. 2. ſaid to be the Words of L. K. *Littleton*. *Vide* Skin. 167, 204.

Yelv. 198. Tuerlcote & Moriſon. Bulſt. 134. S. C.

A Merchant Stranger ſhall have an Action for ſaying he is a Bankrupt, for by Law he may have perſonal Actions, and theſe Words tend to impair his Credit in his Trade.

*Page 84. 11 Ed. 3. Kot. 87. Dyer 2. b. in Margine.

*An Alien Friend, Merchant, may upon a Statute extend Lands, and upon Office the King ſhall not have them, and upon Ouſter he ſhall have an Aſſize; for the main End and Deſign of both the Statute-ſtaple and Merchant, was to promote and encourage Trade, by providing a ſure and ſpeedy Remedy for Merchant Strangers, as well as Natives, to recover their Debts at the Day aſſigned for Payment.

Co. Lit. 129. a. b. Palm. 13. S. P. Molloy 270. S. P.

An Abbot, Prior, or Prioreſs Alien, ſhall have Action real, perſonal or mixt, for any Thing concerning the Poſſeſſions or Goods of his Monaſtery here in *England*, becauſe he ſues in his corporate Capacity, and not in his own Right, to carry the Effects out of the Kingdom.

Cro. Car. 8. Sir Upwell Caroon's Caſe.

So an Alien Friend may be an Adminiſtrator, and ſhall have Adminiſtration of Leaſes, as well as perſonal Things, becauſe he hath them in another's Right, and not to his own Uſe.

Vent. 417. S. C. cited. Doug. 641 to 650.

Cro. El. 142. Owen 45. Wentworth's Office of Executors 15. Molloy 870. Cro. El. 683. Mo. 431. Carter 49. 191. Skin. 370.

But it has been long doubted, whether an Alien Enemy ſhould maintain an Action as Executor; for on the one Hand it is ſaid, that by the Policy of the Law, Alien Enemies ſhall not be admitted to Actions to recover Effects which may be carried out of the Kingdom, to weaken ourſelves and enrich the Enemy; and therefore public Utility muſt be preferred to private Convenience; but on the other Hand it is ſaid, that theſe Effects of the Teſtator are not forfeited to the King by Way of Repriſal, becauſe that they are not the Alien Enemy's, for he is to recover them for others; and if the Law allows ſuch Alien Enemies to poſſeſs the Effects as well as an Alien Friend, it muſt allow them Power to recover, ſince in that there is no Difference, and by Conſequence he muſt not be diſabled to ſue for them; if it were otherwiſe it would be a Prejudice to the King's Subjects, who could not recover their Debts from the Alien Executor, by his not being able to get in the Aſſets of the Teſtator.

Salk. 46. pl. 1. Wells and Williams. Ld. Raym. 282. Foſt. Cr. Law. 186.

If an Alien Enemy comes here *ſub ſalvo conductu*, he may maintain an Action; ſo if an Alien Amy comes hither in Time of Peace *per Licentiam Domini Regis*, as the *French* Proteſtants did, and lives here *ſub Protectione*, and a War afterwards happens between the two Nations, he may maintain an Action, for ſuing is but a conſequential Right of (*b*) Protection; and therefore an Alien Enemy, that is here in Peace under Protection, may ſue a Bond; *aliter* of one commorant in his own Country.

(*b*) But an Alien Enemy who has ſuch Protection, muſt plead it. Fareſt. 150. Sylveſter's Caſe. Ld. Raym. 283. 853. 2 Stra. 1082.

(E) Of pleading Alienage.

IF one born in *Jerſey*, or elſewhere within the King's Obedience, brings a real Action, and the Tenant pleads that the Demandant is an Alien born under the Obedience of the *French* King, and out of the Legiance of &c. the Demandant may reply, That he was born at ſuch a Place in *England*, within the King's Allegiance, &c. and ſuch hath ever been the Manner of pleading in ſuch Caſe *. Co. Lit. 129. b. 7 Co. 26. 6 Co. 47. 2 Keb. 98. Leon. 78, 79. Carter 50. Raſt. Ent. 605. *quod vid.*

* *Qu.* If the beſt Method would not be, to ſay, born within the King's Obedience, *viz.* at, *&c.* the Venue laid by the Plaintiff in his Declaration.

In an Aſſiſe *Tempore Jac.* 1. the Defendant pleaded that the Plaintiff was born *apud E. infra regnum Scotiæ ac intra Ligeantium dicti Domini Regis Regni ſui Scotiæ, ac extra Ligeantiam dicti Domini Regis Regni ſui Angliæ*; and this was held no good Plea, becauſe it referred Ligeance and Faith to *England*, and not to the King. 7 Co. 1, 9. Lit. Rep. 26.

In Debt on an Obligation, which was for Payment of Rent reſerved by Leaſe for Years; the Defendant pleaded the 32 *H.* 8. *c.* 16. and that he was an Alien Artificer, &c. the Plaintiff replied, That he was no Alien Artificer; but having laid no Place where he was born, the Replication was held bad. Sid. 357. Freeman v. King.

* The Defendant pleaded in Abatement, that the Plaintiff was an Alien Enemy, born in ſuch a Place in *France*; the Plaintiff replied that he is *indigena*, and born at ſuch a Place in the Kingdom of *England, et non alienigena modo et forma prout, &c. et hoc petit quod inquiratur per Patriam*; and upon Demurrer to this Replication it was held to be ill, for that the Plaintiff did not rely upon the firſt Part of it, that he was born in *England*, and ſo conclude with an Averment, that an Iſſue might be taken by the other Side, *viz.* that he was not born in *England*, and that this Matter might be triable by a proper *Viſne*; but here he hath put *Alien* or *not Alien* in Iſſue, *viz. non alienigena modo et forma*, which cannot be tried for want of a *Viſne*; and therefore Judgment was given that the Bill ſhould abate. * Page 85 Carth. 302. Nicholas *ver.* Powlet, *Vide* Raſt. Ent. 252. Hern. 361. But if the Plaintiff had concluded his Replication with an Averment only, the Negative Clauſe, *non alienigena*, had been only Surpluſage, and helped upon a general Demurrer; ſo reſolved, Carth. 265. *Brodeck* v. *Briggs*. *Vide* Comb. 212.

Where Alienage is pleaded in Abatement, and the Plaintiff replies *indigena*, he may either take Iſſue, or conclude *et hoc paratus eſt verificare*; but if in Bar, he muſt take Iſſue; and this is the Reaſon of the Difference in the two Precedents in *Raſtal*. Comb. 394. Forteſc. 222. *per* Holt Ch. Juſt.

If Alienage be pleaded to an Alien in League, it muſt be pleaded in Abatement or Diſability of the Plaintiff; but if it be to an Alien Enemy, it may be pleaded either in Abatement or in Bar to the Action, becauſe it is forfeited to the King as a Repriſal for the Damages committed by the Dominion in Enmity with him (*a*). Bro. Tit. Denizen 3, 19. Co. Lit. 129. Raſt. Ent. 252, 605. Cart. 49. Co. Lit. 129. a. b.

(*a*) Not to be pleaded to a perſonal Action, without alledging the Plaintiff to be an Enemy. 2 Stra. 1082. See 12 Mod. 145.

AMBASSADORS.

(a) Difference between Ambaſſador Ordinary and Extraordinary. Molloy 128. An Agent repreſents the Affairs only, but an Ambaſſador

AN (a) Ambaſſador is a Perſon ſent by one (b) Sovereign Prince to another, to tranſact in the Place of his Sovereign ſuch Matters as relate to both States. As to the Manner of appointing and receiving Public Miniſters, their Duty, Power, and Privileges, &c. being chiefly regulated by the Civil Law, or Law of Nations, I muſt refer to other Books for thoſe Matters, and ſhall here only inſert what ſeems moſt worthy of Notice in our Law Books; obſerving that our Law herein pays the greateſt Regard to Rules preſcribed by the Civil Law and the Law of Nations,

the Grandeur of his Maſter. Molloy 128. (b) By the Law of Nations, none under the Quality of a Sovereign Prince can ſend Ambaſſadors. Molloy 129. And it is ſaid by Lord *Coke*, That there can be no Ambaſſador without Letters of Credence from his Sovereign to another that hath a Sovereign Authority. 4 Inſt. 153. But the Electors and Princes of the Empire ſend or receive Ambaſſadors touching Matters which concern their own Territories. Molloy 129. And ſo the *Hans* Towns, being free Imperial Cities, have the ſame *Regalia* by Preſcription or Grant. Molloy 129. But a King deprived of his Kingdom and Royalty, hath loſt his Right of Legation. Molloy 130. *in Margine.* If ſent from a King or abſolute Potentate, though in his Letters of Credence he is termed an Agent or *Nuncius*, yet he is an Ambaſſador or Legate. 4 Inſt. 153. Ambaſſadors were ſent to the Pope, being a Temporal Prince, and alſo his Ambaſſadors received here, who were ſworn not to attempt any Thing prejudicial to the King or Kingdom. 4 Inſt. 156.

* Page 86

Hob. 78, 113, 114. Don Diego Servienti de Acuna, the Spaniſh Ambaſſador and Sir Richard Bingley.

* An Ambaſſador cannot, as Procurator, exhibit a Bill in our Courts for a certain Number of his fellow Subjects, without an Authority from them; for every Procurator muſt ſue in the Name of the Principal, and cannot be ſuch without his Allowance; nay, the King cannot make a Procurator for all his Subjects, without their Conſent, nor would a Releaſe, Sentence or Diſcharge againſt ſuch a one be a Diſcharge againſt the Principal: Alſo the Office of an Ambaſſador doth not imply a private Procuration, but for the Public, and not for a particular Subject, otherwiſe than it concerns the King and his Miniſters to protect them in foreign Kingdoms in Nature of a Negociation of State; and therefore, though he may proſecute and defend for a private Subject at the Council-Table, which is a Court of State, yet when he comes to ſettled Courts he muſt obſerve the eſſential Parts of their Proceedings.

4 Inſt. 152. Molloy 33. S. C. cited, and ſaid, that Ambaſſadors cannot by

In the Biſhop of *Roſs's* Caſe, *Ann.* 13 *Eliz.* the Queſtion being *an Legatus, qui Rebellionem contra Principem ad quem Legatus concitat, Legati Privilegiis gaudeat, et non ut Hoſtis Pœnis ſubjaceat*, it was reſolved he had loſt the Privilege of an Ambaſſador, and was ſubject to Puniſhment.

the Law of Nations be defended when they act againſt the State or Perſon of the King with whom they reſide; and *vide* 3 Bulſt. 28. and Roll. Rep. 185. in which laſt Book the King's Attorney makes a Difference between a Conſpiracy to kill the King and other Treaſons committed by an Ambaſſador.

4 Inſt. 152. Reſolved in Palache's Caſe by the Ch. Juſt. Maſter of the Rolls, & the Judge of the Admiralty, upon a

If *A.* is ſent as Ambaſſador of the King of *Morocco* to the *States*, and by them accepted as an Agent, and there being War between the King of *Morocco* and the King of *Spain*, the King of *Morocco* makes a Commiſſion to *A.* to take *Spaniards*, and their Goods; and the King of *England* grants him Letters of ſafe Conduct as a Public Miniſter, and the *States* licenſe him to levy Men, to furniſh Ships, &c. and there being a League between *England* and *Spain*, and *England* and the *States*, and War between *Spain* and the *States*, *A.* takes at the *Canaries* a *Spaniſh* Ship laden with Goods, and

and by Streſs of Weather is driven to *Plymouth*, he ſhall not be tried as a (*a*) Pirate here; for by the Law of Nations an Ambaſſador ought to be ſafe and ſure in every Place.

Reference to them by the Lords of the Council upon the Prayer of the *Spaniſh* Ambaſſador, to proceed againſt him as a Pirate upon the Statute 28 H. 8. c. 15. Rol. Rep. 175. S. C. cited. 3 Bulſt. 27, 28. S. C. cited. (*a*) But *per* Rol. Rep. it was agreed by the Civilians, that he ought to proceed *Civiliter* for the Goods, becauſe *in ſolo Amici*; and 3 Bulſt. 29. A Suit being in the Court of Admiralty againſt ſeveral Merchants that had bought Goods, the Civilians held, becauſe they were bought *in ſolo Amici*, Proceeding might be for them in the Court of Admiralty; and it is ſaid, that accordingly the Court denied a prohibition: But *per* 4 Inſt. 154. though this was the Opinion of ſome of the Civilians in *Palache*'s Caſe, yet the contrary had been reſolved, 2 Jac. 1.

If a Man that is baniſhed is ſent Ambaſſador to the Place from which he is baniſhed, he cannot be detained or offended there. 4 Inſt. 153.

A Bill was exhibited in Chancery againſt one, then Ambaſſador at the Court of *Spain*; an Order was obtained, that all Proceedings ſhould ceaſe until his Return from his Embaſſy; and on Motion to diſcharge the Order, it was agreed on Debate, that a Protection lies for an Ambaſſador, *quia Profecturus*, or *quia Moraturus*, and that at Law he may caſt an Eſſoin for a Year and a Day, and may afterwards renew it if Occaſion continues; and the Court ordered the Proceedings to ſtay for a Year and a Day, unleſs the Defendant ſhould ſooner return into *England*. 2 Vern. 317. Pilkington *v* Stanhope. Formerly it was held Treaſon to kill the King's Ambaſſador. *Vide* 3 Inſt. 8. *Vide* Co. Lit. 130.

If a foreign Ambaſſador (being *Pro-Rex*) committeth a Crime which is *contra jus Gentium*, as Treaſon, Felony, Adultery, &c. he loſes the Privilege and Dignity of an Ambaſſador, and may be puniſhed here as any other private Alien, and is not to be remanded to his Sovereign but of Courteſy. 4 Inſt. 153. Molloy 139. Same Rule cited. Rol. Rep. 175. Same Rule agreed by the Civilians. So 3 Bulſt. 28. Hawk. P. C. 35. S. P.

* So upon Contracts which are good *Jure Gentium*, he muſt anſwer. * Page 87

4 Inſt. 153. But in Molloy 141. it is ſaid, that moſt certainly by the Civil Law, his Moveables, which are accounted an Acceſſion to his Perſon, cannot be ſeized on as a Pledge, or for Payment of Debt, tho' by Leave of the King or State where he reſides; for all Coercion ought to be far from an Ambaſſador, as well that which touches his Neceſſaries as his Perſon; if therefore he hath contracted a Debt, he is to be called upon kindly; and if he refuſes Payment, Letters of Requeſt are to go to his Maſter, ſo that the ſame Courſe may be taken with him as with Debtors in another Territory; and Notice is taken of the Opinion of my Lord *Coke*, which ſeems to the contrary; and 3 Bulſt. 28. it is agreed by the Civilians, that the Perſon of an Ambaſſador cannot be arreſted.

But if a Thing be only *malum prohibitum* by Act of Parliament, private Law or Cuſtom of the Realm, and is not *malum in ſe jure Gentium*, *nec contra jus Gentium*, an Ambaſſador reſiding here ſhall not be bound by it. 4 Inſt. 153. Molloy 139. Same Rule cited. Rol. Rep. 175. The ſame Rule agreed by the Civilians.

And now by the 7 *Ann. c.* 12. it is declared, "That all Writs and "Proceſſes that ſhall at any Time be ſued forth or proſecuted, whereby "the Perſon of any Ambaſſador, or other public Miniſter of any for-"eign Prince or State, authorized and received as ſuch by her Majeſty, "her Heirs or Succeſſors, or the Domeſtic (*b*) Servant of any ſuch "Ambaſſador, or other public Miniſter, may be arreſted or impriſoned, "or his or their Goods or Chattels may be diſtrained, ſeized or attach-"ed, ſhall be deemed and adjudged to be utterly null and void. See Forreſter 281.

(*b*) On Motion to ſuperſede a Proceſs on this Statute, the Court held, That it was not neceſſary to ſhew that he actually lived in the Houſe, but that he muſt ſhew the Nature of his Office, that the Court may judge of it; alſo that he is not ſuch a one as comes within the Deſcription of any of the Statutes againſt Bankrupts. Fitzgib. 200. 2 Stra. 797. Ld. Raym. 1524. See 10 Mod. 4, 5. Lord *Manſfield* was clear, that an officiating Land-waiter at the Cuſtom-houſe could never be eſteemed a *bona Fide* Domeſtic of a foreign Miniſter. Bur. Rep. 401.

"Provided

"Provided, That no Merchant or other Trader whatſoever within the "Deſcription of any of the Statutes againſt Bankrupts, who hath or "ſhall put himſelf into the Service of any ſuch Ambaſſador or Public "Miniſter, ſhall have or take any Manner of Benefit; and that no Per-"ſon ſhall be proceeded againſt as having arreſted the Servant of an "Ambaſſador or Public Miniſter, by Virtue of this Act, unleſs the Name of "ſuch Servant be firſt regiſtered in the Office of one of the Principal Se-"cretaries of State, and by ſuch Secretary tranſmitted to the Sheriffs of "*London* and *Middleſex*, for the Time being, or their Under-Sheriffs or "Deputies, who ſhall upon the Receipt thereof hang up the ſame in "ſome public Place in their Offices, whereto all Perſons may reſort and "take Copies thereof without Fee or Reward.

"The Perſons who by ſuing out Writs, &c. violate this Law, which "is declared a public Act, to be puniſhed at the Diſcretion of the two "Chief Juſtices and Lord Chancellor, or any two of them."

Abr. Eq. 350. pl. 4. Goodwin and Archer, Paſch. 1729. 2 Will. Rep. 452. And a like Order

One protected by the *Genoeſe* Ambaſſador brought a Bill in Chancery, and was ordered, though after (*b*) Anſwer put in, to give (*c*) Security to anſwer the Coſts, in the ſame Manner as if he were a Foreigner; becauſe by the above Statute all Proceſſes againſt Ambaſſadors and their Servants are made void; ſo that if the Bill ſhould be diſmiſſed, no Proceſs could iſſue againſt him.

ſaid to be made by my Lord *Cowper*, after Anſwer put in, *Trin.* 1709. between *Barret* and *Buck*.

(*b*) But it has been denied in the *Exchequer*. Bunb. Rep. 183. pl. 258. and ſo it has in that Court, even before Anſwer, where the Bill was for an Injunction to ſtay the Defendant's Proceedings at Law in Ejectment, becauſe the Plaintiff was in a Manner forced into this Court (*viz.* the *Exchequer*) and did not come in originally. Bunb. Rep. 272. pl. 349. If the Motion be before Anſwer, the Defendant will not be obliged to put one in, until the Plaintiff give Bond with a Surety to the Senior Six Clerk not towards the Cauſe in 40*l*. Penalty for anſwering Coſts. 2 *Will.* 452. pl. 142. Moſeley 7. 175. pl. 89. (*c*) A Depoſit in Money will not be permitted inſtead thereof. Bunb. Rep. 35. pl. 53.

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* Amendment and Jeofail.

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* (A) Of Amendments at Common Law.

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AT Common Law there was but little Room for Amendments, which appears by the ſeveral Statutes of *Amendments and Jeofails* and likewiſe by the Conſtitution of the Courts; for ſays *Britton*, the Judges are to record the Parols deduced before them in Judgment; alſo, ſays he, *E.* 1. (*a*) granted to his Juſtices to record the Pleas pleaded before them, but they are not to eraſe their Records, nor amend them, nor record againſt their Inrolment, nor any way ſuffer their Records to be a Warrant to juſtify their own Miſdoings. Britt. 2. 8 Co. 156.

(*a*) This Ordinance of E. 1. was ſo ſtrictly obſerved, that when Ch. Juſt. Ingham, in his Reign, moved with Compaſſion for the Circumſtances of a poor Man who was fined 13s. 4d. eraſed the Record, and made it 6s. 8d. he was fined 800 Marks. 4 Inſt. 255.

Hence it appears, that regularly at Common Law, neither falſe *Latin*, the Omiſſion of a Word, Syllable or Letter, or other Defect or Variance from the approved and legal Forms, were amendable. 9 H. 7. 16. 4 H. 6. 16. 8 Co. 157. 2 Hawk. P. C. 192.

But out of this general Rule there are the following Exceptions. 1. All Miſtakes were amendable the ſame Term, becauſe it is a Roll of that Term, and ſo in the Breaſt of the Court during the whole Term, and then a new Roll might be brought in the Cauſe, and conſequently the ſame Roll may be amended. 8 Co. 157. Blackmores Caſe. Salk. 49. 6 Mod. 274.

That Part of the Count which records the Writ was amendable at Common Law, though of a ſubſequent Term; becauſe the Recording the Writ was Surpluſage, and the Judges were not to record againſt a former Record. 8 Co. 156. *b.* 7 H. 6. 45. *Vide* Cro. Car. 144. Sand. 317.

An Eſſoin, if the Plaintiff's Name were miſtaken, or an Eſſoin was made as Guardian, when there was no Guardian in the Writ, this was amendable at Common Law, becauſe ſuch an Eſſoin was contrary to the Writ, and conſequently an Inrolment of it would contradict a former Writ. 2 H. 4. 4. Fitz. Amendment 7, 61. Bro. Amendment 26.

Continuances could be amended at Common Law; as where *A.* brought a Bill againſt *B.* who vouched *C.* who entered into Warranty, and pleaded to Iſſue a *Venire Facias*, and a *Jurat' inter A.* and *B.* was put in, which *Jurat'* ought to have been between *A.* and *C.* and becauſe it appeared by the Record of the Iſſue, and the Award of the *Venire Facias*, and the *Venire* itſelf, that the *Jurat'* ought to have been between *A.* and *C.* this was amended, otherwiſe it would be an Inrolment againſt a former Record. 8 Co. 156. *b.* Rol. Abr. 899. *Vide* for this Cro. Eliz. 619. Stile. 339. Yelv. 155. 2 Mod. 316. 12 Mod. 8, 684. Stra. 139. 2 Stra. 734. 2 Ld. Raym. 1441. 2 Stra. 947.

In

8 Co. 156. 42 E. 3. 6. *Vide infra* Letter C. (95.)

In the Case of the King the Writ was amendable where the Fault was in the Form, as in a *Quare Impedit* brought by the King, the Writ was *Presentere* instead of *Presentare*; and it was amended; for it could not be intended that the original Institution of the Court was to destroy or lessen the Prerogative of the King.

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* (B) The several Statutes of Amendment and Jeofail.

THE tying down the Courts so strictly not to alter their Records after the first Term was found very inconvenient, and many Judgments were reversed by the Misprision of Clerks, &c. Wherefore it was enacted,

"By 14 *Ed.* 3. *cap.* 6. That by the Misprision of a Clerk in any Place "whereſoever it be, no Process shall be annulled or discontinued by "mistaking in Writing (*a*) one Syllable, or one Letter too much or too "little, but as soon as the Thing is perceived by Challenge of the Par-"ty, or in other Manner, it shall be hastily amended in due Form, "without giving Advantage to the Party that challengeth the same be-"cause of such Mipriſion."

(*a*) The Judges construed this Statute so favourably for the Suitors, that they extended it to a Word. 8 Co. 158. a. But they were not agreed whether they could make these Amendments as well after Judgment as before, 8 Co. 157. b. which occasioned the 9 H. 5. c. 4. by which it is declared, That the Judges shall have the same Power as well after as before Judgment, as long as the Record or Process is before them; and this Statute is confirmed by 4 H. 6. c. 3. with an Exception, that it shall not extend to Process on Outlawry, or to Records or Processes in *Wales*. But according to 2 Sand. 40. this last Exception, and the like Exception in 8 H. 6. c. 15. seem to be annulled by the Statute of 27 H. 8. c. 26. by which it is enacted, That the Laws of *England* shall be used, practised and executed in *Wales*.

8 Co. 157. a. An Original, or other Writ in Nature thereof, not included within the Word Process. 8 Mod. 314. 12 Mod. 31, 53, 104, 523, 567. Ld. Raym. 47, 405, 565. 2 Ld. Raym. 1179, 1284, 1295.

Though these Statutes gave the Judges a greater Power than they had before, yet it was found that they were too much crampt, having Authority to amend nothing but Processes, which they did not construe in a large Signification, so as to comprehend the whole Proceedings, but confined it to the Mesne Process and Jury Process: Wherefore to enlarge the Authority of the Courts.

"By the 8 *H.* 6. *cap.* 12. it is enacted, That for Error assigned in any "Records, Process, or Warrant of Attorney, Original Writ, or Judicial "Panel or Return, by Razing or Interlining, or by Addition, Substrac-"tion, or Diminution of Words, Letters, Titles, &c. no Judgment or "Record shall be reversed or annulled, but the Judges, in any Record, "Process, Word, Plea, Warrant of Attorney, Writ, Panel or Return in "Affirmance of Judgment, may amend all that which to them seems to "be the Misprision of the Clerk, (except Appeals, Indictments of Trea-"son, Felony and Outlawries of the same) and the Substance of the pro-"per Names, Surnames and Additions left out in Originals and Exi-"gents, contrary to the 1 *H.* 5. *c.* 5. and other Writs containing Pro-"clamation, and if certified defective, the Parties in Affirmance of Judg-"ment may alledge the Variance between the Record and Certificate, "and if found and certified it shall be amended.

"By the 8 *H.* 6. *cap.* 15. The Judges in any Records or Processes before "them, by Error or otherways, or in Returns of Sheriffs, Coroners, Bai-"liffs of Franchises, or others, may amend the Misprision of the Clerks "of the Courts, or of the Sheriffs, Coroners, their Clerks and other Offi-"cers whatsoever, in writing a Letter or Syllable too much or too little."

As these Statutes extended only to what the Justices should interpret the Misprision of their Clerks and other Officers, it was found by Experience, that

that many juſt Cauſes were overthrown for Want of Form, not aided by any of the Statutes, though they were good in Subſtance: Wherefore for further Relief of Suitors,

The 32 *H.* 8. *cap.* 30. enacts, "That if (*a*) any Iſſue be (*b*) tried "(*c*) by the Oath of twelve Men, for the (*d*) Party Plaintiff or Demandant, or for the Party Tenant or Defendant, in any Courts of Record, Judgment ſhall be given, any Miſpleading, Lack of Colour, inſufficient Pleading or Jeofail, any Miſcontinuance or (*e*) (*f*) (*g*) (*h*) Diſcontinuance or (*i*) Miſconveying of (*k*) (*l*) Proceſs, Misjoining of the Iſſue, (*m*) Lack of Warrant of Attorney of the Party (*n*) againſt whom the Iſſue ſhall be tried, or othe Negligence of the Parties, their Counſellors or Attornies, and the Judgment ſhall ſtand according to the ſaid Verdict, without Reverſal."

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On this Statute a careful & exact Collector has the following Notes, *vide* Danv. Abr. 352.

(*a*) But yet an Iſſue upon the *vi & armis* is not within the Act; but it muſt be one joined upon the ſpecial Matter alledged. Cro. Jac. 599. and *vide* Sand. 81, 82. (*b*) But if in Replevin the Plaintiff is nonſuit after Evidence, and the Jury aſſeſs Damages for the Avowant, this is no Trial within the Act; for the Enquiry of the Jury is only in Nature of an Office of Inqueſt. Cro. Eliz. 339. adjudged, 412. adjudged, and *vide* Goulſ. 49. Hob. 69. (*c*) So that an Iſſue upon *Nul tiel Record* is not within the Act. 11 Co. 8. a. Cro. Jac. 304. (*d*) In Treſpaſs againſt *A.* and *B. A.* pleads Not guilty, and *B.* confeſſes the Action, and a Writ of Enquiry is awarded upon the Roll, but after *quoad B.* there is no Continuance entered, and after the Iſſue is found for the Plaintiff, admitting there is a Diſcontinuance *quoad B.* yet it is aided by the Statute; for *B.* was Party to the Original, and is privy to the Verdict, being liable to the Damages. Sir *John Haydon's* Caſe, 11 Co. 6. b. adjudged. Rol. Rep. 31. adjudged, and *vide* Cro. Jac. 304. and *vide* Cro. Car. 313.—But an Iſſue between the Demandant and Vouchee, is not within the Act. And. 26. Kelw. 207. b. 5 Co. 37. b. 11 Co. 6. b. but *per* Hob. 281. this Opinion is queſtioned, it not being ſaid Party to the Original. (*e*) If as to Part the Defendant joins Iſſue, but ſays nothing as to the reſt, and this Iſſue is found for the Plaintiff, he ſhall have Judgment. *Gomerſal* and *Gomerſal*, 11 Co. 6. b. 2 Leon. 194. Godb. 55. So Rol. Rep. 161. Cro. Jac. 353. Hob. 187. 3 Lev. 39. and *vide Goulſ.* 109. Bulſt. 25. Cart. 51.—But if the Matter is pleaded to the whole, though in Fact but in Anſwer to Part, this is a bad Plea, and not helped by the Statute. Hard. 331. (*f*) This extends as well to thoſe on the Part of the Plaintiff as on the Part of the Defendant. Rol. Rep. 161. (*g*) Diſcontinuances after, as well as thoſe before Verdict, are within this Act. Cro. Eliz. 489. Cro. Jac. 528. and *vide* Cro. Car. 236. Cro. Jac. 211. Cro. El. 320. (*h*) Diſcontinuances are helped by the Statute, but not imperfect Verdicts. 2 Leon. 196. Cro. El. 133. Godb. 57. 3 Lev. 55. (*i*) But if upon an Information of Perjury the Court awarded a *Subpœna* againſt the Defendant, this is not a Miſconveying but a diſorderly Proceſs, and not aided by the Statute. *Topliff* and *Waller*, *And.* 48. adjudged. Kelw. 214. adjudged, and there ſaid this is no more helped by the Statute, than if in *Ejectment* the Court ſhould award a *Petit Cape*, or in a real Action a Diſtreſs or Attachment; for ſuch Diſorders were never intended to be redreſſed by the Statute, and *vide* Cro. Jac. 89. where one Proceſs does not warrant the other.—So when a *Venire* is awarded to a wrong Officer, and he returns it, and thereupon a Trial is had, this is a Mis-trial, and not helped. Brownl. 134. Cro. El. 574, 586. Moor 356. pl. 482. Yel. 15. 5 Co. 36. b.—But that Mis-trials, as where the *Venue* was awarded of a wrong Place, *&c.* were not aided by this Statute, *vide* Cro. El. 468. Goulſ. 38. Winch. 69. 4 Leon. 85. Cro. Jac. 647. Lit. Rep. 365. Moor 91. pl. 212. Kelw. 212. 5 Co. 36. b. (*k*) But if there be any Defect in an Original, or in the Return thereof, it is not helped by this Act. Kelw. 207. *And.* 27. (*l*) As if a *Diſtringas* is awarded where it ſhould be an *Habeas Corpora*. Savil 37. (*m*) *Vide* Leon. 175. Cro. El. 145, 153. where the Entry was, that the Defendant *obtulit ſe per Higgens Attor' ſuum*, without ſhewing his Chriſtian Name; and it was argued that it was helped by this Statute; and in Cro. El. 153. it was ſaid that if there were any Warrant of Attorney, and his Name appears, then it may be amended by it; but for this *vide* Rol. Abr. 289. Leon. 175. and *vide* 18 El. c. 14. by which a Proviſion is made againſt the Want of any Warrant of Attorney. (*n*) But if the Judgment is not given upon the Verdict, it is not within the Act; as in Debt againſt an Heir upon the Bond of his Anceſtor, he pleads *Riens per Deſcent*, except twenty Acres in *D.* and the Plaintiff replies he hath more in *S.* upon which they are at Iſſue: and it is found for the Defendant, but the Plaintiff takes Judgment upon the Confeſſion of the Aſſets. *Mollineux* and *Mollineux*, Yelv. 169. reverſed by Reaſon of a Diſcontinuance; Cro. Jac. 236. reverſed accordingly, and ſaid the Statute muſt be intended where the Verdict is the Occaſion of the Judgment, and *vide* Cro. Jac. 211. Cro. El. 339, 412.

This Statute, though much more extenſive than the others, and though it very much enlarged the Authority of the Judges in Amendments in Miſtakes, yet it remedied no Omiſſion but one, which was the Party's own Neglect, in not filing his Warrant, which ſhould not after Verdict prejudice the Right of the Party that had prevailed; therefore to remedy the Omiſſions which the prevailing Party might have been guilty of, as well as the other Side.

* Page 92 (a) But if in Treſpaſs againſt *A. B.* and *C. A.* pleads Not guilty and it is found for him, but againſt the other two, there is Judgment

* By the 18 *Eliz. cap.* 14. it is enacted, "That after Verdict given in any Action, Suit, Bill, Plaint, or Demand in any Court of Record, Judgment (*a*) thereupon ſhall not be ſtayed or reverſed for want of Form touching falſe *Latin* or Variance from the *Regiſter*, or (*b*) other Faults in Form, in any Writ Original or Judicial, Count, Declaration, Plaint, Bill, Suit or Demand; or for (*c*) (*d*) want of any Writ (*e*) Original or Judicial, or by reaſon of (*f*) any (*g*) imperfect or (*h*) inſufficient (*i*) Return of any Sheriff or other Officer, or for want of any Warrant of Attorney, or for any Fault in Proceſs, upon or after any Aid Prier and Voucher."

by Default, the want of an Original may be aſſigned for Error; for the Verdict being found for *A.* he is out of the Caſe, and it is as if the Action had been brought againſt the other two only; but if the Verdict had been for the Plaintiff, the want of the Original *quoad* the other had been cured. 1 Lev. 210. (*b*) But the Omiſſion of *vi & armis* in a Declaration of Treſpaſs is Subſtance, becauſe that is the Inducement for the King's Fine. Cro. Car. 407. March 140. Cro. Jac. 443, 526, 536. but *vide* Cro. Jac. 130. 2 Rol. Rep. 285. So is the Aſſignment of a Breach upon a Recognizance for good Behaviour. Cro. Jac. 412. (*c*) Leon. 30, 31. *Vide* where the Original was determined and not revived. (*d*) An ill Writ in Subſtance, or a good Writ which warrants not the Declaration, is not aided by the Statute. Cro. El. 722. Goulſ. 126. Yelv. 108, 209. Sid. 84. 5 Co. 37. b. 3 Bulſt. 224. Rol. Rep. 432. When the Variance is ſuch that it ſhall be taken as no Original. Cro. El. 204. Hob. 251. Cro. Jac. 654, 655. Cro. Car. 327. Cro. El. 286. 3 Mod. 136. Ld. Raym. 411, 1209, 1220. 8 Mod. 243. 10 Mod. 19, 69, 70, 318, 368. 11 Mod. 68. pl. 3. 171, 230, 240. 12 Mod. 235. Fitz. 96. Barnes 333, 334, 335, 347, 351. 2 Barnes 381. Stra. 231, 316. pl. 14. 787. 2 Ld. Raym. 1515. 2 Stra. 889, 892. Barnard. K. B. 327, 364, 418. 2 Stra. 909. 933. 1 Barnard, K. B. 55. 2 Rol. Rep. 382. 5 Co. 37. b. But not ſo where the vitious Writ is certified to be the Writ upon which the Proceedings were, and that there is no other. Cro. Jac. 185, 479, 664, 675. Palm. 428. Browul. 96, 97. Cro. Car. 272, 281. Jones 304. Latch. 116. Yelv. 109.—But where it appears there was a good Original, no Averment ſhall be taken that the Proceedings were on the vitious one. Cro. Jac. 597. Palm. 428.—And in *Ejectment*, where the Declaration recited the Original to be *Summonitus eſt*, there being none upon the File, the Court would not intend a vitious one; but that there was a good one, which is loſt; and that the Plaintiff's Clerk miſtook in the Recital thereof. *Redman* and *Edolph*, Sand. 317. Ld. Raym. 565, 1058, 1066. Barnes 14.—So the want of a *Venire*, *Diſtringas*, *&c.* is aided, but not a vitious one; and where a vitious one ſhall be taken as one, *vide* Cro. El. 483. Owen 59. Moor 465. Noy 57. Moor 684. pl. 944. and *vide* Cro. El. 215, 257, 259, 422, 433, 781. Cro. Jac. 65, 162, 396. Cro. Car. 90. Moor 402. pl. 535, 623. pl. 852, 696. pl. 967. Godb. 194. Leon. 329. Bulſt. 130, 131. 3 Bulſt. 180. Brownl. 78, 97. Yelv. 69. Rol. Rep. 22. Stile 8, 483. March 26. 2 Rol. Rep. 285. (*e*) The want of a Bill on the File, which is in the Nature of an Original, is aided by the Equity of this Act. Hob. 130, 134, 264, 282. Jones 304. Cro. Car. 282. Stile 91.—and Cro. Jac. 91. to the contrary is not Law.—*Quære* of the want of a Plaint in inferior Courts, but however an erroneous Plaint is not helped. Cro. Jac. 108, 109. Stile 115. Rol. Rep. 338. (*f*) But if there be no Return, as if the Writ be *Alias breve*, or the Name of the Sheriff not indorſed, this is not helped. Rol. Rep. 295. 5 Co. 41. Cro. El. 310, 509. Yelv. 110. Cro. Jac. 188, 189. (*g*) *Vide* Stile 91. 2 Rol. Rep. 247. In the Return of the *Venire*, the Words *Quilibet Juratorum per Plegiat'* were wanting; and Cro. Jac. 534. *per Curiam*, it was held not as a Blank or no Return, but as an inſufficient one, and helped. 2 Rol. Rep. 87. adjudged, becauſe by the Appearance of the Jurors it was ſalved, and ſaid it was not like Dr. *Huſſy*'s Caſe, where Pledges were wanting upon an Original, which *vide* 3 Bulſt. 275, 276, *&c.* Rol. Rep. 445, 446, 447. Cro. Jac. 414. where it is ſaid, that not finding Pledges upon an Original is merely the Neglect of the Party, and ſo not helped. If a *Venire* is awarded to the Coroners, and returned by two of them only; whereas at the Time of the Award and Return thereof there were two more, this is only a Mis-return, and aided. *Lamb* and *Wiſeman*, Cro. Jac. 383. adjudged. Hob. 70. adjudged; and yet if one Sheriff of *London* makes a Return without the other, this is not helped, being no Return at all; for they make but one Officer; and the Court knows that one Sheriff there is two Perſons. Hob. 70. (*h*) Upon the Return of a *Venire de medietate Linguæ*, it did not appear which were Denizens, and which Aliens. Cro. El. 841. *per Curiam*, It is an inſufficient Return, and aided by the Statute. Upon the *Venire* twenty-three only were returned, but the *Habeas Corpora* was awarded againſt the twenty-three and *A.* and eleven of the other and *A.* were ſworn and tried the Cauſe. *Fines* and *North*, Jones 302. adjudged, it was not helped; for *A.* was not returned by the Sheriff. Cro. Jac. 278. 5 Co. 36. b. 37. a. Cro. El. 194. Brownl. 274. Jones 357. and *vide* Sid. 66. So if the Trial had been by eleven of the twenty-three, and one of the *Tales de Circumſtantibus*, *Sankhill* and *Stocker*, Cro. Car. 223. adjudged *per Curiam cont. Croke*. Jones 245. but *vide* Brownl. 274. where it was adjudged according to the Opinion of *Croke*, *vide* Latch. 54. but if twenty-five are returned, and the twenty-fifth is ſworn, and tries the Cauſe, it is not helped, becauſe a Mis-trial. Cro. Jac. 647. but if tried by twelve of the other, it is helped. Cro. Jac. 647. This was before 48 were returned on the Panel. (*i*) In a *Scire Facias* upon a Recognizance againſt the Heirs and Ter-tenants of the Conuzor, the Sheriff returns *J. S.* Ter-tenant, but ſays nothing as to the Heir, and *J. S.* pleads to Iſſue, and it is found againſt him, Cro. Car. 295. adjudged by three Judges againſt *Croke*, that *quoad* the Heir, there being no Return, it is not helped by the Statute; but *per Croke*, the Defendant having pleaded to Iſſue, and that being found againſt him, he ſhall not now take Advantage of the Heir's not being returned ſummoned, and Cro. Car. 312, 313. it was adjudged for the Plaintiff, becauſe *quoad* the Heir, it was only a Diſcontinuance, which is aided by the 32 H. 8. c. 30. Jones 319. adjudged.

Theſe

* Theſe Statutes were extended only to the Courts above, but the ſubſequent Statutes extend to all Courts of Record, and remedy ſeveral Defects and Omiſſions not included in the former. * Page 93 2 Sand. 258.

By the 21 *Jac.* 1. *cap.* 13. it is enacted, "That after Verdict for "Plaintiff or Demandant, Defendant or Tenant, Baily in Aſſiſe, Vou- "chee, Praiee in Aid, or Tenant by Receipt, in any Action, Suit, Bill, "Plaint or Demand, in any Court of Record, Judgment thereupon ſhall not be ſtayed or reverſed for any Variance, in Form only, between the "Original or Bill, and the Declaration, Plaint and Demand, or for (*a*) "Lack of the Averment of any Life, ſo it be proved they are living, "or becauſe the *Venire*, *Habeas Corpora* or *Diſtringas* was awarded to a "wrong Officer upon any inſufficient Suggeſtion, or (*b*) for that the "Viſne is in (*c*) ſome Part miſ-awarded, or ſued out of more or fewer "Places (*d*) than it ought to be, ſo as ſome one Place be right named, "or for miſ-naming any of the Jurors in (*e*) Surname or Addition, in "any of the Writs, or Returns thereof, ſo as they be proved to be the "ſame as were meant to be returned; or for that there is no Return "upon any of the Writs, ſo as a Panel be returned and annexed there- "to; or for that the Sheriff or other Officer's Name is not ſet to the "Return of ſuch Writ, ſo as it appear by Proof the Writ was returned "by him; or (*f*) for that the Plaintiff in Ejectment, or other Perſonal "Action, being under Age, appeared by Attorney, and the Verdict "paſſed for him."

(*a*) Sid. 61. (*b*) Cro. Car. 17, 162, 284, 480. Jones 395. Stile 201, 206. Raym. 67. 3 Term Rep. 387. (*c*) This Statute aids not, unleſs the Venue ariſes from ſeveral Places, and one of thoſe Places is truly named. Sid. 20.——But if it ariſes from ſeveral Places, though in ſeveral Counties, and it is tried by one only, it is helped. 2 Lev. 122. *per* Hale. (*d*) By the Opinion of the greater Part of the Judges, where by particular Cuſtom a Trial was to be *De vicinet'* of the four Wards next adjoining, and the *Venire* is awarded *De vicinet'* of two of them only, it is helped by the Statute. 2 Sand. 258. But *Sanders dubitavit*, whether it ſhould extend to aid any Proceedings except ſuch as were according to the Courſe of the Common Law. (*e*) But this extends not to any Miſtake in the Chriſtian Name. Cro. Car. 202. (*f*) Stile 216, * 218. *per* Roll. Ch. J. If the Party appear by Attorney, where he ought to appear by Guardian, it is Error, and not helped by this Statute. Danv. Abr. 2 V. Tit. *Error*, ſo. 12. pl. 13. and Rolls Abr. 1. V. 747. pl. 13. S. C. where he ſays the Judgment was reverſed, becauſe the Party Plaintiff appeared in Perſon. See 2 Sand. 212, 213. and Com. Dig. 5. V. 171. It ſeems the general Opinion, that when the Plaintiff appears by Attorney, unleſs it is pleaded in Abatement, it is cured after Verdict for him, by the Stat. 21 Jac. 1. c. 13. the Words being expreſs. The Caſes in the Books *contra* (except that in *Stiles*) were *before* the Statute.

The main Deſign of this Statute was to help any Miſtake in the Jury Proceſs, but there were ſeveral Things ſtill to be ſupplied, and ſeveral others to be adjudged Form, which were always conſtrued to be Matters of Subſtance, and conſequently not aided by any of the former Statutes; wherefore the 16 & 17 *Car.* 2. was made, the Act which *Twiſden* called *The Omnipotent Act*. 1 Vent. 200.

By the (*a*) 16 & 17 *Car.* 2. *cap.* 8. it is enacted, "That after Verdict "in any Action, Suit, Bill or Demand, in the Courts of Record at *Weſt-* "*minſter*, County Palatine of *Cheſter* or *Durham*, or of the Great Seſſions "in *Wales*, Judgment thereupon ſhall not be ſtayed or reverſed for Want "of Form or Pledges [Sheriff's Name] returned upon the Original, or "for Want of Pledges upon any Bill or Declaration, or for Want of a "*Profert in curia* of any Deed, or of Letters Teſtamentory, or of Ad- "miniſtration, or for the Omiſſion of *vi & armis*, or *contra pacem*, or for "the Miſtake of the Chriſtian or Surname of either Party, Sums, Day, "Month or Year, in any Bill, Declaration and Pleading, being right "in any Writ, Plaint, Roll or Record preceding, or in the ſame, to "which the Plaintiff might have demurred and ſhewed the ſame for "Cauſe, or for Want of *hoc paratus eſt verificare*, or *hoc paratus eſt verifi-* "*care per recordum*, or *prout patet per recordum*; or for that there is no

(*a*) This Act was only for three Years, but is made perpetual *per* 22 & 23 *Car.* 2. *c.* 4.

"right Venue; so as a Trial was by a Jury of the (*b*) proper County or
* Page 94 "Place (*c*) *where the (*d*) Action is laid; nor shall any Judgment after
"Verdict, Confession by *Cognovit Actionem* or *Relicta Verificatione*, be
"reversed for Want of a *Misericordia* or a *Capiatur*, or because one is en-
(*b*) But this extends not to any Trial in an improper County. Mod. 37, 199. 8 Mod. 226, 239, 380. 10 Mod. 54, 69, 300. 12 Mod. 71, 322, 349, 371, 408, 494.
"tered for the other; nor for that *Ideo conceſſum eſt per curiam* is entered
"for *Ideo conſideratum eſt*, &c. or for that the Increaſe of Coſts after
"Verdict in an Action, or upon a Nonſuit in Replevin, are not entered
"to be at the Requeſt of the Party for whom the Judgment was given,
"nor by Reaſon that the Coſts in any Judgment whatſoever, are not
"entered to be by Conſent of the Plaintiff; and that all ſuch Omiſſions,
"Variances and Defects, and (*e*) other Matters of like Nature, not be-
"ing againſt the Right of the Matter of the Suit, nor whereby the Iſſue
"or Trial are altered, ſhall be amended where ſuch Judgments are or
"ſhall be removed by Writ of Error."

Comyn 555. Stra. 313. 2 Stra. 1011. 2 Mod. 24.——(*c*) In Debt upon a Bond in *London*, conditioned for the Performance of Covenants, one of which was for the Enjoyment of *Shrub-walk*, in the Foreſt of *W.* in *Com. N.* and the Defendant pleaded Performance generally; and the Plaintiff replied, that the Earl of *N.* having Title by Grant, &c. entered and ouſted him; and the Defendant pleaded the Earl of *N.* had no Title; and thereupon Iſſue was joined, and tried by a *Viſne* of *Shrub walk*, and found for the Plaintiff; and though no *Viſne* could ariſe on the Walk, and it could not be intended a Vill, being only collaterally alledged as a Thing granted, and not as a Place where any Fact was done, yet being tried by a Jury of the County where the Matter of the Iſſue aroſe, *Stirk* and *Bates*, Lev. 207. it was adjudged for the Plaintiff by three Judges *con' Twiſden*, who ſaid it was not within the Words, and being a new Law, it ſhould not be taken according to the Intent, againſt the Words; and after, Error was brought; but the Parties agreed, the Defendant making the Plaintiff Satisfaction. Sid. 326. adjudged *per totam Cur' præter Twiſden*, though objected, the Action being laid in *London*, the Iſſue ſhould have been there tried, unleſs ſome other Place had been ſhewed in the Record; and *vide* 1 Lev. 122. (*d*) The Plaintiff declared that the Defendant *apud London* ſaid of the Plaintiff, That he had ſtole Plate at *Oxford*: and the Defendant juſtified that he did ſteal Plate at *Oxford*, *per quod* he ſpoke the Words at *London*; and the Plaintiff replied, *De injuria ſua propria*, &c. and thereupon Iſſue was joined and tried in *London*, and found for the Plaintiff; and though it was adjudged, that the only Point in Iſſue was, Whether the Felony was committed, which was triable at *Oxford*, yet the Plaintiff had Judgment. *Croft* and *Boite*, Sand. 247, 248. by three Judges, who ſaid, that the Iſſue being tried by a Jury of the proper County, it was within the expreſs Words of the Statute; but *Twiſden forment cont'*; and by the Reporter, this Judgment was given not only againſt the Opinion of *Twiſden*, but of ſeveral others, as he was informed; and being of Counſel with the Defendant, he agreed the Meaning of the Statute was, that the Iſſue ſhould be tried in the proper County where it ariſes, elſe it would be impoſſible, by any Plea, to remove the Trial from the County where the Action is laid. Raym. 181. adjudged, that it was helped by the Statute; but ſaid that the Defendant might have demurred upon it. 2 Keb. 496. adjudged, Vent. 263. cited, to be adjudged; ſo *Adderly* and *Wiſe*, 2 Lev. 164, 165. adjudged. Vent. 263. cited and *vide* Raym. 392. where the like Point was in Queſtion, & *adjorn'*; ſo 2 Jones 82, & *adjorn'*. And in the Caſe of *Jenning* and *Hunking*, Vent. 263. (where the Court ſaid it was within the Words, but not the Meaning of the Act; for the Intention was ſo, that the Trial was in the County where the Iſſue did ariſe) but in Regard of theſe Precedents cited, they would not ſtay Judgment; but by the Report of this laſt Caſe, 2 Lev. 121. it does not appear how the Judgment was; but *Hale* Ch. Juſt. there ſaid the Meaning of this Statute was, If the Iſſue was tried in the County where the Matter thereof aroſe; for it is not reaſonable to believe the Parliament intended to alter the whole Courſe of Trials, and to have Things tried in foreign Counties, & *adjornatur*; and by the Report of the ſame Caſe, 3 Keb. 350, 371, 509, the Parties agreed to amend and lay the whole Matter in the County where the Action was laid; and ſaid the Court inclined ſtrongly againſt the Judgment cited. (*e*) Vent. 272. Raym. 398.

Carth. 66. Skin. 49. pl. 3.

The above Statutes being chiefly calculated to aid Imperfections after Verdict, and the Statute 27 *Eliz. c.* 5. aiding Defects in Form only on a general Demurrer, it was thought adviſeable to enlarge the Authority of the Courts further in Favour of Suitors; and therefore,

By the 4 *Ann. cap.* 16. for the Amendment of the Law, it is enacted,
Note; This Act is ſaid to have been penned by the great Lord Somers. See 2 Biſhop Burnet's Hiſt. of his own Times, p. 439.
"That where any Demurrer ſhall be joined and entered in any Action or
"Suit in any Court of Record, the Judges ſhall proceed and give Judg-
"ment according as the very Right of the Cauſe and Matter in Law ſhall

"appear

" appear unto them, without regarding any Imperfection, Omiſſion or " Defect in any Writ, Return, Plaint, Declaration or other Pleading, " Proceſs or Courſe of Proceeding whatſoever, except thoſe only which " the Party demurring ſhall ſpecially and particularly ſet down and ex- " preſs together with his Demurrer, as Cauſes of the ſame, notwith- " ſtanding that ſuch Imperfection, Omiſſion or Defect might have here- " tofore been taken to be Matter of Subſtance, and not aided by the 27 " *Eliz. c.* 5. ſo as ſufficient Matter appear in the ſaid Pleadings; upon " which the Court may give Judgment according to the very Right of " the Cauſe, and no Advantage or Exception ſhall be taken of or for an " immaterial Traverſe, or of or for the Default of entering Pledges upon " any Bill or Declaration, or of or for the Default of alledging the bring- " ing into Court any Bond, Bill, Indenture or other Deed whatſoever, " mentioned in the Declaration or other Pleading, or of or for the De- " fault of alledging of the bringing into Court * Letters Teſtamentory * Page 95
" or Letters of Adminiſtration, or of or for the Omiſſion of *vi & armis*, " *& contra pacem*, or either of them, or of or for the Want of Averment " of *hoc paratus eſt verificare*, or *hoc paratus eſt verificare per recordum*, but By 9 Ann. c. 20. ſ. 7. this Act is extended to Writs of *Mandamus*, and Informations in Nature of *Quo warranto*.
" the Court ſhall give Judgment according to the very Right of the " Cauſe, as aforeſaid, without regarding any ſuch Imperfections, Omiſ- " ſions and Defects, or any other Matter of like Nature, except the ſame " ſhall be ſpecially and particularly ſet down and ſhewn for Cauſe of De- " murrer."——*And*, " That all the Statutes of *Jeofails* ſhall be extend- " ed to Judgments which ſhall be entered upon Confeſſion, *Nihil dicit*, " or *Non ſum informatus*, in any Court of Record, and no ſuch Judgment " ſhall be reverſed, nor any Judgment upon any Writ of Inquiry of " Damages executed thereon, be ſtayed or reverſed for or by Reaſon of any " Imperfection, Omiſſion, Defect, Matter or Thing whatſoever, which " would have been aided and cured by any of the ſaid Statutes of *Jeofails*, " in Caſe a Verdict of twelve Men had been given in the ſaid Action or " Suit, ſo as there be an Original Writ or Bill, and Warrants of Attorney " duly filed according to the Law as is now uſed."

Notwithſtanding the great Enlargement of the Power of the Judges, by the above recited Statutes in amending Writs, Proceſſes, &c. yet none of them were thought to extend to Writs of Error; and the rather, becauſe ſuch Amendment would not be in Affirmance of the Judgment; but it being found that defective Writs of Error occaſioned great Delay of Juſtice Carth. 158, 367, 520. Ld. Raym. 71, 151, 564. 5 Mod. 16. 69. Comb. 354. Salk. 49. pl. 9.

By the 5 *Geo.* 1. *c.* 13. it is enacted, " That all Writs of Error where- " in there ſhall be any Variance from the Original Record, or other De- " fect, may and ſhall be amended and made agreeable to ſuch Record, " by the reſpective Courts where ſuch Writ or Writs of Error ſhall be " made returnable; and that where any Verdict hath been or ſhall be " given in any Action, Suit, Bill, Plaint or Demand, in any of his Ma- " jeſty's Courts of Record, the Judgment thereupon ſhall not be ſtayed " or reverſed for any Defect or Fault, either in Form or Subſtance, in " any Bill, Writ Original or Judicial, or for any Variance in ſuch Writs " from the Declaration or other Proceedings *." * This Diviſion, which comprehends the Hiſtory of the Statute Law, as to the Power given the Judges to amend, ſhews evidently how very cautious the Judges in former Times were of exceeding the Power delegated to them; for they had always in View the important Diſtinction between judging, or adminiſtering Juſtice according to Law, and Legiſlation.

(C) Whether the Statutes of Amendment extend to the King, or to any criminal Proceedings.

Vide Cro. Car. 144, 312. Jones 320. 3 Mod. 7, 167. 8 Mod. 58, 296, 328, 330. Fitzgib. 56, 122, 263. 3 Wms. 493, 499. Stra. 2, 62. 2 Stra. 999. 2 Lev. 239. Hob. 328. 2 Sand. 258, 308. 3 Bulſt. 276. Rol. Rep. 447. 4 Mod. 396. 6 Mod. 269. Ld. Raym. 511, 565. 1 Salk. 48, 51. pl. 14. 2 Salk. 699. pl. 1. Sand. 249. 2 Mod. 144. Ld. Raym. 134, 859. 2 Ld. Raym. 1061, 1057, 1059, 1137, 1307, 1472. 10 Mod. 88. Fitzgib. 193. 11 Mod. 198. pl. 12. 230. pl. 3. 233. 12 Mod. 107, 248, 274, 312, 369, 384. 402, 598. Ld. Raym. 495. 2 Ld. Raym. 860. 2 Salk. 604. Carth. 520. Barnes 3. 2 Barnes 22, 256. Stra. 187. 2 Stra. 739, 871, 911. 2 Barnard. K. B. 6. 2 Stra. 1026. Carth. 506. Andr. 14. (*a*) Cowp. 407, 425, 841. 1 Term Rep. 782. 2 Term Rep. 707. 3 Term Rep. 349, 657, 749. A modern judicious Author owns he is not aware of any material or ſolid Reaſon to make theſe Statutes extend to criminal Proceedings: That no one could have heard of the late Application to the Houſe of Lords in the Caſe of *Luckup*, to reverſe a Judgment of the *King's Bench* for what is *called Error*, but muſt have wiſhed there was ſuch a Power to amend. *Obſerv. on Stat.* 201. *2d Edit.*

IT has been a great Queſtion, Whether any of theſe Statutes extend to the Caſe of the King, either to remedy the Party where he has prevailed againſt the King, or the King againſt the Party; but as it has been ruled in both Caſes, and ſeems now eſtabliſhed that theſe Statutes do not extend to the (*a*) King, it will be needleſs to enter minutely into this Enquiry; for though only Indictments, Appeals and Informations on Penal Statutes are excepted in all the Statutes from 8 *H.* 6. *cap.* 12. yet becauſe the firſt Statute ſays it ſhall be amended on the Challenge of the Party, in which the King cannot be included, the ſubſequent Statutes are ſuppoſed to be made on the ſame Plat-form; and that this Exception is only *ex abundanti cautela.*

* Page 96 Jones 320. * *Vide* Stat. 9 Ann. c. 20. ſ. 7. † The *Venire* is now to be awarded of the Body of the County, *vide* the Stat. 4 Ann. c. 16. ſ. 6. and 24 Geo. 2. c. 18. ſ. 3. *Vide* Head of *Juries.*

* Thus in a *Quo warranto quare* the Defendant claims a Warren, the Defendant preſcribes for a Warren within the Manor of *Ridge*, and the *Venire* was awarded from the *Villa* of *Ridge*, and not from the Manor of *Ridge*, and a Verdict for the Defendant; the Court awarded a new *Venire* *, becauſe they held the King was not within the Statute 21 *Jac.* 1, *c.* 13 †.

Salk. 51. pl. 14. 6 Mod. 268. S. C. 2 Ld. Raym. 1061, 1472. Mich. 3 Ann. The Queen *verſ.* Tutchin, by three Judges, *hæſitante Gould.*

So in an Information for a ſeditious Libel, the *Venire* was returnable 13 *October*, and the *Diſtringas* teſted 24 *October*, this was a Diſcontinuance, becauſe not returned in the Preſence of the Party; and nowithſtanding the Queen had a Verdict, the Court would not amend it, though ſuch Amendment would have been warranted by the Roll, where the *Diſtringas* was well awarded.

Cro. Jac. 414. Hob. 101. Cro. Jac. 318. 2 Bulſt. 66. Sid. 66. Stile 307. 2 Sand. 258.

But it has been adjudged, that the ſeveral Proviſoes in theſe Statutes, which except Appeals and Indictments of Felony, &c. and that they ſhall not extend to any Writ, Bill, Action or Information upon any Popular or Penal Statute; do not (*a*) extend to thoſe Caſes in which a Remedy is given by Way of Recompence to a Party; as upon the Statute of *Waſte*, for not ſetting forth Tithe, Forcible Entry, &c.

(*a*) But a Writ of Raviſhment of Ward upon the Statute of *Weſtm.* 2. c. 35. is within the Proviſo. Dr. *Huſſy* and *Meer*, 3 Bulſt. 275, 276.

Alſo by the 4 *Ann. cap.* 16. for Amendment of the Law, it is enacted, "That all the Statutes of *Jeofails* ſhall extend to all Suits in any of her "Majeſty's Courts of Record at *Weſtminſter*, for Recovery of any Debt "imme-

" immediately owing, or any Revenue belonging to her Majeſty, her " Heirs or Succeſſors, and ſhall alſo extend to all other Courts of Record." And by the 9 *Ann. cap.* 20. *ſect.* 7. it is enacted, " That the Statute for " the Amendment of the Law, and all the Statutes of *Jeofails* ſhall be " extended to Informations in Nature of a *Quo Warranto*, and Proceed- " ings thereon for any the Matters in the ſaid Act mentioned." *Vide* Tit. Informations.

(D) In what Caſes the Proceedings in Civil Cauſes are amendable, and the Manner thereof; as by amending one Part of the Record by another. And herein,

1. Of the Original Writ and Proceſs.

THE Original Writ is made amendable by 8 *H.* 6. *cap.* 12. and other Statutes, when it is not made out purſuant to the Inſtructions given to the Curſitor; and likewiſe in thoſe Miſpriſions which appear to be *vitia ſcriptoris*, and are not of the Subſtance of the Writ; as where the Inſtructions to the Curſitor are for a *Præcipe* againſt *Lenthrop Frank Milite*, and the Curſitor makes the Original *Lenthrop Frank Generoſo*, the Writ (*a*) ſhall be amended according to the Inſtructions given the Curſitor. Hob. 118. Cro. El. 644. S. P. 8 Co. 15. b. S. P. Lit. Rep. 50. S. P. but if the Inſtructions were wrong, it is not amendable. 2 Vent. 46, 49. 130. S. P. Sid. 412. S. P.

(*a*) So *Deviſit* for *Demiſit*, Rol. Abr. 198. Hob. 249. Brownl. 130. *Vacariam* for *Vicariam*, Hob. 128. were amended, becauſe the Inſtructions to the Curſitor in both Caſes were right.

So if Inſtructions are given to the Curſitor for drawing a Writ againſt *Weſtby*, and he by Miſtake makes it *Weſtly*, and ſo are all the Proceedings afterwards, this ſhall be amended; and accordingly the Court ordered the Curſitor to attend, who ſatisfying them that his Inſtructions were right, they ordered the Original to be amended in Court, without any Application to the Chancery, or Order thence, and they amended all the Proceedings after. 2 Vent. 152. *Page 97

So when there are two Defendants, and the Writ is *Præcipe* to them both, *quod teneat conventionem*, this ſhall be amended, becauſe the Inſtructions beginning againſt ſeveral, the Curſitor had not purſued them. 2 Lev. 173. So where in a Writ it was *reddat* inſtead of *reddant*. 2 Sand. 58.

A *Quare Impedit* was brought *ad præſentand' ad Eccleſiam de Watton*, where it ſhould have been *ad Vacariam Eccleſiæ de Watton*, though this be an Error in Subſtance, the Vicarage being diſtinct from the Parſonage; yet becauſe the Inſtruction to the Curſitor was right, and this a peremptory Writ, it was allowed to be amended. Cro. Car. 74. Turner and Palmer. 2 Hawk. P. C. 278. Cowp. 841. Doug. 115, 135, 378. 1 Term Rep. 782. 3 Term. Rep. 349, 749.

So if the Party, in order to have a Formedon in Deſcender, draws Inſtructions that the Land deſcended to him as Son and Heir of the Donee, and the Clerk draws the Writ that the Land deſcended to him as Son, and omits Heir, if the Clerk ſhews his Inſtructions, and will make Oath thereof, it ſhall be amended. 8 Co. 159. b.

Alſo the Writ was held amendable if there was (*a*) falſe *Latin*, or a Word falſe Latin and no Latin, *vide* Lev. 2.

(*a*) For a Diverſity between 2 Vent. 173.

Word that was no *Latin*, if it were only in the (*a*) Form of a Writ; but if it were of the Subſtance of a Writ it could not; for by the Statutes the Courts are allowed, where they have ſufficient Authority to amend the Form of that Authority, but not to make an Authority for themſelves, by altering the Subſtance of the Writ.

(*a*) There is a Diverſity between the Negligence and the Neſcience of the Clerk; for the Negligence (as if he had a Copy of the Bond, and does not follow it) ſhall be amended); but his Neſcience or Ignorance in the legal Form and Cauſe of Originals, is not amendable; for if this were allowed, it would introduce Error and Barbarity into legal Proceedings. 8 Co. 159. a. Lev. 2.

Therefore if the Writ be *imaginavit* for *imaginatus eſt*, or *avæ* for *aviæ*, it ſhall be (*b*) amended.

8 Co. 159. b. Moor 5. pl. 17. S. P. N. Bendl. 33. S. P. cited. *And.* 24. S. P. cited. (*b*) But in *Blackmore's* Caſe, 8 C. 159. b. *hes breve* for *hoc breve* is held not amendable; but *Quære, & vide* 2 Vent. 173. which ſeems to hold otherwiſe.

But the eſſential Part of a Writ is not amendable; as in Aſſiſe, where the *Teſte* was *duodecno Regis* for *duodecimo*, the Writ was abated; (*c*) becauſe it would have been erroneous to have proceeded on a wrong Writ; for this could not have been pleaded in Bar of a new Aſſiſe; and the Court could not amend it, becauſe the Curſitor was judge of the Day when the Writ iſſued, and there were no Inſtructions to amend the Writ by.

Lev. 2. Heath and Pageat. (*c*) *Diſtrictionem*, when it ſhould have been *Deſtructionem* in a Writ of *Waſte*, not amendable. *Freeman's* Caſe, 5 Co. 43. adjudged. Cro. El. 462. adjudged, the Word there being *Diſtrictionem* with an *i*, and not an *e*. 2 Bulſt. 51. cited, and *vide* Hut. 56. *indicari* for *indictari*; and 2 Rol. Rep. 255.

So if a Writ be brought againſt Executors in the *Debet* and *Detinet*, that ſhall not be amended, becauſe the Action is miſ-conceived, giving the Court Authority to proceed againſt Executors *Jure proprio*, when they are not ſo chargeable by the Law.

8 Co. 159. a. 5 Co. 36.

But the negligent (*d*) Omiſſion of what the Clerk in Courſe ought to have inſerted (as the Omiſſion of *Dei gratia*) in the Style of the King, ſhall be amended.

8 Co. 160. (*d*) So in a Writ of Partition, the Omiſſion of the Words *oſtenſurus quare non feceret*, was ſupplied. 8 Co. 160. a.—In a *Quare impedit*, the Word *ad* was omitted and amended, Goulſ. 78. Cro. El. 119.—In a *Formedon* of Lands in *L.* the Word *in* was omitted and amended. Noy 73.

* Page 98 * And here it may be proper to obſerve, that the Want of an (*a*) Original is (*b*) helped after the Verdict by 18 *Eliz. c.* 14. ſo is the Want of a (*c*) Bill upon the File, (*d*) but the Statute does not extend to help a vitious Writ.

(*a*) So is the Want of a *Venire*, *Diſtringas*, and other Proceſs. *Vide ſupra* the Notes on 18 El. c. 14. (*ante* 92.) and 2 Salk. 454. 2 Ld. Raym. 1143. (*b*) *Vide ſupra* the Notes on 18 El. (*ante* 92.) (*c*) That the Want of Bill upon the File, which is in Nature of an Original, is aided by the Equity of the Act. Hob. 130, 134, 264, 282. Jones 304. Cro. Car. 282. Style 91. Cro. Jac. 91. *cont.* (*d*) Cro. El. 722. Yelv. 108. Sid. 84.

But if the Original be miſrecited on the Roll, as in Ejectment, if it be *Summonitus* inſtead of *Attachiatus*, after Verdict, if on Search no Original is found, it will not be Error, for the Statute helps the Want of an Original to all Intents, as if there had been a good one on the File; and if there had been a good one, ſuch Miſrecital would not have been erroneous; and if the Recital of the Original be but Form, it was not neceſſary after Verdict to amend the Bill.

Sand. 317. 3 Mod. 3. Redman and Edolph.

2. Of the Imparlance Roll.

AFTER the firſt Term it is allowed in *C. B.* to amend the Imparlance Roll by the Office Paper-Book, becauſe that is Inſtructions to the Prothonotary to enter up the Imparlance Roll, and therefore that is equally amendable as the Original is by the Inſtructions given the Curſitor; but this muſt be on Affidavit that the Paper-Book has not been altered ſince the Defendant's Attorney has put his Hand to it. Rol. Abr. 198. Hob. 83. 246 2 Rol. Rep. 152. Moor 892. Hut. 83. Lit. Rep. 278.

In the King's Bench they will amend both the Bill and the Roll by the Office Paper-Book; becauſe this is Inſtructions for making them both; but they cannot amend from any other Paper-Book, becauſe ſuch Book is not Inſtructions left in the Office to make up both the Roll and the Bill; but where there is no Office-Book, as where the General Iſſue is pleaded, it ſeems they ſhould amend either the Bill or the Roll by the Declaration, of which they gave the Defendant a Copy, becauſe ſuch Declaration is the only Inſtruction to the Clerk of the Office*.

* In *B. R* a Bill is ſeldom filed, unleſs againſt a privileged Perſon.—Where a Bill is not filed, the Court will permit a right Bill to be filed, without enquiring into the Time of filing, and give the Plaintiff Leave to amend his Plea-Roll, by the Bill filed. *Gardner* againſt *Browne, Trin.* 15 *Geo.* 3. *B. R.*

If the Bill on the File be with Blanks, or the Imparlance Roll be with Blanks for Dates or Quantities, yet it may be amended by the Paper by the Clerks themſelves, until a *Recordatur* be ordered of the Verdict returned on the *Niſi Prius* Roll; but after ſuch *Recordatur* it can only be amended by the Court; for the Roll lies with the Prothonotary to be made up according to the Paper-Book, until the *Recordatur* of the Verdict be allowed; but if after the *Recordatur* be entered, it is ordered on the Roll *in ſtatu quo tunc*; and then the Court is ſuppoſed to take Conuſance of it, in what Manner it then was; and if the Clerks might afterwards alter the Roll after Entry of the Verdict, they might amend it in the Verdict which is on the *Niſi Prius* Roll, and which was ſettled by the Judge of *Niſi Prius*, and cannot be altered but by Rule of Court. Lit. Rep. 278. Hetley 142. Latch 165. Rol. Abr. 207. Cro. Jac. 165. Cro. Eliz. 258. 2 Leon. 120. 2 Mod. 316. 12 Mod. 8, 684. Stra. 139.

2 Stra. 734. 2 Ld. Raym. 1441. 2 Stra. 947. Doug. 135. 1 Term. Rep. 783.

The Imparlance Roll cannot be amended by the original Writ, becauſe the original Writ is the Authority on which the Court proceeds, which the Plaintiff muſt proſecute, for otherwiſe he does not proceed in that Cauſe. Rol. Abr. 191. Hob. 251.

And *note*: If the Count varies in Form, the Defendant may plead it in Abatement, for he has abated his own Writ by proſecuting it in a different Manner; but if it varies in Subſtance, the Defendant may move in Arreſt of Judgment, becauſe the Court has no Authority to proceed, having proſecuted a different Matter from that which the Writ has given Authority to the Court to take Cognizance of. Jon. 304. Cro. Eliz. 722. Cro. Jac. 654.

The Imparlance Roll cannot be amended by the Plea Roll or *Niſi Prius* Roll; for the Imparlance Roll is the original Declaration and the Ground of all. Rol. Abr. 207. Cro. Car. 92. Lit. Rep. 72.

Hut. 92. Hetl. 59. 3 Bulſt. 227. Hob. 76. Latch 165.

*But if the Declaration be againſt *H. B.* and he imparls by the Name of *R. B.* but pleads by his right Name *H. B.* this is no material Fault, becauſe it is only a Continuance from one Term to another, and by pleading by his right Name he acknowledges he imparled by a wrong Name. *Page 99. Rol. Abr. 199.

3. Of the Plea Roll.

The Plea Roll may be amended by the Imparlance Roll, which is no more than a recital of the Imparlance Roll, and begins with an *Alias prout patet*, Hob. 76. Rol. Abr. 207.

patet, being the Count of the ſecond Term, to which the Defendant pleaded *ore tenus*.

Moor 711. If there be a Miſtake in the Attorney's Name, it may be amended by the Warrant of Attorney, for the Warrant of Attorney being precedent will amend the Plea Roll, and the Court will take Notice that it is the ſame that appeared.

Yelv. 38. Cro Jac. 13. But if the Name of a Stranger be put into the Plea, this will be Error, for it cannot then appear to the Court that the ſame Man that appeared did plead; and then there was no Plea pleaded; and ſo if the Defendant's Name be miſtaken in the putting in his Plea, as if in an *Audita Querela* the Plaintiff ſurmiſes that he entered into a Statute of 300*l.* to the Defendant, for the Payment of 50*l. per Ann.* for ſix Years, to *John Buſh*, a Stranger, if the Defendant comes, and *Proteſtand', &c. pro plac' idem Johannes Buſh*, inſtead of the Defendant; this is erroneous, becauſe it does not appear to the Court that the Plea was put in by the Stranger, to whom the Payment was to be made, and not to the Defendant; but if the Plea had been, that the *prædict'* Plaintiff *venit et dicit*, inſtead of the Defendant, this will be conſtrued to be the Miſpriſion of the Clerk, for it is apparent that the Plaintiff could not be the Defendant; but it ſhall be ſuppoſed to be put in by him that appeared, ſince there is no other Perſon.

Cro. Eliz. 94.

4. Of the Jury Proceſs and *Niſi Prius* Roll.

Vide Head of Juries. If the *Venire* be of the ſame Place, and in the ſame Action, and between the ſame Parties, all other Faults will be amended.

Vide 4 Ann. c. 16. ſ. 6, 7. and 24 Geo. 2. c. 18. ſ. 3. But if the Place be totally miſawarded, this is not helped by any Statute; but if it is only miſawarded in Part, this is helped by the expreſs Words of 21 *Jac.* 1. *cap.* 13. That the Award is to be at large of the Body of the County; and 3 Geo. 2. c. 25. Head of *Juries*.

Jones 302. Godb. 194. Cro. El. 259. Cro. Jac. 528. *Quære.* Cro. Car. 275. In Ejectment, where the *Venire* was *de placit' tranſgreſſionis*, omitting *et Ejectionis Firmæ*, the Court held the *Venire* to be ill, becauſe it was not in the ſame Action, for an Action of Treſpaſs and Ejectment are different, and there might be an Action of Treſpaſs between the ſame Parties; but if the *Diſtringas* had been right, they would have judged this *Venire* to have been null, and the Want of a *Venire* is aided by the Statute.

Danv. Abr. 334, 335. If the *Jurata* mentions the Iſſue to be *de placit' tranſgreſſionis*, where the Action is Debt, and the Award of the *Venire* and *Diſtringas* Debt, this ſhall be amended; for the *Jurata* is an Award of the *Diſtringas*, in Purſuance of the Award of the *Venire*, and the *Venire* being right, the (*a*) Secondary Proceſs ought to be made accordinly.

(*a*) The Award on the Roll being right ſhall amend the *Venire*, and the *Venire* being right ſhall amend the *Diſtringas*, which is the proper Proceſs for convening the Jurors in the King's Bench: So of the *Habeas Corpora*, which is the Common Pleas Proceſs. Lit. Rep. 252, 253.

*Page 100 Rol. Abr. 202. Cro. Car. 275. * So if the Sheriff return *nomina Jurat' inter Partes prædict' de placit' tranſgreſſionis*, where the *Venire* is *de placit' debit'*, this ſhall be amended; for *in dorſo Brevis* he ſays *executio iſtius Brevis Patet, &c.* which could not be if it was not in the ſame Action.

Mo. 465, 710. Danv. Abr. 335. The Award of the *Venire* muſt be to a Day in the ſame Term, or to the next Term, but it muſt be in Term, otherwiſe it is erroneous.

But

But if the *Diſtringas* be without the Day of *Niſi prius*, or mentions a wrong Day, if the *Jurata* Roll be right, the *Diſtringas* may be amended by the *Jurata* Roll. 3 Mod. 78. 10 Mod. 88. 12 Mod. 107, 274. Lord Raym. 95, 511. 2 Lord Raym. 1144. 2 Barnes 3, 4, 9, 10.

So if the Return of the *Venire* be miſtaken, this may be amended by the Roll; and if the *Teſte* of the *Venire* be out of Term, or before Plea pleaded, it is no Error; for the *Teſte* of judicial Writs being only Matter of Form, ſhall not vitiate if miſtaken. Cro. Eliz. 760, 820. Owen 62. Cro. Jac. 162. Cro. Car. 38. 2 Rol. Abr. 200. Cowp. 407, 425, 841. Doug. 115, 136. 1 Term Rep. 782. 3 Term Rep. 349, 657.

If the Number or Qualifications of the Jury be omitted in the *Venire*, it may be amended by the Roll, and the rather, becauſe theſe Matters are aſcertained by the Law. *Vide* Head of *Juries*.

If there be a Miſtake in the Chriſtian Name of a Juror it is (*a*) incurable, for the Statutes do not extend to it, but only extend to cure Surnames and Additions, for there can be but one Name of Baptiſm, but there may be various Surnames and Additions; and therefore if it can be proved what Perſon the Sheriff meant by his Surname or Addition, it may be amended and ſet right. Dany. Abr. 330. Cro. Eliz. 262, 563. (*a*) But if the Chriſtian Name be wrong in the *Diſtringas*, or in the Panel returned, or in the Panel of the Jury ſworn, if it can be proved to be the ſame Man that was intended to be returned in the *Venire*, having there his right Chriſtian Name, it may be amended. Rol. Abr. 196, 197. 3 Bulſt. 18. *Heb.* 64. Brownl. 174. See 2 Stra. 1214.

If the Court on an inſufficient Suggeſtion awards the Proceſs to an improper Officer, yet this is aided after Verdict, for that only makes an Inſufficiency in the Return of the Jury, and inſufficient Returns are aided; for it was the Deſign of the Statute, that if the Cauſe was tried by a right Jury, that it ſhould not be material what Officer got them together. *Vide* for this Head of *Juries*.

As to the *Niſi prius* Roll, which is only a Tranſcript of the Plea Roll to carry the Iſſue into the Country, if it differs from the Plea Roll in any Matter which does not alter the Iſſue, it may be amended; but if it differs in any Matter which alters the Iſſue, it cannot be amended by the Plea Roll, becauſe it does not give the Judge of *Niſi prius* Authority to try the Matter which is in Iſſue between the Parties on the Plea Roll (*b*). 8 Co. 166. Moor 681. Carth. 506. 5 Mod. 211. Salk. 48, 49. (*b*) Variance in the *Niſi prius* Roll amended by the Plea Roll in Indictment for Forgery. Barnard. K. B. 31. 2 Ld. Raym. 1518. 2 Str. 843.

Af if the Iſſue be on the Addition of the Defendant's Name, whether *J. S.* was Huſbandman *die impetrationis Brevis*, and the *Niſi prius* Roll be, whether he was Huſbandman generally, omitting the Words *die impetrationis Brevis*, this is not the Iſſue on the Plea Roll; and therefore cannot be tried. 8 Co. 166.

So in a Bond conditioned for the Payment of a certain Sum at the firſt ——— next enſuing the Date, and on the *Niſi prius* Roll the Date be omitted, this is not the ſame Iſſue as on the Plea Roll. Brownl. 47.

But where the Defendant's Name is omitted in joining of Iſſue, this ſhall be amended by the Plea Roll, becauſe the Iſſue is not varied, and the Juſtice of *Niſi prius* have Authority to try it by the *Diſtringas*. N. Dyer 260.

So where in an Action on the Caſe upon *Aſſumpſit*, the Defendant (upon the Plea Roll) pleads *Non Aſſumpſit*, and on the *Niſi prius* Roll it is *Non Culpabilis*, after Verdict the *Niſi prius* Roll ſhall be amended by the Plea Roll, for both Pleas traverſe the Giſt of the Action; and the Defendant has the ſame Advantage in the *Non Culpabilis*, as in the *Non Aſſumpſit*, and the Iſſue is the ſame in Subſtance. Rol. Abr. 202, 203.

So

So in Ejectment againſt *ſeven* Defendants, who entered into the common Rule, and pleaded to Iſſue, the Plea Roll, *Venire*, *Diſtringas* and *Jurata* were right; but the Iſſue on the *Niſi prius* Roll was between the
Page 101 * Plaintiff and *five* Defendants only; after Verdict for the Plaintiff this was amended, for the Leſſor's Title was the Giſt of the Action, and the only Thing inquirable of by the Jury.

Salk. 48. pl. 5. Ld. Raym. 94. 12 Mod. 107. Comb. 393.

5. Of the Verdict.

If the Jury find a certain Verdict, and it is entered uncertainly on the Record, if the Judge who tried the Cauſe remembers certainly how the Jury found it, it ſhall be (*a*) aſcertained by the Memory of the Judge, and the Verdict may be made certain as the Jury found it.

(*a*) Where the *Poſtea* is amendable by the Notes of the Verdict taken by the Clerk of Aſſiſe. Moor 689. Cro. Eliz. 112. Where the Miſentry of the Verdict ſhall be amended. *Vide* Cro. Eliz. 677. 2 Jones 211. Special Verdict amended after Argument, without Coſts. Ld. Raym. 335. See Sta. 514. *Poſtea* amended by Judge's Notes. 2 Sra. 1197.

Cro. Car. 338. Eliot and Skypp adjudged.

As if in Debt for 19*l.* 10*s.* the Plaintiff declares upon a Leaſe of Copyhold Lands, rendering 38*l.* *per Ann.* and upon a Leaſe of Freehold Land, rendering 20*s.* *per Ann.* and demands 19*l.* for Half a Year's Rent of the Copyhold, and 10*s.* for the Freehold; and upon *Nihil debet* pleaded it is found for the Plaintiff, *quoad* the 10*s.* for the Freehold, and for the Defendant *quoad* the 19*l.* for the Copyhold; but in the *Poſtea* it was returned, that they found for the Plaintiff *quoad* 10*s.* Part of the ſaid 19*l.* 10*s.* and *quoad* the Reſidue *Nil debet*, ſo that it was altogether uncertain which of thoſe Rents were paid; yet if the Judge that tried the Cauſe remembers that, *quoad* the Copyhold Rent, the Jury found for the Defendant, and *quoad* the Freehold for the Plaintiff, the *Poſtea* ſhall be amended accordingly.

Rol. Rep. 82. Rol. Abr. 207. 3 Bulſt. 181. Hetl. 52. Lit. Rep. 61. Cro. Car. 144. 4 Co. 52. Salk. 47. pl. 4. 48.

Alſo a ſpecial Verdict may be (*b*) amended by the Minute or Notes taken by the Counſel or Clerk of Aſſiſe, after a Writ of Error brought.

(*b*) But though a Verdict, General or Special, may be amended by the Notes in the Book of the Clerk of Aſſiſe, if there be a Miſpriſion; yet this cannot be done in a criminal Caſe. Salk. 53. pl. 19. 47. S. P. Ld. Raym. 141. 11 Mod. 84. *contr.*

Cro. Eliz. 150. Godb. 57. Stile 110, 191. Cro. Jac. 239. Poph. 102. 203. Mo. 686. pl. 974.

But nothing can be added to the Minute or Notes, though never ſo ſtrongly proved by the Evidence, becauſe that would be to ſubject the Jury to an Attaint for a Fact that was never found by them *.

* In Treſpaſs with an *Aſportavit*, &c. If the Jury do not find the *Aſportavit*, and give Damages, which do not intitle the Plaintiff to Coſts, and the Aſſociate by Miſtake records, a general Verdict, which would intitle the Plaintiff to Coſts, the Court will amend by the Judge's Notes.

(E) What Defects may be amended or aided after Verdict: And herein,

1. Of the Want of ſufficient Certainty in the Plaintiff's Declaration, in not ſetting forth his Cauſe.

A Verdict cures not only ſuch Defects as may be called artificial Defects, and come within the Purview of the ſeveral Statutes of Amendment and *Jeofail*, but alſo natural Defects, or the Omiſſions of the Parties in their Allegations, which muſt be preſumed to have been given in Evidence to the Jury; otherwiſe they could not have found a Verdict for the Party. For this *vide* Head of Error.

The chief Intent of all the Statutes of *Jeofails* ſeems plainly to be, that the wrong Pleading of any collateral Matters not eſſential to the Action, ſhould, after the Expence of a Trial, and Verdict for the Party, be aided, but not to extend to Matters of Subſtance, or whatever is eſſential to the Giſt of the Action; for this would have ruined all Proceedings in the Courts of Juſtice; beſides, had ſuch eſſential Part been ſet forth, it might occaſion a contrary Verdict; neither can the Jury be attainted for a falſe Verdict * on the uncertain Allegations of the Parties, for it cannot appear whether the Damages given by the Jury be proportionable to the Demand or not. *Page 102

Whatever therefore appears to be eſſential to the Giſt of the Action, cannot be cured after Verdict; for the Law requires, that all ſubſtantial Facts ſhould be laid in proper Time and Place, ſo that the Defendant may traverſe them diſtinctly if he pleaſes; for as he may traverſe the Whole, ſo he may traverſe each ſubſtantial Part, in order to put the Weight of the Cauſe on any one Thing that will put an End to the Cauſe. *Vide* Head of Pleas and Pleadings. 5 Mod. 286.

But as this Matter is more fully treated of under the Heads of *Error* and *Pleas and Pleadings*, we ſhall here only obſerve, that the Difference in all the Caſes on this Head turns upon what is *Subſtance*, and what is *Form*; which muſt be determined in every Action according to its Nature.

2. Of Repugnancy and Surpluſage.

Surpluſage does not vitiate after Verdict, according to the Maxim, *Utile per inutile non vitiatur*; and therefore, if ſuch Surpluſage is repugnant to what is before alledged, it is void; as if in Trover, the Plaintiff declares that he was on the 4th of *March* poſſeſſed of Goods, and that afterwards, *ſcilicet* the 1ſt of *March*, they came to the Hands of the Defendant, who converted them *. Cro. Jac. 94.

* It is after a *Scilicet*, the Day of the Converſion is not material, the Allegation that he *afterwards* converted them, is ſufficient, and what follows is therefore Surpluſage.

So in Ejectment, the Plaintiff declares on a Leaſe made to him the 3d of *May*, and that the Defendant *poſtea*, *ſcilicet* 1ſt of *May*, ejected him; this was held good after Verdict; for by the *Poſtea* it appears, that the Defendant committed a *Tort* on the Plaintiff's Title; and when he ſays a repugnant Day, it is as if he had laid none; and if no Day be laid, it ſhall be intended after Verdict, that the *Tort* was committed before the Action brought; for it would be very foreign after Verdict, to intend that the Action was brought by the Spirit of Prophecy, for a Wrong to be committed afterwards; beſides, the Jury could not take Cognizance of any Fact done ſince the Action brought, for that was not in Iſſue. Yelv. 94. Carth. 288, 289.

In

Cro. Jac. 549. In Debt on an Obligation, the Defendant pleads Payment of 50*l.* 14 *Junii* 11 *Jac.* according to the Condition; the Plaintiff replies *quod non solvit* 50*l. prædict'* 14 *Auguſt'* *Anno* 11. *ſuprad' quaſi ad eundem diem ſolviſſe debuiſſet, et hoc, &c.* the Verdict found *quod non ſolvit prædict'* 14 *Junii prout* the Defendant had alledged; the Objection here was, that no Iſſue was joined, becauſe they do not meet in the Time the Money was paid; but the Word *Auguſt* is plainly Surpluſage, for when he ſaid *quod non ſolvit prædict'* 14 *Die*, it is a ſufficient Traverſe without the Word *Auguſt*, and *Auguſt* is plainly repugnant to the Word *prædict'*, for *prædict'* refers to *June*; and ſuch Surpluſage being a Repugnancy to what was before Material, was idle and void.

Where the Plaintiff may releaſe ſuch repugnant Part, *vide* Sand. 282, 286. and Head of *Pleas and Pleadings*. But if there be a Repugnancy in any Point material, there it is not helped by a Verdict, unleſs the Verdict appears to have been given on a different Part of the Declaration.

Cro. Jac. 264. Sand. 116, 226. If the Replication be repugnant to the Declaration, it makes the Declaration bad, becauſe the ſubſequent Pleading falſifies the Declaration; as if a Man declares on a Bond made 1 *Martii*, if the Plaintiff replies that the Bond was delivered 30 *Martii*, this falſifies the Declaration; becauſe it could not be made the firſt; ſo if the Rejoinder falſifies the Bar, the Bar is vicious.

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* 3. Of Inſufficiency in the Defendant's Bar.

Cr. El. 778. As the Plaintiff's Action muſt have all Eſſentials neceſſary to maintain it, ſo the Defendant's Bar muſt be ſubſtantially good; and if the Giſt of the Bar be naught, it cannot be cured by a Verdict found for the Defendant; but if found for the Plaintiff, he ſhall have Judgment, either for the Badneſs or Falſehood of the Bar; but if it be bad only in Form, a Verdict will cure it; and if the Giſt be traverſed, all collateral Circumſtances will be intended after a Verdict.

5 Co. 43. Mo. 692. Cro. Jac. 177, S. C. cited. Thus in an Action of Debt on a ſingle Bill, the Defendant pleads Payment without an Acquittance, and it is found for the Defendant, yet he ſhall not have Judgment, becauſe the Giſt of the Plea is bad, ſince the Obligation is in Force till diſſolved *eo ligamine quo ligatur*, and the Acquittance under the Seal of the Plaintiff is the Giſt of the Bar; but if it had been found for the Plaintiff, he ſhould have Judgment, becauſe the Bar was not only bad in Subſtance, but found falſe.

Vide Head of Pleas and Pleadings. But if the Bar be only bad in Form, a Verdict will ſupply it; as if in Debt on a Bond conditioned for Payment of 100*l.* 25 *Junii prox'*, and the Defendant pleads Payment on the 20th of *June*, and it is, according to the Plea, found that he did pay it the 20th; though this Bar be bad in Form, becauſe it does not follow the Condition, and the Plaintiff might have taken Advantage of it on a ſpecial Demurrer, yet the Verdict having found Payment *before* the Day, that in Law is Payment *at* the Day, and the Subſtance is found.

4. Of immaterial and informal Iſſues.

Lev. 32. Carth. 371. A Verdict cannot help an (*a*) *immaterial* Iſſue; for if what is material in the Pleadings be not put in the Iſſue, it is not made neceſſary to be proved

(*a*) An *immaterial* Iſſue is where what is materially alledged by the Pleadings is not traverſed; but an Iſſue taken upon ſuch a Point as will not determine the Merits of the Cauſe, and an *informal* Iſſue is where it is not traverſed in a right Manner. Brownl. 229. Cro. El. 227. 2 Mod. 137. 8 Mod. 356, 380. 10 Mod. 19, 11 Mod. 2. Ld. Raym. 168. Stra. 313. 2 Stra. 933. 2 Barnard K. B. 55. 2 Stra. 1011.

proved on the Trial; or if it be alledged and proved, yet if it appears insufficient, ſo as not to be deciſive between the Parties, the Verdict will be no good Foundation for the Judgment; but an *informal* Iſſue is helped by the Verdict.

If the Plaintiff declares on a Promiſe to find the Plaintiff, his Wife and two Servants, with Meat and Drink for three Years, on Requeſt; the Defendant pleads that he promiſed to find the Plaintiff Meat, &c. *abſque hoc*, that he did promiſe to find, &c. for three Years next following, and *hoc petit*, &c. and Verdict for the Plaintiff; yet he ſhall not have Judgment, becauſe the Promiſe in the Declaration is laid to be on Requeſt, which Promiſe is not traverſed in the ſame Manner: Beſides the Plaintiff in his Replication alledges a Promiſe next after he was married, which is not the ſame the Defendant traverſed; ſo that they are not at Iſſue on a Point traverſed in Bar, ſince the Bar is for a Contract for three Years on Requeſt, and the Replication for a Contract for three Years next enſuing the Marriage, and *non conſtat* by the Verdict which of the Contracts was proved on the Trial *.

3 Leon. 66. Kirlee and Lees. 2 Leon. 195. S. C. cited. Godb. 56. S. C. cited.

* Qu. If in this Caſe the general Iſſue, would not have been the proper Plea, and put the whole in Iſſue?

So in Treſpaſs, the Defendant pleads an Accord between the Plaintiff and *J. S.* of the one Part, and the Defendant of the other Part; the Plaintiff replies *quod non habetur talis concord'* between the Plaintiff and Defendant, *qualis* the Defendant had alledged; and on Iſſue joined and Verdict for the Plaintiff; yet he ſhall not have Judgment, becauſe the Plaintiff does not traverſe the ſame Accord that is ſet out in the Defendant's Bar, but * puts another Accord in Iſſue, not alledged in the Defendant's Bar, *viz.* between the Plaintiff and Defendant only.

Rol. Rep. 86.

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So in a Debt on a Bond, conditioned for the Payment of 105*l.* the Defendant pleads Payment of 100*l. ſecundum formam & effectum conditionis*; the Plaintiff replies, *Non ſolvit prædict'* 105*l.* this is an (*a*) immaterial Iſſue not aided, for the Plaintiff has not traverſed the ſame Payment that is in the Defendant's Plea.

Cro. Jac. 585. Sandbank and Turvy. Cro. Car. 593. S. P. Cowp. 671, 826. 2 Term Rep. 28. 3 Term Rep. 531. Doug. 683. 1 Term Rep. 141. 2 Term Rep. 758. adjudged upon Error. Hob. 173. S. P. adjudged. (*a*) But where an Iſſue is deciſive between the Parties, though not ſo apt, ſhall yet be cured after Verdict, *vide* Yelv. 58. Cro. Jac. 44, 435. and Heads of *Error*, and *Pleas and Pleadings*.

If an Iſſue be on a Point that is impoſſible in *Subſtance* and *Nature* of the Thing, it is not cured by the Verdict; but if it be only impoſſible in the *Manner* and *Form* of it, a Verdict will cure it; as in Debt on a Bond conditioned for the Payment of 100*l.* on the 31ſt of *September*, and Defendant pleads Payment at the Day, and it is found againſt him, the Plaintiff ſhall have Judgment; becauſe the Payment is what is material, and the Day impoſſible, and altogether idle and void; for not being paid before the End of that Month, the Obligation is abſolute.

Cro. Car. 38. Purchaſe and Jegon. Jones 140. S. C. Latch. 158. S. C. Noy 85, 86. S. C. adjudged.

In an Action of Aſſault and Battery, the Defendant pleads that the Plaintiff neglected his Service, *per quod Moderate Caſtigavit*; the Plaintiff replies, *Quod non Moderate Caſtigavit*, and the Iſſue found for the Plaintiff; though this be an informal Traverſe, being (*b*) rather a Traverſe of the Chaſtiſement, than of the moderate Manner of doing it, and the right Traverſe ſhould have been *de Injuria ſua Propria abſque tali cauſa*; yet after Verdict it is good, becauſe the Jury have aſcertained that he did not beat him moderately.

Sid. 444. Vent. 70. 2 Keb. 93. (*b*) Where an Iſſue joined on a Negative Pregnant, though bad on a Demurrer, is good after Verdict, *vide* Cro. Jac. 87. Cro. Car. 312. Cro. Eliz. 457. and Head of *Pleas and Pleadings*.

In

Noy 56. Cro.El. 773. 4 Jones 184. (c) Where Not guilty was pleaded to an *Aſſumpſit*, yet

In an Action of Debt, if Not guilty be pleaded, and there be a Verdict for the Plaintiff, it ſhall be aided by the Statute; becauſe being an (c) ill Plea, and a falſe one, the Plaintiff ought to have his Judgment, both for the Badneſs of the Plea and for its Falſehood; but if the Verdict had been for the Defendant, yet the Plaintiff ſhould have Judgment, becauſe the Declaration is not anſwered by the Plea *.

the Plaintiff had Judgment, though an improper Plea. Cro. Eliz. 470. Palm. 392. 2 Rol. Rep. 368. *cont.* In Debt againſt an Executor upon the Bond of his Teſtator, the Defendant pleads *Non eſt factum*, &c. Hard. 458. In an Action of Covenant, on a Covenant that *C.* was ſeiſed in Fee, and aſſigns for Breach that *C.* was not ſeiſed in Fee, & *ſic infregit conventionem*; though in Covenant the Defendant ought to traverſe either the Deed or the Breach, and both cannot be involved *in non fregit conventionem*; becauſe the Gift of the Action lies on the Deed, which muſt be traverſed by itſelf; yet when the Defendant pleads a bad Plea, which is found againſt him, the Plaintiff may have Judgment either for the Inſufficiency or Falſity of the Plea. Sid. 289. Lev. 183. S. C. *vide* Moor 399. Cro. Eliz. 457. 2 Leon. 116. S. P. * *Qu.* If in Debt on a penal Statute, as for not ſetting forth Tithes, for Uſury, &c. Not Guilty, would not be a good Plea, though *nil debet* is the proper, formal Plea.

Rol. Abr. 200. Yelv. 65. S. P. Cro. Jac. 67. adjudged. Cro. Eliz. 752. S. P. adjudged. Palm. 524. S. P. *per Cur'*.

If on an Iſſue tendered by the Plaintiff, the Defendant joins the *Scilicet* by the Plaintiff's Name, or the Plaintiff joins the *Scilicet* by the Defendant's Name, to an Iſſue tendered by the Defendant, this ſhall be amended, there being a Negative and Affirmative before, between the Plaintiff and Defendant, which is the Pattern from whence the Joining that Iſſue is to be taken; there is a ſufficient Copy from whence this may be amended, it being, from the Nature of the Thing, a plain Miſtake of one Man's Name for another.

Miſnomer in joining Iſſue upon an Information. Stile 167.

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* (F) Of Amending the Judgment.

Leon 134. 8 Co. 158. Carth. 158, 367, 520. Lord Raym. 17, 151, 565. 5 Mod. 16, 69. Comb. 354.

IT is a general Rule, that the Court will make no Amendment that will defeat a Judgment, the Statutes allowing Amendments in Affirmance of Judgments only.

Rol. Abr. 337.

But in Affirmance of the Judgment, the Judgment itſelf may be ſet right and amended by another Part of the Record, in a Fact, which appears to be the Miſpriſion or Neglect of the Clerk, as in the Miſtake of the Names of the Parties; ſo in Debt againſt *A.* and the Judgment is *quod prædictus B. capiatur*, when it ſhould have been *prædict' A.* this ſhall be amended.

Vent. 217. *Vide* ſeveral Caſes to this Purpoſe. Cro. El. 400, 864. Hob. 327. Moor 361, 697. Hut. 41. Brownl. 56. Raym. 39. Comb. 64.

So in an Action brought by *Robert Meredith*, and the Judgment, as entered, was *quod prædict' Carolus Meredith recuperet*, and the Court held this amendable, being only the Fault of the Clerk, the Miſpriſion being only in the Name, which was right in the Reſt of the Record, which was before the Clerk, and ſhould have directed him.

Cro. Car. 594. Pelham and Heming. A Judgment

So if in an Action of Debt upon an Obligation againſt *Rob. H.* conditioned that if *Henry H.* or *Rob. H.* the Defendant, ſhould pay, &c. Judgment is entered that the Plaintiff *recuperet debitum & damna* againſt the ſaid *Robert*, & *prædictus Henricus in Miſericordia*, where it ſhould have been *Robert*,

Robert, for *Henry* was no Party to the Record; this ſhall be amended, for it is only the Miſtake of the Clerk. *quod prædictus Thomas recuperet*; inſtead of *prædict' Arthurus*, amended after twenty Years ſtanding. 4 Mod. 371. 12 Mod. 384. 2 Stra. 1132, 1156, 1182.

As to the amending the Judgment by the Docket, it is to be noted, that before the Statute 4 & 5 *W. & M. cap.* 2. which, for the Security of Purchaſers, requires that all Judgments ſhould be docketed, the Courts uſed to amend both the Judgment and the Docket, where there were ſufficient Inſtructions to amend by; but now the Docket cannot be amended; and therefore if there be a falſe Docket, which is as none, though a right Judgment, the Purchaſer is ſafe, and the Party grieved muſt take his Remedy againſt the Officer for not docketing it truly. Cro. Car. 574. Raym. 39. Sid. 70.

In a *Quare impedit* for the Preſentation of a *Vicarage*, and the Judgment is *quod recuperit Eccleſiam*, this ſhall be amended, (*a*) being the Miſtake of the Clerk, who had ſufficient Inſtructions from the *Poſtea* to enter it right. Hob. 327. Hut. 41. Cro. Jac. 633. S. C.

(*a*) So in Debt, where the Judgment was entered *quod recuperet* the Sum in the Declaration, *pro miſis & Cuſtagiis*, inſtead of *pro debito prædict'*, and amended. Vent. 132. In Debt againſt an Attorney by Bill, the Judgment is *quod querens nil Capiat per breve*, where it ought to be *per billam*, yet it ſhall be amended. Rol. Abr. 296. Cro. Car. 580.

So if Judgment be againſt a Man and his Wife, and the Judgment is that the Wife is *in Miſericordia*, and not the Huſband, this is amendable by the Paper-Book that is right. Hob. 127. Moor 869. Cro. Jac. 633. Brownl. 16. Rol. Abr. 206, 215. S. C.

In Ejectment brought by two, if Judgment be entered that the Plaintiffs *recuperet*, this is a plain Miſtake of the Clerk, and ſhall be amended. 2 Jones 199.

If the Damages *de incremento* be (*b*) miſtaken by the Clerk, the Court will amend it by the Judgment-book, becauſe that was a ſufficient Inſtruction *to the Clerk to have entered the Judgment by, and therefore it was his Miſpriſion not to go according to his Inſtructions, which may be rectified and amended. Rol. Abr. 205. *Page 106

(*b*) As where the Jury found for the Plaintiff, and gave 2*s.* Damages, and ſo much for Coſts, and the Clerk, in entering thereof, ſays 2*s.* for Damages, and ſo much for Coſts, and ſo much *pro incremento, quæ in toto ſe attingunt* to ſo much; in which Sum the 2*s.* is not comprehended, this ſhall be amended. 3 *Bulſt.* 114. 8 Co. 162. Palm. 509. Dyer 55. Rol. Rep. 272. and *vide* like Amendments in Declarations, where the total Sum is miſcaſt. Bulſt. 171, 179. 2 Bulſt. 149. Yelv. 5. Noy 44. Poph. 209.

In Ejectment, if the Judgment is entered *quod querens recuperet* the Damages and Coſts, and not *quod recuperet Terminum*, as the Caſe is, this ſhall be amended, though this be but an Action of Treſpaſs in its own Nature. Rol. Abr. 206.

If a Judgment be given on Demurrer againſt the Plaintiff, and the Entry of the Judgment is of a Nonſuit inſtead of a Judgment in Demurrer, this ſhall be amended. Rol. Abr. 205.

In the Award of a Repleader for the Error of the Defendant's Plea, it was entered *quia Placitum eſt ſufficiens in Lege*, inſtead of *quia minus ſufficiens eſt*, and the Court held this not amendable, (though it was right in the Paper-Book, between the Parties); but *Popham* and *Granville contra*. Owen 19. And *qu.* If thoſe *contra*, were not right?

If in Replevin the Defendant demurs to the Plaintiff's Plea in Bar to the Defendant's Avowry, and Judgment is entered *quod viſis Præmiſſis, &c. videtur Juſticiariis quod placitum prædict', &c. minus ſufficiens, &c.* but theſe Words, *Ideo conſideratum eſt quod* the Plaintiff *nihil Capiat per breve ſuum, ſed ſit in Miſericordia, & prædict'* Defendant *eat inde ſine die* are totally omitted, yet this ſhall be amended. 2 Sand. 289. Between Pool and Lonſville, amended after a Writ of Error brought, and the firſt Judgment affirmed accordingly. Raym. 39. S. P. cited. Sid. 70. cited.

3 Mod. 112. If Judgment is given upon a Demurrer, and a Writ of Inquiry awarded, but in the Entry thereof upon the Roll, theſe Words *per Sacramentum duodecim Proborum & Legalium hominum* are left out, this ſhall be amended.

Salk. 50. pl. 13. Parſons and Gill. Ld. Raym. 695. Com. Rep. 117. In Debt upon a *Mutuatus* the Judgment was entered up as of *Hil.* Term 1700. whereas the Borrowing appeared to be 2 *April* 1701. After Error brought it was moved to amend the Judgment by the Paper Book ſigned by the Maſter, which was the 2d of *January* 1700. and allowed to be amended; for it is but a Slip of the Clerk, who ſhould have peruſed the Paper-Book ſigned by the Maſter, which is authentic enough to amend by.

Cro. Eliz. 497. Palm. 98. Doug. 115, 116. 1 Term Rep. 783. But if there be a Miſtake or Error in the Judgment in any ſuch Matter in which the Clerk has no Inſtructions; as if before the 16 & 17 *Car.* 2. *cap.* 8. a *Capiatur* were entered for a *Miſericordia*, or *e converſo*; this was Error in the Judgment, becauſe before the Statute it made a Fine to the King, and a Difference in the Execution; and there being no Inſtruction in the Record itſelf, or in the Judgment-Book, whereby to amend it, it did not appear whether it was the Error of the Clerk in the entering, or of the Court in giving the Judgment, and therefore could not (*a*) be amended; but may now by 16 & 17 *Car.* 2. *c.* 8. and the 5 *W. et M. cap.* 12. takes away the *Capiatur* Fine, in Actions *vi & armis*, therefore no *Capiatur* ſhall be entered againſt the Defendant, nor any Thing in Lieu thereof (*b*).

12 Mod. 104. Ld. Raym. 565. 2 Rd. Raym. 1284. (*a*) 4 Mod. 6. Carth. 167. (*b*) Carth. 390.

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*Page107 * (G) At what Time the Amendment muſt be made; and therein of Records removed out of inferior Courts, and paying of Coſts.

Salk. 47. pl. 1. (*c*) And by Style's Pract. Reg. 45. the Plaintiff may amend his Declaration, though it be ſeven Years paſt ſince he declared, if it be but in Paper, paying Coſts, or ſuffering the Defendant to imparl till the next Term after. After Plea pleaded, and the Replication and Rejoinder to Part, and Iſſue, Notice of Trial with *Proviſo* as to the other, and Rule ſerved to make up the Iſſue to carry it down to Trial, and the *Niſi Prius* Roll ingroſſed in Parchment; but all the Proceedings above continuing in Paper, the Plaintiff had Leave to amend upon Payment of Coſts. *Fareſt.* 156. 8 Mod. 226. Ld. Raym. 95, 116, 134, 183, 548. *Vide* Salk. 47. pl. 3. Where *Holt* ſaid, That he had known an Amendment made, not only after Plea pleaded, but after the Record was ſealed up, juſt even when it was going to be tried. The Defendant cannot amend his Plea after Iſſue joined, or Demurrer thereto; for by this he delays the Plaintiff, which may turn greatly to his Prejudice. Style's Pract. Reg. 49. Ld. Raym. 669, 679, 683. Str. 11. Salk. 179. Lutw. 1218*.

IT ſeems to be the eſtabliſhed Doctrine of the Courts, to allow the Plaintiff to amend his Declaration at (*c*) any Time, whilſt the Cauſe is in Paper, on Payment of Coſts, and giving the Defendant Liberty to alter his Plea, becauſe the Pleading in Paper came in only inſtead of the antient Way of Pleading *ore tenus*, and in Pleading *ore tenus* the Record was only in *Fieri*, but after the Pleadings were entered on Record, if it were not a Record of the ſame Term, it could not be amended or altered.

* The Courts have, in many Caſes, ſuffered the Defendant on Payment of Coſts, and ſubmitting to Terms, to amend his Plea after Demurrer, and even after Argument, where Leave was prayed before Judgment given; *i. e.* where Defendants had Merits.

If the Plaintiff declares, and the Defendant pleads, and the Plaintiff replies, and the Defendant demurs, and the Plaintiff joins in Demurrer; yet the Plaintiff may move to amend on paying of Coſts, if the Cauſe be ſtill in Paper; ſo may he withdraw a Demurrer not entered of Record, and move to amend.

But

But where the Plaintiff declared againſt *J. G.* Knight, the Defendant pleaded in Abatement he was a Knight and Baronet; and the Plaintiff replied that he was a Knight, *&c.* on Motion to have it amended upon Payment of Coſts, all being in Paper, and that the Action being by Bill the Addition was not material; not being within the Statute of Additions it was denied, there being nothing to amend by, and the Defendant had taken (*b*) Advantage of the Fault. Salk. 50. Leperd and Germain.

(*b*) Where after a Demurrer the Court cannot give Leave to amend, *vide* Doug. 115. Bulſt. 204. March 1. Yelv. 38, Cro. Jac. 13, 14. Leon. 28. Sid. 54, 107. Raym. 231. 2 Vent. 142. 3 Lev. 39. 2 Bulſt. 149. 3 Mod. 235. Ld. Raym. 669, 679. 6 Mod. 263, 310. Fitzgib. 193. 2 Stra. 890. Barnard. K. B. 408. Where after Iſſue joined or Plea pleaded, and where not. Vent. 336. Style Rep. 33, 85. But ſee the laſt Note to the firſt Clauſe.

An Action was brought by the Maſter on the Statute of *Winton*, for a Robbery committed on his Servant, in which he declared of an Aſſault and Battery done to himſelf, (though then fifty Miles from the Place) alſo that he made Oath that he did not know any of the Perſons; the Iſſue was entered of Record, and the Jury appeared at the Bar ready to try it, but being for other Buſineſs adjourned to another Day, the Plaintiff obſerving his Miſtake moved to amend, by declaring of a Robbery on his Servant, *&c.* and it appearing that the Year in which the Action muſt be brought was expired, and conſequently the Action muſt be loſt, if not allowed; the Court after long Debate, and Conſideration of former Precedents, admitted him to amend. 3 Lev. 347. Bearcroft *v.* Hundred of Barnham and Stone.

So where in *Aſſumpſit* an Executor laid the Promiſe to be made to his Teſtator, and the Defendant pleaded the Statute of Limitations, and on Motion to amend and lay the Promiſe to himſelf, it was objected, that this would alter the Nature of the (*c*) Iſſue, and take away the Party's Defence; yet it appearing that by the Expiration of the ſix Years the Action would be loſt, the Court gave Leave to amend. Hil. 4. G. 2. The Dutcheſs of Marlborough and Wigmore. Fitzgib. 193. 2 Stra. 890.

Barnard. K. B. 408. (*c*) If the Iſſue ſhall be changed thereby, there ſhall be no Amendment. Lit. Rep. 349. Hetl. 164. Mo. 681. 2 Rol. Rep. 312.

*If the Bill on the File be with Blanks, or the Imparlance Roll be with Blanks for Dates or (*d*) Quantities, yet it may be amended by the Paper by the Clerks themſelves until a *Recordatur* be ordered of the Verdict returned on the *Niſi prius* Roll; but after ſuch *Recordatur* it (*e*) can only be amended by the Court, for the Roll lies with the Prothonotary, to be made up according to the Paper-Book, until the *Recordatur* of the Verdict be allowed; but if after the *Recordatur* be entered it is ordered on the Roll *in ſtatu quo tunc*, and then the Court is ſuppoſed to take Cognizance of it, in what Manner it then was, and if the Clerks might afterwards alter the Roll after Entry of the Verdict, they might amend it in the Verdict which is on the *Niſi prius* Roll, and cannot be altered but by Rule of Court. *Page 108 Lit. Rep. 278. Cro. Jac. 143, 365. 2 Leon. 120. Hetely 142. Latch 164. 2 Mod. 316. 12 Mod. 8. 684. Stra. 139. 2 Stra. 734. 2 Ld. Raym. 1441.

2 Stra. 947. (*d*) So in an *Ejectione firmæ*, where the Bill was with Blanks for the Quantities of Land and Meadow. Rol. Abr. 207. 8 Co. 162. (*e*) Raym. 53. 8, P.

The Inferior Court from whence the Record is returned, whether it be by the Common Pleas, or another Court of Record, may amend after Judgment, as well after as before a Writ of Error brought, and the Rule of ſuch Amendment is to be certified by the Clerk of ſuch Inferior Court to the Superior; for though the Record is removed by Writ of Error, and a *Mittimus recordum* is entered on the Roll, yet the Writ of Error is to ſend the Record in the State and Condition in which it ought to be by Law, and that is corrected from all Miſpriſions of Clerks; or on alledging Diminution the Record is to be ſent up amended as it ought to be, or it may be amended in the Superior Court, if the other refuſeth; for Cro. El. 435, 459, 677. 2 Rol. Rep. 471. 8 Co. 162. Moor 407. Hob. 327. Hut. 41. Rol. Abr. 209, 210. Salk. 49. 2 Jones 212. 1 Stra. 551, 642. 1 Term Rep. 783.

as it ſuperintends ſuch inferior Court, ſo it may correct the Miſpriſions of the Clerks of that Court.

Cro. Car. 410. But there is this difference, where the Clerks carry the Rolls of Amendment to a Superior Court, and where Diminution is alledged, and a *Certiorari* thereon iſſues; for when the Clerks bring up the Roll, it appears to have been amended by the Date of the Rule after Error brought; but when Diminution is alledged, they bring up the Record *in ſtatu quo* the *Certiorari* finds it; and therefore when it is brought up they will intend it to be amended at the Time of the Judgment given, and that the Tranſcript firſt ſent up was a Diminution and a Miſtake; and therefore if Dower be brought againſt an Infant, who appears and pleads by Guardian, he ought not to be amerced, for an Infant cannot be amerced for his indiſcretion; nor a Guardian, becauſe he is appointed by the Court; ſo this is Error in the Judgment itſelf, which is not amendable; and if certified by the Clerks of the Court to have been amended after Error brought, could not have been amended, but yet certified to the *Certiorari* rightly amended, they will ſuppoſe it was amended the ſame Term Judgment was given, and during that Term whilſt Matters are *in fieri*, they can rectify not only the Miſpriſion of Clerks, but their own Miſtakes.

3 Lev. 344, 345. Salk. 49. If a Writ of Error be brought, the Defendant in Error ſhall pay all the Coſts of the Writ of Error, becauſe until the Record was amended, the Plaintiff in Error had ſufficient Reaſon to bring the Writ; but then the Plaintiff in Error muſt nonſuit his Writ; for if he proceed to reverſe the Judgment on any other Error, there the Defendant ſhall not pay Coſts for his Amendment, becauſe it is plain that the Plaintiff did not depend on the Error the Defendant had amended.

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*Page 109 *(H) **Where Records defaced by Deſign or Accident will be ſet right and amended.**

Rol. Abr. 208, 209. Latch. 162. S. C. Poph. 196. S. C. (*a*) 2. Rol. Rep. 80, 81. S. P. adjudged; though objected, that if the Record ſhould be amended, the Delinquent could not be impeached for Felony; for to make it ſo by the Statute, the Razure muſt be ſuch that the Judgment be defeated thereby: But *per* two Judges the Razure of the Record is the Offence, and not the Annulling the Judgment thereby: and *per* 11 Co. 34. The Razure of a Record, by which an Outlawry was made good, was held Felony. (*b*) Where in a *Venire Facias* the Word *Chumley* was razed, and made *Himley*, and amended. Rol. Abr. 208.

IF any Part of the Record be vitiated by Razure, the Court will reſtore it by Amendment, becauſe the Wickedneſs of any Perſon in corrupting the Records of the Court, ought not to obſtruct the Juſtice of the Court, or prejudice any of the Parties; (*a*) as *in Ejectione Firmæ*, the Leaſe was made the 10th of *May*; after Verdict for the Plaintiff it was made the 11th of *May* by a Razure; and it appearing to the Court that the Declaration was (*b*) vitiated by ſuch Razure, they amended it, both in *C. B.* and *B. R.*

8 Co. 160. Earl of Arundel and Lord Lumley, cited to have been adjudged by all the Judges of *England*, *una voce*, *eo potius*, becauſe a common Recovery. And. 79, 80. S. C. adjudged by all the Judges of *England*; and there is a *Nota* by the Reporter, that all the Parchment remained intire, and if not that, perhaps it might have been otherwiſe; and *vide* And. 170.

If an original Writ, upon which a common Recovery of ſeveral Manors, *&c.* was ſuffered, being larger than the other Writs on the ſame File, through the Negligence of the Officer, and by continual Handling, is ſo obliterated and worn out, that but a Letter of the Name of ſeveral of the

Manors

Manors can be ſeen, but the Names of the Manors are truly recited in the Count, and in the *Habere facias ſeiſinam*, the Original ſhall be amended according to the other Parts of the Record.

So if the Original, or other Part of the Record, be ſtolen, taken away, withdrawn, or avoided by any Clerk, though this be felony *per* 8 *H.* 6. *cap.* 12. *ſect.* 3. yet this may be ſupplied and amended by the other Parts of the Record; but if ſuch Part ſtolen, *&c.* or obliterated, cannot be ſupplied by the Record, or any Exemplification thereof, then it ſhall not be amended. 8 Co. 160. b.

*Antient Demeſne.

*Page 110

(A) The Nature of the Tenure, and how proved. 110.
(B) Of the Privileges annexed to Ancient Demeſne. 111.
(C) How it may become Frank-fee. 112.
(D) Where Antient Demeſne may be pleaded, and the Form thereof. 113.

(A) The Nature of the Tenure, and how proved.

ALL thoſe Lands which were in the Poſſeſſion of *Edward* the Confeſſor, and afterwards came to *William* the Conqueror, and were by him, about the 20th Year of his Reign, ſet down in a Book called *Domeſday*, under the Title *De Terra Regis*, are (*a*) Antient Demeſne Lands; theſe were exempt from any feudal Servitude, and were let out to Huſbandmen to plow and cultivate for ſupplying Proviſions and Neceſſaries for the King's Houſhold and Family; and for this Purpoſe the Tenants (who were called by *Bracton*, *Villani Privilegiati*) enjoyed certain Privileges, and the Tenure itſelf had ſeveral Properties diſtinct from others, which it retains to this Day, though the Lands be in the Hands of a Subject, and the Services changed from Labour to Money. 4 Inſt. 269. 2 Inſt. 542. F. N. B. 14. Salk. 57. pl. 2.

(*a*) Lands which are next or moſt convenient to the Lord's Manſion-Houſe, and which he keeps in his own Hands, for the Support of his Family, and for Hoſpitality, are called his Demeſnes, but have not the ſame Properties with Antient Demeſne. Spelm. 12.

This Tenure, my Lord Ch. Juſt. *Holt* ſays, is as antient as any other, though he ſuppoſes that the Privileges annexed to it commenced by ſome Act of Parliament, for that it cannot be created by Grant at this Day. Salk. 57 pl. 2.

The

Salk. 57. pl. 2. 4 Inſt. 269. Hob. 88. Brownl. 43.

The Lands which were in the Poſſeſſion of *Edward* the Confeſſor, and were given away by him, are not at this Day Antient Demeſne; nor are any others, except thoſe writ down in the Book of *Domeſday*; and therefore, whether ſuch Lands are Antient Demeſne, or not, is to be (*a*) tried only by that Book.

(*a*) Where the Book of *Domeſday* was brought into Court by a *Certiorari* out of Chancery, directed to the Treaſurer and Chamberlain of the Exchequer, and by *Mittimus* ſent into the Common Pleas, Dyer 150. b. Iſſue was taken, whether *Longhope* in the County of *Glouceſter* was Antient Demeſne, or not; and on producing the Book of *Domeſday*, it appeared that *Hope* was Antient Demeſne, but nothing ſaid of *Longhope*; and the Court held, that the Party failed in his Proof. Lev. 106. Sid. 147.

Salk. 56. pl. 1. 2 Salk. 174.

But if the Queſtion is, Whether Lands be Parcel of a Manor which is Antient Demeſne? this ſhall be tried by a Jury.

Where an Acre of Land may be Antient Demeſne, though the Manor of which it is Parcel is not ſo, *vide* Rol. Abr. 321. and for this *vide* F. N. B. 14. *Leon.* 232. Dyer 8. 11 Co. 10. Bro. Antient Demeſne 15. 2 Leon. 191. 3 Lev. 405.

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*Page 111 * (B) Of the Privileges annexed to Antient Demeſne.

4 Inſt. 269. *vide* Rol. Abr. 323.

MY Lord *Coke* enumerates the ſix following Privileges which Tenants in Antient Demeſne are to enjoy. (*b*) 1. That they ſhall not be impleaded for any of their Lands, &c. out of the ſaid Manor, but are to have Juſtice adminiſtered to them at their own Doors, by *Petit-Writ of Droit Cloſe*, directed to the Bailiffs of the King's Manors, or to the Lord of the Manor, if it be in the Hands of a Subject.

(*b*) But it muſt appear firſt that the Land is Antient Demeſne; for if a Fine levied of thoſe Lands in *C. B.* be ſtill in Force, the Lands are Frank-fee till it is reverſed; and therefore may be impleaded at Common Law. 2. The Land muſt be holden of the Manor, being Antient Demeſne. 3. It muſt be held by Knight's Service, becauſe Huſbandry is the Cauſe of the Privilege. 4. It is ſaid that the Tenant may remove the Cauſe out of the Lord's Court, if there be no Suitors, or but one Suitor, for that the Suitors are Judges; otherwiſe there would be a Failure of Juſtice. 5. If the Tenant accept a Releaſe of his Lord of his Seigniory, or the Seigniory be otherwiſe extinguiſhed, by Reaſon of the Seiſin of the King, or otherwiſe. 6. Or if the Lord diſſeiſe his Tenant, and make a Feoffment in Fee. 7. If the Lord grant the Services of his Tenant, and the Tenant attorn. 4 Inſt. 269. Alſo if the Manor and Demeſnes of the Manor is in Diſpute, it muſt be impleaded at Common Law, and not in the Lord's Court; otherwiſe the Lord would be Judge in his own Cauſe. Salk. 56. pl. 1.

4 Inſt. 269. That they may have

2. They cannot be impanelled to appear at *Weſtminſter*, or elſewhere in any other Court, upon any Inqueſt or Trial of any Cauſe.

a Writ *De non ponendis in Aſſiſis & Juratis* againſt the Sheriff, or any one who hath the Return of Writs; and if, notwithſtanding ſuch Writ, the Sheriff will return them, they may have an *Attachment*. F. N. B. 166.

4 Inſt. 269. Rol. Abr. 321. S. P.

3. They are free and quiet from all Manner of Tolls in Fairs and Markets, for all Things concerning (*c*) Huſbandry and Suſtenance.

(*c*) But this Privilege does not extend to him who is a Merchant, and gets his Living by buying and ſelling, but is annexed to the Perſon in reſpect to the Land, and to thoſe Things which do grow and are the Produce of the Lands. F. N. B. 228. 2 Leon. 191. Cro. Eliz. 227. Leon. 231, 233. 2 Inſt. 221. S. P. *Vide* 2 Lutw. 1144. and how it muſt be ſet forth in Pleading; and that this Privilege extends to Tenant in Antient Demeſne, whether he hold in Fee, for Life, Years, or at Will. Rol. Abr. 322. 2 Leon. 191.

4. They

4. They are to be free of Taxes and Tallages by Parliaments, unleſs they be ſpecially named. 4 Inſt. 269. That Regularly all general Acts of Parliament extend to Antient Demeſne Lands, *vide* 2 Inſt. 270. And. 71.

5. That they were not to contribute to the Expences of Knights of Parliament. 4 Inſt. 269.

6. That if they be ſeverally (*a*) diſtrained for other Services, than they are obliged to by the Cuſtom of the Manor, they all, for ſaving of Charges, may join in a Writ of *Monſtraverunt*, albeit they be ſeveral Tenants. 4 Inſt. 269. (*a*) Where the Tenants in Antient Demeſne

are diſtrained to do the Lord other Services or Cuſtoms than they or their Anceſtors have formerly done, they may have a Writ of *Monſtraverunt* directed to the Lord, commanding him not to diſtrain for other Services; and if he will ſtill diſtrain, *&c.* then by a Writ directed to the Sheriff he may command him not to demand or diſtrain for other Services; and if he ſtill perſiſts, then he may raiſe the *Poſſe Comitatus*, or command the Neighbours to reſcue and reſtore the Diſtreſs; but the uſual Courſe is, that if after the Writ to the Sheriff the Lord will diſtrain, then an Attachment lies againſt him, returnable in one of the Courts of Record at *Weſtminſter*, to anſwer the Contempt. Plowd. 129.

Lands in Antient Demeſne are extendable upon a Statute-merchant, Staple, or *Elegit*. 2 Inſt. 597. 4 Inſt. 270. S. P. Moor

211. S. P. Lands in Antient Demeſne, upon an *Elegit*, may by the Sheriff be delivered in Execution, becauſe the Title of the Land is not directly put in Plea in the King's Court; adjudged. Hob. 47. Moor 211. pl. 351. and Brownl. 234. S. C.

* In an Indictment for not taking upon him and executing the Office of a Conſtable, to which he was choſen by the Leet, the Queſtion was, Whether a Tenant in Antient Demeſne was obliged to execute that Office; and the Court held he was. *Page 112 Vent. 344.

(C) How it may become Frank-fee.

IF a Fine be levied, or Recovery ſuffered of Lands in Antient Demeſne, this makes them Frank-fee. 4 Inſt. 270. 10 Co. 50.

But if the Lord be not a Party, he may (*b*) have a Writ of Diſceit, and avoid the Fine or Recovery; for Lands in Antient Demeſne were not originally within the Juriſdiction of the Courts of *Weſtminſter*; but the Tenants thereof enjoy this among other Privileges, not to be called from the Buſineſs of the Plough by any foreign Litigation. 7 H. 4. 44. Rol. Abr. 327. (*b*) But cannot bring a *Scire facias*, becauſe not

a Party to the Fine or Recovery. 3 Lev. 419. That a Termor may have a Writ of Diſceit, and make it Antient Demeſne, at leaſt during his Term. Rol. Abr. 327.

But if the Lord be Party, then the Lands become Frank-fee, and are within the Juriſdiction of the Courts of *Weſtminſter*; for the Privilege of Antient Demeſne being eſtabliſhed for the Benefit of Lord and Tenant, they may deſtroy it at Pleaſure. 2 Rol. Abr. 324. Salk. 57. pl. 2.

If a Fine be levied of Lands, Part Antient Demeſne, and Part Frank-fee, and the Lord brings a Writ of Diſceit, the Court of *B. R.* upon View of the Tranſcript of the Record, and Proof that Part are Antient Demeſne, will reverſe and avoid the Fine as to that Parcel; but they will not order the Fine to be torn off the File, as in Caſes where the whole Fine is reverſed, becauſe it ſhall ſtand good as to the Frank-fee; but they will order a Mark to be made on the Fine, to ſignify that it is cancelled as to that Part; and in this Caſe the Ter-tenant muſt be made Party by Kelw. 43. Rol. Abr. 775. Leon. 290. Cro. El. 417.

Scire-

Scire-facias; for otherwiſe the Conuſance of him that was Party to the Fine ſhall not bind, if the Tenements are Frank-fee; becauſe by that Means the Ter-tenant might be diſpoſſeſſed without Notice; whereas if he appears upon the *Scire-facias*, he may plead a Releaſe or Confirmation in Bar, and ſo preſerve his Poſſeſſion.

Bro. Tit. Fine 101. 17 E. 3. 31. F. N. B. 98. a. 9 H. 7. 12. 8 E. 4. 6. Rol. Abr. 863. Cro. El. 471.

But if a Fine be levied of Land all Antient Demeſne, and the Lord reverſes it by Writ of Diſceit, it ſeems doubtful from the Books, whether the Fine ſhall ſtand good between the Parties; ſome ſay, that it ought not to be wholly ſet aſide, nor the Conuzor reſtored to his Land againſt his own ſolemn Acknowledgment on Record, eſpecially ſince the Lord, who brings the Writ of Diſceit, ſeeks nothing but to reſtore the Land to the Privileges of Antient Demeſne (*a*); others, on the Contrary, hold, that the Writ of Diſceit, and the Reverſal thereon, wholly avoids the Fine, and reſtores the Conuzor to the Poſſeſſion of the Land; and the Conuzance, though on Record, ſhall be no Eſtoppel; becauſe it was made in a Court that had no Juriſdiction of the Matter; and therefore the whole Proceedings *coram non judice*.

(*a*) But if after the Fine levied, the Conuzor had releaſed to the Conuzee and his Heirs, are confirmed his Eſtate, he ſhould have retained the Lands, notwithſtanding the Fine was deſtroyed; becauſe by the Releaſe or Confirmation, his Eſtate would have been made firm and rightful. 4 Inſt. 470. 10 Co. 50. Fitz. Diſceit 37. Leon. 290. If Tenant in Tail of Lands in Antient Demeſne, leaſes for ſixty Years, and after levies a Fine, with Proclamations, in the Common Pleas, and this is after reverſed in a Writ of Diſceit, yet, *quoad* the Leſſee, this Fine ſhall not be avoided, but ſhall make the Leaſe good againſt the Iſſue in Tail, by the better Opinion of the Books. Leon. 290, *vide* Lutw. 710, 711.

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F. N. B. 19. 4 Inſt. 270.

* If in a Writ of Right in Antient Demeſne the Tenant pleads in Abatement of the Writ, and by that Judgment is abated, and the Demandant brings a Writ of *Falſe Judgment*, wherein the Writ of *Right* is affirmed to be good, the Court of Common Pleas ſhall proceed as the inferior Court ſhould have done; and although Judgment be there given to recover the Land, yet the Land is not Frank-fee, but continues Antient Demeſne, becauſe the Beginning and Foundation of thoſe Proceedings was in the Court of Antient Demeſne.

Rol. Abr. 324.

If the Lord infeoffs another of the Tenancy, this makes the Land Frank-fee, becauſe the Services are extinguiſhed perpetually.

Vide Rol. Abr. 324, 325. and the ſeveral Caſes there cited out of the Year-Books, and where it becomes Frank-fee, by coming into the Hands of the King.

So if the Lord releaſes to the Tenant all his Right in the Tenancy, or if he confirms to him to hold by certain Services at the Common Law, theſe make the Land Frank-fee.

(D) Where Antient Demeſne may be pleaded, and the Form thereof.

8 H. 6. 35. Rol. Abr. 322. Where the Suit may be removed to the Courts above, and they to proceed as the inferior Court might have done, *vide* F. N. B. 19. 4 Inſt. 270. Moor 451.

IN all Actions wherein if the Demandant recovers the Lands would be Frank-fee, Antient Demeſne is a good Plea.

Vide 4 Inſt. 270. Rol. Abr. 322, 323.

Therefore in all Actions Real, or where the Realty may come in Queſtion, Antient Demeſne is a good Plea; as *Aſſiſe*, Writ of *Ward of Land*, Writ of *Account* againſt a Bailiff of a Manor, Writ of *Account* againſt a Guardian, &c.

In

In *Replevin* Antient Demeſne is a good Plea, becauſe by Intendment the Freehold will come in Queſtion. Godb. 64. Bulſt. 108. Owen 28.

In an *Ejectione Firmæ*, Antient Demeſne is a good Plea; for by common Intendment the Right and Title of the Land will come in Queſtion; and if in this Action it ſhould not be a good Plea, the antient Privileges of thoſe Tenants would be loſt, inaſmuch as moſt Titles at this Day are tried by *Ejectment*. 5 Co. 105. Hob. 47. Bulſt. 108. Hetl. 177. Cro. Eliz. 826. 2 Rol. Rep. 181. Hob. 47. For the Affidavit, ſee 2 Bur. Rep. 1047, 1048. See the Note on the laſt Clauſe of this Diviſion. Doug. 190.

But in all Actions merely Perſonal, as *Debt* upon a Leaſe, *Treſpaſs Quare Clauſum fregit, &c.* Antient Demeſne is no Plea. 5 Co. 105. Rol. Abr. 322.

In *Treſpaſs contra pacem*, though the Realty comes in Debate, yet Antient Demeſne is no Plea; for this is at the Suit of the King, and puniſhable for the Good of the Commonwealth. Cro. El. 826. Rol. Abr. 322.

In an *Aſſiſe* by Tenant by Statute-Merchant, Antient Demeſne is no good Plea, becauſe the Plaintiff does not demand the Freehold, but till he hath Satisfaction. 2 Inſt. 397. Hob. 48.

In a *Quare Impedit* Antient Demeſne is no Plea, becauſe if it ſhould be granted there would be a Failure of Right, for there they cannot grant a Writ to the Biſhop. Rol. Abr. 323. Hob. 48.

So in an Action of *Waſte* Antient Demeſne is no Plea, becauſe in Antient Demeſne they cannot, upon the Diſtreſs returned, award a Writ to inquire of Waſte, according to the Statute; for the Sheriff ought by the Statute to go in Perſon, which cannot be ſupplied by their Officer, and ſo there would be a Failure of Right; but in this the Land ſhall not be Frank-fee. 2 Inſt. 306. Hob. 47. 4 Inſt. 270. Rol. Abr. 323.

* If the Manor and Demeſnes thereof are demanded, Antient Demeſne is no Plea, becauſe the Lord would be Judge in his own Cauſe. *Page 114 F. N. B. 11. 2 Leon. 191. Salk. 56. pl. 1. Comb. 183. Show. 271.

Antient Demeſne may be pleaded after Imparlance, becauſe the Lord may reverſe the Judgment by Writ of *Diſceit*; and it goes in Bar of the Action itſelf, *viz.* in that Court, becauſe it is *coram non judice*. Dyer 210. in Margin. Stile 30. Latch 83.

Moor 451. Where the Defendant in *Ejectment* pleads Antient Demeſne, he need not make any Defence by adding *Defendit vim & injuriam Juam.* Carth. 220. Show. 386. Salk. 217. *Vide* Doct. Pl. 51, 52. Rol. Abr. 322. and Tit. *Pleas and Pleadings*. It may be pleaded without Affidavit. 2 Ld. Raym. 1418. Barnard. K. B. 7.

Annuity and Rent-charge.

AN Annuity, ſtrictly taken, is an yearly Payment of a certain Sum of Money granted to another in Fee-ſimple, Fee-tail, for Life or Years, charging the *Perſon* of the Grantor only; if payable out of Lands, it is properly called a Rent-charge; but if both the Perſon and Eſtate be made liable, as they moſt commonly are, then it is generally called an Annuity. Co. Lit. 144. b. Finch 161. Rol. Abr. 226. Doct. & Stud. Dial. 2. c. 30.

(A) How an Annuity or Rent-charge differs from other Rents. 114.
(B) What shall be a good Grant or Creation thereof. 115.
(C) Of the Remedies for the Recovery of an Annuity. 117.

Apportionment and Extinguishment of an Annuity or Rent-charge, *vide* Head of *Rents*.

(A) How an Annuity or Rent-charge differs from other Rents.

Lit. s. 218. *vide* for this Head of Rents.

A Man seised of Land grants, by Deed Poll or Indenture, a yearly Rent to be issuing out of the same Land to another in Fee, in Tail, or for Life, &c. with a Clause of *Distress*; this is a Rent charge; and if the Grant be without Clause of *Distress*, then it is a Rent-seck.

Vent. 161. Co. Lit. 142.

A Rent-service is an annual Return, made by the Tenant, either in Labour, Money or Provisions, in Retribution for the Land that passes.

Lit. s. 214, 215. 2 Inst. 505. Plow. 134. *Page 115

If a Man makes a Feoffment in Fee, or a Lease for Life, or a Gift in Tail, Remainder over in Fee, upon such Grants there can be no Rent-service reserved at this Day, the Feoffor or Grantor having no Reversion, and the Feoffee or Grantee by the Statute of *Quia Emptores* * *Terrarum* must hold of the capital Lord; therefore if in such Deeds a Rent be reserved, there must be a (*a*) Clause of *Distress* inserted; and this will make a good Rent-charge, the Land being charged with a Distress for the Payment of it.

(*a*) For without such Clause it is only a Rent-seck.

Whether such Reservation be good in a Deed Poll, has been doubted, the Words of Reservation proceeding intirely from the Feoffor or Donor; but it seems now settled that such Reservation is good in a Deed Poll, because whoever claims an Estate under any Deed, ought in Reason and Equity to be obliged to take it under the Terms expressed in the Deed. Vide Co. Lit. 143. b. 2 Rol. Abr. 449. Plow. 134.

Co. Lit. 147. b. 7 Co. 51. b.

If a Man grants a Rent out of three Acres, and grants over, that if the Rent be Arrear, that he shall distrain for the Rent in one of the Acres, this is one intire Rent; but it cannot be a Rent-charge for the Whole, because the greatest Part of the Land out of which it issues, is not chargeable with any Distress for the Recovery of it; and *denominatio sumenda a majori*; therefore it is taken to be a Rent-seck, for which, by the Words of the Grant, the Grantee may distrain in the third Acre; for whenever the Remedy, by way of Charge for the Rent, is not commensurate to the Rent, the Rent is called *seck*, and the Charge is only appurtenant to the Rent, and does not give it its Denomination; and the Reason is, because if such original Grant should be lost and worn out by Time, and a Man were to prescribe for it, if he were to give it the Denomination of a Charge, it would grasp more Land than was originally intended to be charged; and therefore the Law binds them down to the Denomination of the Rent, as Seck, and to set forth the Charge as an Appurtenant, that by Length of Time no more should be comprehended in the Charge that was originally intended in the Grant of that Charge.

Co. Lit. 147. b. 7 Co. 51. b.

If a Man grants a Rent out of his Lands to *J. S.* and his Heirs, and grants that he may distrain for it during his Life, this is a Rent-charge in

J. S.

J. S. becauſe he may diſtrain in the Land, out of which it iſſues, during his own Life; but it ſhall be Seck in the Hands of his Heirs, becauſe by the expreſs Words of the Deed, the Remedy was to ceaſe upon his Death; *aliter* if the Diſtreſs had been limited only for Years, for then the intire Rent had been Seck, becauſe the Remedy being Temporary is not adequate to the Right, which is perpetual.

If a Rent be granted to two and their Heirs out of one Acre, and that it ſhall be lawful for one of them and his Heirs to diſtrain for it, this is a *Rent-ſeck*; and the Diſtreſs given to one is only an Appurtenant to the Rent; but if he to whom the Diſtreſs was not limited dies, the Survivor ſhall diſtrain, becauſe the whole Rent is then in him. Co. Lit. 147. 7 Co. 51.

(B) What ſhall be a good Grant or Creation thereof.

IF a Man obliges himſelf to *J. S.* in an annual Rent of 10*l.* *percipiendum annuatim de manerio de* D. and bindeth the ſaid Manor, and all the Chattels therein, to a Diſtreſs, this amounts to a good Grant of the Rent, and *J. S.* may diſtrain for it. 2 Rol. Abr. 424.

For in many Caſes, without Words of granting, the Law creates a Rent-charge, becauſe it is the Deſign of the Law to render all Contracts binding and effectual, ſo far as the Intention of the Parties may be gathered from the Deed; and ſuch Interpretation is made ſtrongeſt againſt the Grantor, becauſe he is preſumed to receive a valuable Conſideration for what he parts with.

* So if I bind my Goods and Lands to the Payment of a yearly Rent to *J. S.* this is a good Rent-charge, with Power to diſtrain, though there be no expreſs Words either of Grant or Diſtreſs; or if I grant that if ſuch a Rent be Arrear, that *J. S.* ſhall diſtrain for it in the Manor of *D.* this is a good Rent-charge, for in all theſe Caſes it is evidently my Intention that my Land be liable to the Charge. *Page 116 Co. Lit. 147. a. 2 Rol. Abr. 424. Bro. Rent. 14.

So it is if I grant to *S. S.* that he and his Heirs, or the Heirs of his Body, ſhall diſtrain for 40*s.* Rent in my Manor of *Dale*; this is a good Rent-charge in Fee or in Tail, becauſe the Power of diſtraining is in one Caſe given to the Heirs General, and in the other to the Deſcendants of the Body of *S. S.* and whoever has a Power of diſtraining, has an Eſtate in the Rent for which the Diſtreſs is given. Co. Lit. 147. a. Lit. ſ. 221. 2 Rol. Abr. 424. 7 Co. 51. Butt's Caſe.

But if I grant a Rent of 40*s.* out of the Manor of *Dale*; and if the Rent be behind, that the Grantee ſhall diſtrain in my Manor of *Sale*; this Power of Diſtreſs in the Manor of *Sale* ſhall not amount to the Grant of a Rent-charge out of the Manor of *Sale*; for though in the former Caſes ſuch Conſtruction is admitted to ſupport the Intention of the Parties, where the Grant is not explicit, yet in this Caſe the Reaſon of ſuch Conſtruction fails, becauſe here is a plain Grant of the Rent out of the Manor of *Dale*, and the Diſtreſs is given in the Manor of *Sale*, as a Means for the Recovery of it, for which he had no Remedy by the Grant itſelf; and therefore the Rule, *Quod expreſſum ſemper facit ceſſare tacitum*, takes Place here, that where the Intentions of the Parties are evident, there that Conſtruction ſhall never be admitted, which the Law only allows in dubious Contracts, *ut res magis valeat quam pereat*; for if that Manner of Interpretation were admitted, the Grant might be made double, and the Grantor twice charged againſt the Deſign of the Grant. 2 Rol. Abr. 425. Co. Lit. 147. a. 7 Co. 51.

If a Rent be granted to *A.* and if the Rent be behind, that a Stranger ſhall diſtrain for it for the Uſe of the Grantee; that is a good Rent-charge in *A.* and a Diſtreſs limited to a Stranger for his Benefit, 2 Rol. Abr. 425.

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is in Effect making him the Grantee's Servant for that Purpoſe; and what a Man may do by one Servant, he may do by himſelf or any other.

2 Rol. Abr. 425. But if the Diſtreſs had been limited to a Stranger, without ſaying for the Benefit of the Grantee, ſo that the Limitation of the Diſtreſs may ſeem to be independent on the Grant, and without Relation to it; this Diſtreſs does not make it a Rent-charge, ſince by no Words in the Deed the Diſtreſs ſhall not be applied to the Uſe or Advantage of the Grantee.

Bro. Tit. Grant 69, 73. 2 Rol. Abr. 425. If *A.* grants and confirms to *B.* a Rent of 5*l.* to be taken out of his Lands, which Rent *B.* has of the Grant of his Father, though *B.* never had any ſuch Rent from his Father, yet this Grant of *A.*'s ſhall be good to create a Rent-charge in *B.* for it is evidently the Intention of *A.* that *B.* ſhall have a Rent of 5*l.* out of his Land; and a Miſtake or Error in the Deſcription of the Thing referred to, ſhall not render the true Deſign of the Contract ineffectual and void,

Co. Lit. 147. Rol. Abr. 228. Kelw. 3. If two Tenants in Common, If a Man ſeiſed of twenty Acres of Land, grants a Rent of 20*s.* *percipiendum de qualibet Acra terræ ſuæ*, or out of every Acre of Land; this is in Nature of a ſeveral Grant out of every Acre, for the Grant ſhall be taken moſt ſtrongly againſt the Grantor, and the Grantee ſhall have 20*s.* out of each Acre.

or ſeveral Tenants be, and they grant a Rent of 20s. *per Ann.* out of their Land, the Grantee ſhall have 40s. Rent; for as their Eſtate is ſeveral, ſo ſhall their Grant be too; and therefore each ſhall be taken to grant a ſeveral Rent of 20s. 5 Co. 7. b. Plow. 140. b. 161, 171, 289. Co. Lit. 197. a. 267. b.

Co. Lit. 147. b. *Page 117 If *A.* bargains and ſells Land to *B.* by Indenture, and before Inrolment they both join in a Grant of a Rent-charge to *C.* this after the * Inrolment ſhall be conſtrued the Grant of *B.* and the Confirmation of *A.* becauſe when the Bargain and Sale is inrolled, it has the Effect of a Deed inrolled, from the making thereof; and therefore it muſt be the Grant of *B.* who had the Land at the Time of the Grant made; but if the Deed had never been inrolled, then it ſhould have been the Grant of *A.* and Confirmation of *B.* becauſe the Land never paſſed from *A.* the Deed being ineffectual and void, without Inrolment.

Bro. Tit. Grant 86. 8 H. 7. 3. Plow. 156. Palm. 29, 30. 2 Vent. 204. But a Rent *in eſſe*, or already created, cannot be granted to commence after the Death of J. S. becauſe to ſuch Rents there may be precedent Titles, and therefore ſuch If an Original Grant be made of a Rent-charge to commence after the Death of *J. S.* it is good; for this is not like the Caſe of Lands, where the Livery muſt carry the Freehold immediately, and where the Abeyance, or Want of diſtinguiſhing where the Freehold is, may be of Prejudice to the Rights of others; for if the Freehold was to be granted *in futuro*, a Man that had brought his *Præcipe* againſt the Grantor, after he had proceeded in it a conſiderable Time, might have his Writ abated by the Freehold's veſting in a Stranger, by Reaſon of a Conveyance made by the Grantor, before the Writ brought; but the Grant of a Rent *de novo* is not attended with this Inconvenience; for no Man can have a precedent Right to a Thing which is originally created by the Grant itſelf; yet *Quære* at what Diſtance of Time ſuch Charges may be allowed to commence, whether it muſt not be after the Lives of the Perſons *in eſſe*; for if they be indefinite, they ſeem to have the ſame Tendency to a Perpetuity as any other contingent Remainders, or executory Intereſt; and the bare Affectation of a Perpetuity is ſufficient to condemn any Conveyance.

Grants are not good; for ſuch Freehold, by thus being ſplit and ſevered doth hide the Perſon in whom the Right is; and therefore the Party that has Right, will not be able to diſcern againſt whom to bring his *Præcipe* for the Recovery of it. Bro. Tit. Grant 86. 8 H. 7. 3. Plow. 156.

(C) Of the Remedies for the Recovery of an Annuity.

IF a Man grants by his Deed an annual Rent to *J. S.* in Fee, for Life or Years, out of certain Lands, with Clauſe of Diſtreſs, the Grantee may at his Election either diſtrain for this Rent, or have a (*a*) Writ of Annuity, and thereby charge his Perſon. Lit. ſ. 219. F.N.B. 154. 6 Co. 58. b.

(*a*) But no Writ of Annuity lies for a Rent-Service, *vide* Tit. *Rents*, and Rol. Abr. 226. 1 H. 4. 4. nor if a Man deviſes a Rent out of his Land, and dies; for after his Death it is impoſſible to charge his Perſon. 6 Co. 58. b. Nor will a Writ of Annuity lie for a Rent granted for Equality of Partition, or in Lieu of Dower; for though theſe be given by the Perſon, yet, being granted in Satisfaction of a real Eſtate, they retain the Nature of the Things for which they are given, and therefore not recoverable in a perſonal Action. Pop. 84. Co. Lit. 144, 145. Rol. Abr. 227. Co. Lit. 144. a.

If a Man grants a Rent out of his Lands, and by a Proviſo in the Deed, or by Deed of Defeaſance, provides that the Grant, nor any Thing therein contained, ſhall be conſtrued to extend to charge his Perſon by Writ of Annuity; in this Caſe the Perſon of the Grantor is not chargeable; becauſe the Charge upon the Perſon ariſing only from the Manner of conſtruing Grants, which, for the Conſideration given, ought to be extended as far as the Words will bear againſt the Grantor, there can be no Room for ſuch Conſtruction, when, by the expreſs Words of the Grant, the Perſon of the Grantor is not charged; for no Implication ſhall be admitted to overthrow an expreſs Clauſe in the Deed. Lit. ſ. 220. Pop. 87. 6 Co. 87. a.

But if the Proviſo had been that the Grant, nor any Thing therein contained, ſhould charge the Land, that Proviſo had been void, as repugnant to the Grant. Co. Lit. 146. a.

* If a Man grants a Rent-charge out of the Manor of *Dale*, in which the Grantor has no Intereſt, with a Proviſo that the Grant ſhall not charge his Perſon, this Proviſo is void; becauſe the Grantor, having nothing in the Manor of *Dale*, could not, by any Act of his, charge it; and conſequently, the Grantee having no Remedy for his Annuity, but againſt the Perſon of the Grantor, the Proviſo to exempt his Perſon is void, as rendering the whole Grant ineffectual; and if in this Caſe the Grantor had been ſeiſed of the Manor, and had granted a Rent-charge out of it, for the Life of the Grantee, with a Proviſo that the Grant ſhould not charge his Perſon, though the Grantee himſelf could have no Remedy but by Diſtreſs, becauſe, that Remedy being open to him, the Proviſo is good to exonerate the Perſon; yet, upon the Death of the Grantee, his Executor may have an Action ~~of Debt~~ againſt the Grantor for the Arrears, becauſe the Executor has no other Remedy for the Recovery of them; for he cannot diſtrain after the Grant is determined; and therefore the Proviſo to exempt the Perſon is void againſt the Executor, as rendering the Grant uſeleſs and ineffectual. *Page 118 Co. Lit. 146. 6 Co. 41. b. 7 Co. 65. b. Debt.

And hence it is, that if a Rent be granted out of Lands, with a Proviſo that the Perſon of the Grantor ſhall not be charged, that this Proviſo is void, becauſe the Grantee, having no Diſtreſs given by the Deed for the Recovery of the Rent, would be without any Manner of Remedy, if the Proviſo took Place. 6 Co. 58. b.

But if the Grantor had given a Penny, or any other Thing in the Name of Seiſin, the Proviſo had been good, becauſe he might recover the Rent in an Aſſize. 6 Co. 58. b.

If a Man by his Deed grants, that if *J. S.* be not yearly paid the Sum of 10*s.* that then he may diſtrain for it in his Manor of *Dale*, this is a good Rent-charge out of the Manor; but no Writ of Annuity lies for it, becauſe Co. Lit. 146. If *A.* and *B.* Jointenants, grant a Rent-

charge out of their Land, with a Proviso that the Grantee shall not charge the Person of *A.* this discharges the Person of *A.* but leaves *B.* liable to the Writ of Annuity. Co. Lit. 147. b.

because there is no Grant of the Rent made by the Grantor; yet because he hath given the Grantee a Power to distrain, if such a yearly Sum be not paid him, the Manor is thereby charged with the Distress, and consequently with the Rent for which the Distress is given.

Co. Lit. 147. Cro. Jac. 390. Rol. Rep. 330. Cro. Eliz. 607, 622. Doug. 407.

If a Man seised of Land in Fee, and possessed of other Land for Years, grants a Rent-charge for Life out of both, with a Power to distrain in both, if the Rent be Arrear, the Leasehold, as well as the Land of Inheritance, are subject to the Distress; because a Man may oblige his Chattels to the Discharge of the Rent; but the Rent being a Freehold shall issue only out of the Inheritance; because the Leasehold, being only a temporary and perishing Interest, is not a Fund commensurate to the Charge; and therefore the Rent shall issue out of the Inheritance, which for its Duration is a more complete Estate to support the Charge, and render the Grant effectual. And hence it was (*a*) adjudged, that though the Grantee might distrain the Leasehold Lands, yet he must avow for a Rent issuing out of the Inheritance.

(*a*) 7 Co. 51, 52. Butt's Case.

7 Co. 51. Cro. El. 183.

But if a Man possessed of a Term for Years, grants a Rent out of it to another for Life, though the Estate be of shorter Duration than the Charge; yet because it is the only Fund provided by the Grant, for the Payment of the Rent, it shall answer the Grantee so long as it has Continuance, if the Life for which the Rent was granted, lasts so long.

There is another Remedy for the Recovery of an Annuity or Rent-charge, and that is when a Power is given the Grantee to enter and hold the Lands till satisfied the Arrears by the Perception of Profits, the Grantee, when the Rent is Arrear, may in such Case enter and hold the

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Perception of Profits. Sid. 223, 262, 344. Lev. 170. Keb. 784. Raym. 135, 158. Sand. 112, 113. Jemet and Cawley.

* Lands till satisfied by the Perception of the Profits; though in this Case it was objected, that there was no Estate conveyed, out of which a Use might arise to the Grantee, upon the Nonpayment of the Rent; and that this Grant could pass no Estate to the Grantee, as a Conveyance at Common Law, because the Grantee could have no Inheritance or Freehold in the Land, when the Rent was in Arrear for Want of Livery, nor an Estate for Years, for Want of a certain Commencement and Determination; yet it was adjudged, that by the Grant he had an Interest vested in him, when the Rent was Arrear; and though it be an uncertain Interest, which, for the Uncertainty of its Commencement and Determination, might be void by the strict Rules of Law, if it were granted independent of any Estate certain, yet it is good in this Case, because it is created to attend a determinate Estate; and the Nonpayment of the Rent fixes the Certainty of its Beginning, and the Satisfaction of the Arrears, by the Perception of the Profits, the End and Determination of such Interest; and therefore the Grantee may reduce such Interest, as it rises, into his possession by Ejectment, which is the proper Remedy to recover the Possession.

Cro. Jac. 510, 511, 512. 2 Rol. Rep. 12. Poph. 126, 147. 3 Bulst. 250. Fearne's Cont. Rem. 423. Havergile and Hare. And by the better Opinion it seems, that

If a Man grants a Rent-charge to *J. S.* his Heirs and Assigns; and if it shall happen that the Rent be behind and unpaid, that then the said *J. S.* his Heirs and Assigns, shall enter into the Land, and have and enjoy the Rents thereof, until the Arreas be fully satisfied; and the Grantor covenants to levy a Fine to the Uses of the said Deed; if after the Fine levied the Rent be Arrear, the Grantee may enter into the Land, or make a Lease for Years to try his Title in Ejectment; because by the Fine there is an Estate vested in the Conuzees, to raise an Use in the Grantee, of the Rent-charge, when the Rent is behind; and whenever the Rent becomes Arrear, the Possession is executed to that Use, and consequently the Grantee hath a Right to take and keep that Possession, till the Use for which it was executed be satisfied; and that was till the Arrears of Rent be paid

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by the Perception of the Profits; and therefore though the greateſt Intereſt in the Land be uncertain (becauſe it is uncertain when the Rent will be paid out of the Profits) yet while his Intereſt remains, if his Poſſeſſion be diſturbed or diveſted, he may reſtore it by Ejectment, which is the proper Remedy to recover the Poſſeſſion; and if the Grantee aſſigns over the Rent, the Aſſignee may likewiſe enter, and maintain a Title in Ejectment; for though the Uſe ariſes out of the Eſtate of the Conuzee only, as the Rent is in Arrear, and, till the Rent be behind and unpaid, there is nothing more than a bare Poſſeſſion of a Uſe, which in its Nature is not aſſignable; yet by the Conveyance of the Rent it ſhall paſs, becauſe it is nothing more than a Remedy or Security for the Rent; and therefore ſhall attend that into whoſe Hands ſoever it comes.

if the Rent be Arrear before the Fine levied, yet the Fine levied afterwards ſhall be ſufficient to raiſe an Uſe in the Grantee to enter into the Land for the Recovery of theſe Arrears; becauſe the Fine is guided by the Deed of Grant, and both amount but to one Aſſurance. Cro. Jac. 512.

An Action of Debt does not lie for the Arrearages of an Annuity, if the Grantee be ſeiſed of it in Fee, Tail, or for Life.

Co. Lit. 162. 4 Co. 49. a. But where an Annuity was granted by Deed for two Years, and the Grantee brought an Action of Debt for the Arrears; on Demurrer it was held, that Debt would lie upon the Contract, it being granted by Deed, and for Years. Cro. Eliz. 268. For the Remedies which Heirs and Executors have by Diſtreſs or Action of Debt, *vide* Head of *Rents*, and the Statutes 32 H. 8. c. 37.* 8 Ann. c. 14. 4 Geo. 2. c. 28. 11 Geo. 2. c. 19.

* See a good Comment on this Statute of H. 8. Co. Lit. 162. a. b.

As regularly the Remedies for Recovery of an Annuity or Rent-charge are either by Writ of Annuity or Diſtreſs, it is to be ſeen which is the moſt eligible Method, and what ſhall determine the Grantee's Election. If *A.* grants a Rent-charge to *B.* and his Heirs, if the Rent be Arrear, not only the Grantee, but his Heirs *in infinitum*, may diſtrain for it; for the Remedy, being commenſurate to the Right, muſt be of equal Duration with the Right; but if in this Caſe the Rent be Arrear, and the Grantee brings a * Writ of Annuity, in order to charge the Perſon of the Grantor, it is no longer to be conſidered as a Rent iſſuing out of the Land, becauſe the Writ of Annuity has intirely turned the Charge upon the Perſon of the Grantor; and under that Denomination it muſt determine with the Life of the Grantor, becauſe his Heirs are not chargeable.

Rol. Abr. 236. Poph. 87. Hob. 58. Dyer 344. Co. Lit. 144.

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But if *A.* had granted for him and his Heirs to *B.* and his Heirs, ſuch a Rent out of his Lands, in this Caſe the Heirs being comprehended in the Contract, are bound to make good the Grant ſo far as they have Aſſets by Deſcent from the Grantor.

2 Rol. Abr. 226. Co. Lit. 144. Poph. 87.

If a Rent be granted in Tail, the Grantee cannot alien it while it continues a Rent; becauſe as ſuch it may be intailed within the Statute *De donis*; but if the Grantee brings his Writ of Annuity, it is no longer within the Statute, becauſe then it is become a Charge merely perſonal, without any Relation to the Land out of which it was firſt granted, and therefore is become a Fee-ſimple conditional, as ſuch a Gift of Lands had been before the Statute; and therefore the Annuity not being within the Statute, may be aliened.

Poph. 87. Co. Lit. 19. a. 7 Co. 61. Nevil's Caſe.

But in ſome Reſpects the Writ of Annuity is the better Remedy; as if a Termor for Years grants for him and his Heirs a Rent-charge out of his Land to another and his Heirs; in this Caſe, if the Grantee diſtrains, and thereby has thrown the Charge intirely off the Perſon upon the Land, upon the Expiration of the Term, the Rent is gone; becauſe the Grantor could not charge the Land longer than his own Intereſt in it continued; but if the Grantee had brought his Writ of Annuity, the Charge upon the Perſon had been perpetual, ſo long as the Heirs of the Grantor had any Aſſets; becauſe the Grant was for him and his Heirs.

Annuity where better. Poph. 87.

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Lit. ſ. 219. Rol. Abr. 223. Co. Lit. 145. The next Thing to be inquired into is, what Acts of the Grantee are ſufficient to determine his Choice; and this Determination muſt be by ſome ſolemn Act in a Court of Record, that it may appear to be the Act of the Grantee himſelf, and not of a Stranger, without his Permiſſion or Authority; and therefore if the Grantee diſtrains for the Rent, that is no Determination of his Election; neither is the ſuing forth a Writ of Annuity any Determination, becauſe theſe may be done by a Stranger, without the Grantee's Knowledge or Conſent; or rather, becauſe the Deſign of the Law being to help Men to the Recovery of their Rights, in the moſt beneficial and beſt Method, the Grantee ſhall not be foreclоſed of either of his Remedies, by any raſh or unadviſed Act of his; but if the Grantee counts in the Writ of Annuity, or avows the taking of the Diſtreſs, the Count and Avowry is a repeated Determination, or plain Confirmation of his firſt Choice and Election; and this, being entered on Record, is taken to be the deliberate Act of his Mind, and therefore he ſhall not be allowed to recede from what he has done in ſo ſolemn a Manner.

Dyer 344. b. Hob. 58. But if a Man grants a Rent-charge in Fee, without ſaying, for him and his Heirs, and the Grantor dies, and the Grantee brings a Writ of Annuity againſt the Heir, though he counts thereon, and proceeds to Judgment, yet that does not foreclоſe him of his Diſtreſs on the Land out of which the Rent iſſues; becauſe, by the Death of the Grantor, the Grant, as an Annuity, was determined, and conſequently the Grantee had no Election, having but one Remedy for the Recovery of it, which was by Diſtreſs; but the Diſtreſs in this Caſe ſtill remained, becauſe the Grantee loſt his Election by the Act of GOD, for which no Man ought to ſuffer.

Poph. 86. Co. Lit. 148. Mo. 301. 2 Co. 36. So it is if Tenant *pur auter vie* grants a Rent-charge for ten Years, and the *Cuſtuy que vie* dies, in this Caſe the Charge is determined as a Rent, becauſe the Eſtate for Life, out of which it iſſued, is ended; but the Grantor is ſtill liable to a Writ of Annuity for the growing An-

*Page 121 * nuity, becauſe the Grantee had not by any Act of his determined his Choice, and therefore the Election being taken away by the Act of God, and not by any Act of his own, he may purſue the other Remedy by Writ of Annuity.

Co. Lit. 148. (a) But Q. Whether the Caſe may not be ſo circumſtanced as to intitle him to Relief in Equity, *vide* 2 Vern. 143, 144. But if the Grantee of a Rent-charge, before he has made his Election, purchaſes Part of the Land, in this Caſe he is (*a*) without any Remedy, either againſt the Land or againſt the Perſon of the Grantor, the Land is not liable becauſe the Rent is extinct by the Purchaſe, and it being in its original Creation a Rent-charge, though the Law gave a double Remedy for it, yet when the Grantee has by his own Act diſcharged the Land, and extinguiſhed the Rent, he can have no Remedy for the Thing which he has wilfully deſtroyed, and therefore he can have no Writ of Annuity againſt the Perſon.

APPEAL.

AN Appeal is the Party's private Action, ſeeking Revenge for the Injury done him, and at the ſame Time proſecuting for the Crown, in reſpect of the Offence againſt the Public.

Though this be a legal Suit, and therefore to be carried on in a reaſonable Way, yet as none of the Statutes of *Amendment* or *Jeofail* extend

extend to it, the utmoſt Exactneſs is required in the Proceedings, eſpecially where the Life of a Man is brought into Danger; but as the nice Diſtinctions made and allowed of in the ſeveral Kinds of Appeals, are accurately treated of by Mr. Serjeant *Hawkins*, it may be ſufficient to ſet down here what ſeems to have been moſt materially ſaid by him relating to Appeals, under the following Heads. 2 Hawk. P. C. 155.

(A) Of the different Kinds of Appeals: And herein, 122.

1. Of an Appeal of Death. 122.
2. Of Appeals of Larceny. 122.
3. Of an Appeal of Rape. 123.
4. Of an Appeal of Mayhem. 123.

(B) In what Courts an Appeal may be brought. 123.

(C) Who may bring an Appeal. 124.

(D) Within what Time an Appeal muſt be brought. 125.

(E) In what County an Appeal muſt be tried. 125.

(F) How the Appellant is to appeal and proſecute. 126.

(G) How the Form of the Writ muſt be, and for what Faults it may be abated. 126.

* (H) How the Form of the Declaration muſt be. 127. *Page 122

(I) What may be pleaded in Bar to an Appeal. 128.

(K) How the Appellant is to be puniſhed for a falſe Appeal. 128.

(A) Of the different Kinds of Appeals.

THERE were anciently ſeveral Kinds of Appeals which ſeem obſolete at this Day, as Appeals of Treaſon, which might be ſued before the Parliament and other Courts of Law, as well as before the Conſtable and Marſhal, and were determinable by Battle. 2 Inſt. 132. Bract. 118. 2 Hawk. P. C. 161.

But Appeals before the Parliament are taken away by 1 *H.* 4. *cap.* 14. and thoſe before other Law Courts are become (*a*) obſolete. 2 Inſt. 132.

(*a*) But as to the Juriſdiction of the Conſtable and Marſhal, in relation to Treaſons committed out of the Realm, it ſeems to continue ſtill in Force; for in the ſeventh Year of *Charles* the Firſt, an Appeal of Treaſon ſuppoſed to be committed beyond Sea, was actually commenced before the Conſtable and Marſhal, who, for want of ſufficient Proof to clear the Truth, awarded that a Duel ſhould be fought between the Parties, for the final Determination of the Matter. Ruſhworth's Collect. Part 2. Vol. 1. fol. 112. between *Donald*, Lord *Rea*, and *David Ramſay*, Eſq.

Appeals *de Pace*, *de Plagis* and *de Impriſonamento*, are out of Uſe, and have been turned to Actions of Treſpaſs for many hundred of Years paſt; alſo the whole Learning of Appeals of (*b*) *Arſon* ſeems obſolete at this Day. 4 Inſt. 182. Co. Lit. 126. (*b*) Co. Lit. 288. a.

The kinds of Appeals therefore that ſeem to require any Conſideration at this Day, are thoſe of Death, Larceny and Rape, which are capital Appeals, and that of Mayhem, which is conſidered as a Treſpaſs: And therefore,

APPEAL.

1. Of an Appeal of Death.

An Appeal of Death, which is now chiefly in Uſe, is a vindictive Action which the Law gives a Wife againſt her Huſband's Murderer, and to the Heir at Law againſt one who kills his Anceſtor, which being the Suit of the Subject, the King cannot pardon: but as the ſeveral Matters ſet forth in the following Part of this Head more particularly relate to this kind of Appeal, it ſeems needleſs to inſert them here.

2. Of Appeals of Larceny.

H.P.C. 184. Latch. 127. An Appeal of Larceny is an Action which a Perſon robbed of Goods may bring againſt the Felon, in which there ſhall be (*c*) a Reſtitution of the Goods, and the Offender to ſuffer ſuch Puniſhment as if he were convicted at the Suit of the King.

(*c*) Where freſh Suit is required in order to intitle the Party to a Reſtitution, *vide* 2 Hawk. *P. C.* 169.

2 Hawk. P. C. 177. In every Appeal of Larceny it is neceſſary to ſet forth whoſe the Goods were that were ſtolen, and (*d*) what the Price of them was, and that the Words *Felonice cepit* be made uſe of.

(*d*) But 2 Hawk. P. C. 177. This does not ſeem neceſſary for any other Purpoſe, than to ſhew that the Crime amounts to Grand Larceny, and to aſcertain the Goods, in order thereby the better to intitle the Appellant to a Reſtitution.

*Page 123 2 Hawk. P. C 167. (*a*) Keilw. 70. pl. 7. * They who are robbed of Goods in which they have a ſpecial Property, as Churchwardens, Carriers, &c. may maintain an Appeal of Larceny, and (*a*) may either bring it generally for their own Goods, or ſpecially for the Goods of *J. S. &c.* in their Cuſtody.

3. Of an Appeal of Rape.

2 Inſt. 180. Co. Lit. 123. By the Common Law, any Virgin, Wife or Widow, might bring an Appeal of Rape againſt any one who had raviſhed her, though ſhe were his Nief; but a lawful Wife could never bring ſuch Appeal without her Huſband; and by the Common Law the Raviſher was to ſuffer Death.

2 Hawk. P. C. 172. But by the Statute of *Weſtm.* 1. *cap.* 13. the Offence of committing a Rape was reduced to a Treſpaſs, and puniſhable in the ſame Manner with other Treſpaſſes, till the making of the Statute of *Weſtm.* 2. *cap.* 34. by which it is enacted, *That whoever raviſhes any Woman, where ſhe did not conſent before or after, ſhall have Judgment of Life and Member; and tho' ſhe do conſent after, he ſhall have Judgment if attainted at the King's Suit*; but it is obſervable, that this Statute does not reſtore the old Common Law in relation to ſuch Appeals, as it would have done if it had only repealed the ſaid Statute of *Weſtm.* 1. but makes a new Law concerning them; from whence it follows, that all Appeals of Rape, which are impliedly given by this Statute, muſt conclude *contra formam ſtatuti.*

4. Of an Appeal of Mayhem.

Hob. 134. 2 Jones 205. An Appeal of Mayhem lies for any Hurt done to a Man's Perſon, whereby he is rendered leſs able in Fighting to annoy others or defend himſelf.

Vide 2 Hawk. P. C. 158. In this Action the Words *Felonice Mayhemiavit* are neceſſary, though the Defendant is not ſubject to the Loſs of Member.

(B) In what Courts an Appeal may be brought.

APPEALS are commenced either by Writ, which is an Original out of Chancery, returnable in the *King's Bench* only, or by Bill. 2 Hawk. P. C. 155.

Appeals by Bill may be ſued in the *King's Bench* againſt any Perſon in actual Cuſtody, or by (*b*) having Bail filed for him there. Cro. El. 605.

(*b*) But not againſt one who is mainpriſed *de die in diem*. Cro. Eliz. 694. 2 Hawk. P. C. 155. and *note*, That if the Appelle be arraigned and tried the ſame Term, there is no Neceſſity to file a Bill againſt him. Jones 425. Cro. Car. 532. Rol. Abr. 536. But *vide* Skin. 634. pl. 3. where notwithſtanding, the Court ordered a Roll to be made, and a Copy of it to be delivered to the Appellee, and gave him a Day to plead.

If a Man be brought into Court either by a void Writ of Appeal, or by a voidable one, which is afterwards abated, he may be arraigned by Bill *in Cuſtodia Mareſchalli*. 2 Hawk. P. C. 155. Skin. 634. *Vide* Cro. El. 605, 695.

A Bill of Appeal lies before Juſtices of *Eyre*, and before Juſtices ſpecially aſſigned, and before Juſtices of Gaol-Delivery, and for the ſame Reaſon, as ſome ſay, before Juſtices of Aſſiſe; who by the Purport of ſeveral Statutes are authorized to deliver Gaols without any ſpecial Commiſſion againſt any Priſoner in the Gaol, which they are to deliver, or as it is generally holden, againſt a Perſon whom they have bailed. *Page 124

Vide 2. Hawk. P. C. 156. and the Authorities there cited, for Appeals before the Sheriff and Coroner, and Appeals of Felonies done out of the Realm, before the Conſtable and Marſhal, *vide* 2 Hawk. P. C. 157. And that they cannot be ſued before Juſtices of the Peace. *Idem.*

If ſome of the Accomplices only be in Priſon, a Bill of Appeal lies againſt all, which, after the Trial of thoſe in the Priſon, ſhall be removed into the *King's Bench*, where the Reſt ſhall be proceeded againſt. 2 Hawk. P. C. 156.

(C) Who may bring an Appeal.

AN (*c*) Infant may bring an Appeal, but he muſt proſecute it by Guardian, and ſhall be nonſuited upon ſuch Guardian's Non-appearance at a Day whereon he is demandable; but if the Infant comes into Court, and ſays, that he will relinquiſh the Suit, and the Guardian inſiſts to continue it, the Court may diſcharge him and aſſign another. Moor 461. H.P.C. 183. 11 Mod. 216. 2 Ld. Raym. 1288. Holt 355.

(*c*) Alſo an Appeal lies againſt an Infant. H. P. C. 185. 2 Hawk. 168.

But an Ideot, or Perſon born deaf and dumb, or one attainted of Treaſon or Felony, or outlawed in a perſonal Action, ſo long as ſuch Attainder or Outlawry continues in Force, cannot bring any Appeal whatſoever. H.P.C. 183. 2 Hawk. P. C. 162.

The (*d*) Wife only (unleſs ſhe had a Share in the Guilt, in which Caſe it ſhall be brought by the Heir) can bring an Appeal of the Death of her Huſband, but ſhe muſt have been his lawful Wife; which are to be tried by the Biſhop's Certificate. *Vide* Title Baron and Feme. 2 Inſt. 68.

(*d*) That an Appeal may be brought againſt a Feme Covert, *vide* 2 Hawk. P. C. 168.

2 Hawk. P. C. 164. (c) For this

Alſo a Woman divorced from her Huſband, though by a voidable Sentence, (c) cannot maintain an Appeal.

at leaſt is implied in the old Rule, that a Woman ſhall have an Appeal *de Morte Mariti inter brachia ſua interfecti, & non aliter.* 2 Hawk. P. C. 164. *Vide* 2 Inſt. 68.

2 Hawk. P. C. 164.

But a Wife who elopes from her Huſband, and the Wife of one attainted of High Treaſon, may have an Appeal of his Death; though ſuch a Wife cannot have Dower, for the Statutes, which take away Dower in thoſe Caſes, ſay nothing as to her Right of bringing an Appeal.

2 Hawk. P. C. 164. (d) But whether the Court may

If the Wife take another Huſband either before or pending the Appeal, ſhe puts an End to it for ever; and if ſhe marry after Judgment (d) ſhe cannot pray Execution.

not award Execution againſt him either *ex Officio*, or at leaſt at the Demand of the King. Q. 2 Hawk. P. C. 164.

Vide Head of Deſcent. (e) But if he have a Share in the Guilt, the next Heir ſhall

For the Death of an Anceſtor who leaves no Wife, the Heir only can bring an Appeal, and ſuch Heir muſt himſelf be (e) innocent of the Fact, he muſt be Heir (f) General according to the Courſe of the Common Law, and alſo Heir (g) Male, and in his Count muſt ſet forth how he is Heir to the Deceaſed.

have an Appeal againſt him. H. P. C. 182. 2 Hawk. P. C. 165. (f) Therefore the Father cannot bring an Appeal for the Death of his Son, nor the youngeſt Son in *Borough Engliſh* for the Death of his Father; and if the Deceaſed have two Sons at the Time of his Deceaſe, the eldeſt attainted of Treaſon, neither of them can bring the Appeal. Co. Lit. S. Leon. 326. Dyer 50. (g) This depends upon *Magna Charta*, which ordains, that none ſhall be impriſoned on the Appeal of a Woman for the Death of any but her Huſband; and therefore if ſhe brings ſuch Appeal, the Court *ex Officio* will abate the Writ; but no other Appeals by Women are excepted, beſides the Appeal for the Death of an Anceſtor. 2 Hawk. P. C. 165, 166.

Vide 2 Hawk. P. C. 166. *Page 125

If an Heir die, pending an Appeal commenced by him, it ſeems agreed that no other Heir can proceed in ſuch Appeal, or commence a new one; * and it ſeems the ſtronger Opinion, that if the Right of bringing an Appeal be once veſted in an Heir, who dies without bringing any, the Right of Appeal is gone for ever; and if an Heir die after Judgment given againſt the Appellant, it is queſtionable whether his Heir can ſue Execution.

(D) Within what Time an Appeal muſt be brought.

2 Inſt. 320. 3 Inſt. 53. 4 Co. 42. b. 2 Hawk. P. C. 162. 3 Salk. 38. Ld. Raym. 21, 22, 434, 556, 557. 11 Mod. 70. pl. 9.

BY the Statute of *Glouceſter*, *cap.* 9. which has been conſtrued to extend only to Appeals of Death, *An Appeal ſhall not be abated for Default of freſh Suit, if the Party ſue within the Year and Day after the Deed done*, the Computation whereof, as the Law is now ſettled, ſhall be made not from the Day when the Wound was given, but from the Day when the Party died; alſo the Year and Day ſhall be computed from the Beginning of the Day, and not from the preciſe Time when the Death happened, becauſe regularly no Fraction ſhall be made of a Day.

2 Hawk. P. C. 175. (a) So of Appeal of Larceny. 2 Hawk. P. C. 168.

An Appeal of Rape may be brought in any reaſonable Time, the Judgment whereof lies in the (a) Diſcretion of the Court; for, as has been ſaid, the above Statute of *Glouceſter*, *cap.* 9. extends only to Appeals of Death.

(E) In

(E) In what County an Appeal muſt be tried.

ALL Appeals are local Actions, and regularly to be tried in the County wherein the Offence was committed. Dyer 38.

But it is ſaid, that if a Perſon had died in one County of a Wound given in another, the Appeal might be brought in either of them, and the Trial be at the Bar by a Jury returned from the Body of each of thoſe Counties; but ſince the 2 & 3 *E.* 6. *cap.* 2. which enacts, *That the Party may ſue an Appeal in the County where the Perſon feloniouſly ſtricken, &c. ſhall die,* &c. it ſeems the Trial may be from ſuch County only. 2 Hawk. P. C. 163.

So an Appeal of Larceny is a local Action; yet if one rob me of Goods in the County of *A.* and carry them into the County of *B.* I may (*a*) either bring an Appeal of Robbery in the County of *A.* or an Appeal of Larceny in the County of *B.* Dyer 39. 7 Co. 2. 2 Hawk. P. C. 168.

(*a*) But if one take me from the County of *A.* into that of *B.* and there rob me, he ſhall be appealed of Robbery in the County of *B.* only, for he was only a Treſpaſſer in *A.* 2 Hawk. P. C. 168. So in Rape, if a Man takes a Woman by Force in one County, and carries her into another, and there raviſhes her, the Appeal ſhall be brought in the latter only. 2 Hawk. P. C. 174.

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* (F) How the Appellant is to appear and proſecute. *Page 126

AT Common Law neither Plaintiff nor Defendant in any Appeal whatever, could make an Attorney (*b*) except in ſome ſpecial Caſes; but now by the 3 *H.* 7. *cap.* 1. it is enacted, *That the Appellant in any Appeals of* (*c*) *Murder, or Death of a Man, where Battle by the Courſe of the Common Law lies not, may make an Attorney, and appear in the ſame, in the ſaid Appeals, after they be commenced, to the End of the Suit, and Execution of the ſame.* 2 Inſt. 313. 2 Hawk. P. C. 173.

(*b*) As where a Defendant prayed his Clergy after his Conviction, and the Plaintiff replied Bigamy; in which Caſe he was allowed to make his Attorney, in order to procure the Biſhop's Certificate. 2 Hawk. P. C. 175. Alſo after a Defendant is acquitted, he may appear by Attorney, in order to recover Damages from the Abettors. 8 *E.* 4. 3. pl. 5. (*c*) Cannot appear by Attorney in an Appeal of Mayhem. Carth. 395.

But it ſeems that the Appellant cannot make an Attorney till he has once appeared in proper Perſon; and that if the Plaintiff or Defendant appear or plead by Attorney where they ought not, and the Court receive the Plea, and adjourn the Cauſe, it ſeems that the Appeal is diſcontinued, becauſe ſuch Appearance was merely void in Law. Skin. 48. *pl.* 1. 670. *p.* 9. Carth. 394. Salk. 61.

The Appellant may be nonſuited for not appearing when demanded, at any Day of Continuance, except a Verdict hath been given againſt him; in which Caſe by the 2 *H.* 4. *cap.* 7. he cannot be nonſuited. Noy 88. Latch 178. Moor 407. Cro. E. 465.

Where an Appeal is commenced in the Court below, and removed into the *King's Bench*, the Appellee is to be arraigned *de novo* on the ſame Bill of Appeal, and it is not neceſſary to exhibit a new Bill againſt him *in Cuſtodia Mareſchalli*; and if the Appellant will not appear to proſecute his Appeal, the Appellee may ſue out a *Scire facias* reciting the whole Matter, Rol. Abr. 131. 2 Bulſt. 19. Skin. 670. pl. 9.

Carth. 394, 395. Matter, warning him to appear at a certain Day; and if he make Default on that Day, the Court on Demand will nonsuit him; but the Appellant may appear *gratis*, and prosecute without any *Scire facias*.

(G) How the Form of the Writ must be, and for what Faults it may be abated.

Abr. Eq. 416. THE Writ in an Appeal is an Original issuing out of Chancery, returnable into the *King's Bench* only; before the Return thereof the Court of Chancery only can supersede or set it aside, where it appears to have issued *erronice* or *improvide*, by some Error extrinsic to the Writ itself; but for any Error or Defect on the Face of it, it may be quashed after it is returned into the *King's Bench*.

2 Hawk. P. C. 184. Where it might be quashed for false *Latin*, *vide* Danv. 252. The Court (*a*) *ex Officio* will quash the Writ for apparent Faults appearing on the Face of the Writ; as where the Sense is defective for want of a material Word, or where it wants those Words of Art which the Law has appropriated for the Description of the Offence.

(*a*) But the Appellant is first to demand *Oyer* of the Writ, and this he must do in open Court. 2 Hawk. P. C. 184.

2 Hawk. P. C. 185. So if in a Writ of Appeal brought by Husband and Wife, the Conclusion is in the Name of the Wife only; or if the Writ omits either the
*Page 127 * Name of Baptism, or Surname of the Appellant or Appellee being under the Degree of Nobility, it shall be abated.

Vide Hawk. P. C. 184. and where such Faults in the Declaration are not fatal, if the Writ on the File be right, 8 Co. 162. and Title *Amendment and Jeofail*. Also the Court will abate the Writ when the Declaration varies from the Writ in some material Point, either as to the Reign of the King, or as to the County wherein the Fact is laid, &c.

Salk. 63. pl. 4. See Lord Raym. 671. 12 Mod. 416, 448, 451. On the Exception of the Party the Court will abate the Writ; as if he shews that there are not 15 Days between the *Teste* and Return of the Writ; but this he must do before he has pleaded in Chief, without taking Advantage of it.

Vent 7. For this *vide* Title Misnomer and Addition; and 2 Hawk. P. C. 184 to 193. If the Writ or Declaration mistake either the Name of Baptism, or Surname or Addition of the Appellant or Appellee, the Appellee before Imparlance may plead it in Abatement.

2 Hawk. P. C. 190. But the Omission or Insufficiency of an Addition is salved by the Appellee's coming in and pleading, without taking any Advantage of such Defect, but not by his bare Appearance.

2 Hawk. P. C. 191, 192. (*b*) *Vide* Carth. 56. That he must plead the General Issue at the same Time that he pleads in Abatement. The Defendant may at the same Time plead as many Pleas in Abatement as he pleases, together with Matter in Bar, and the General Issue, if he can do it without Repugnancy; and if he be (*b*) suffered to plead any such Plea without pleading with it the General Issue, the Finding it against him doth not conclude him from pleading the General Issue afterwards.

(H) How

(H) How the Form of the Declaration muſt be.

THE Declaration muſt ſet forth the Offence with the utmoſt Certainty, and likewiſe deſcribe it by ſuch Words of Art as the Law has appropriated to the Purpoſe; therefore if the Words *Felonice* in any Appeal, *Murdravit* in an Appeal of Murder, *Rapuit* in an Appeal of Rape, *Cepit* in an Appeal of Larceny, *Mayhemiavit* in an Appeal of Mayhem, be omitted, they cannot be ſupplied by any Circumlocution. 2 Hawk. P. C. 177. *Vide* Head of Indictments.

The Declaration muſt ſet forth in what Part of the Body the Wound was given; and therefore, if it only ſays, that the Wound was given *circa Pectus*, it is vicious; but it is certain enough, by ſhewing that the Wound was given in the Left Part of the Belly, or of the Side, or in the Left Leg, &c. 2 Hawk. P. C. 177, 178. Muſt ſhew the Length and Breadth of the Wound, if practicable. 2 Hawk. P. C. 178.

"By the Statute of *Glouceſter*, *cap.* 9. If an Appeal declare the Deed, "the (*b*) Year, the (*c*) Day, the (*d*) Hour, the Time of the King, and "the (*e*) Town where the Deed was done, and with what (*f*) Weapon, "it ſhall ſtand in Effect." (*b*) The Year is ſufficiently expreſſed by ſhewing the Year of the King without adding that of the Lord, or ſaying that it was in ſuch a Year of the Reign of the King. 3 Inſt. 318. 2 Hawk. P. C. 181. (*c*) Muſt not only ſhew the Day of the Hurt, but alſo the Day of the Death; and if done in the Night time, power to alledge *nocte ejuſdem diei*; but a Miſtake of the Day is not material on Evidence, 2 Hawk. P. C. 180. (*d*) *Circa Horam Primam* ſufficient. 2 Hawk. P. C. 180. Cart. 333. S. P. But a Miſtake of the Hour on Evidence is not material. (*e*) If a Place be generally alledged, the Law will intend it a Vill, unleſs it be mentioned with ſome Addition which ſhews the contrary. 2 Hawk. P. C. 182. Skin. 554. Carth. 333. But upon Evidence the Place is not material, ſo as the Fact be proved any where within the County. 2 Hawk. P. C. 182. (*f*) If it were by other Means, as by poiſoning, drowning, ſuffocating, burning, or the like, the Circumſtances muſt be ſpecially ſet forth; but if the Count be for killing with one Weapon, and the Evidence of killing with another, the Variance is not material, if the Means made uſe of may any way come under the Notion of a Weapon. 2 Hawk. P. C. 179. 3 Mod. 158.

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*(I) What may be pleaded in Bar to an Appeal. *Page 128

IF the Appellant wants any of thoſe Requiſites required by Law in a Perſon who brings an Appeal, it will be a good Plea; as that a Woman was never lawfully married, that *A. B.* is Heir at Law, and not the Appellant, &c. 2 Hawk. P. C. 193.

Auterfoits convict of Manſlaughter is a good Plea to an Appeal of Murder for the ſame killing. Carth. 17. Where the Appellee pleaded that he was before indicted of Murder and convicted of Manſlaughter, and prayed his Clergy, which the Court would not allow him, *vide* 3 Mod. 101. Carth. 16, 19. Salk. 61. Skin. 670, pl. 9.

A *Retraxit* of one Appeal is a good Bar of another for the ſame Thing, and ſo alſo is a Nonſuit; and according to ſome Opinions, ſo is a Diſcontinuance after Appearance, but not before. Salk. 64. pl. 5. Cro. Eliz. 605. Sid. 32. Bulſt. 141. Cro. Jac. 283. Yelv. 204. 1 Com. Dig. 371.

A Releaſe of all Manner of Actions, or of all Actions Criminal, or of all Actions concerning Pleas of the Crown, or of all Appeals, or of all Demands, 2 Hawk. P. C. 196.

mands, is a good Bar of any Appeal; but a Releaſe of all Perſonal Actions does not Bar an Appeal of Felony, being an Action of an higher Nature.

2 Hawk. P. C. 196. Carth. 56. If the Appellee pleads a ſpecial Plea, which does not amount to a Confeſſion of the Fact, he muſt at the ſame Time plead over to the Felony, except in ſpecial Caſes; as where ſuch Plea would be prejudicial to him, or where ſuch Plea declines the Juriſdiction of the Court.

(K) How the Appellant is to be puniſhed for a falſe Appeal.

Co. Lit. 283. BY the Common Law a Defendant may recover Damages for a falſe and malicious Appeal againſt the Appellant and his Abettors, by a Writ of Conſpiracy or Action on the Caſe.

And by *Weſtm.* 2. *cap.* 12. it is enacted as followeth, "For as much "as many through (*a*) Malice, intending to grieve others, do procure "falſe Appeals to be made of (*b*) Homicides and other Felonies, by "Appellors having nothing to ſatisfy the King for their falſe Appeal, "nor to the Parties appealed for their Damages; it is ordained, That "when any being appealed of Felony ſurmiſed upon him, doth (*c*) acquit himſelf in the King's Court in due Manner, either at the Suit of "the Appellor or of our Lord the King, the Juſtices before whom the "Appeal ſhall be heard, ſhall puniſh the Appellor by a Year's Impriſonment, and the Appellor ſhall nevertheleſs reſtore to the (*d*) Parties "appealed their Damages, according to the (*e*) Diſcretion of the Juſ- *Page 129 "tices, having reſpect to the Impriſonment or Arreſtment, that the "Party appealed hath ſuſtained by reaſon of ſuch Appeals, and to the "Infamy that they have incurred by the Impriſonment, or otherwiſe; "and ſhall nevertheleſs make a grievous Fine unto the King; and *(f)* "if peradventure ſuch Appellor be not able to recompence the Damages, "it ſhall be inquired by whoſe Abetment by Malice the Appeal was "commenced, if the Party appealed deſire it, and if it be found by "the ſame Inqueſt, that any Man is an Abettor through Malice, it ſhall "be diſtrained by a Judicial Writ, at the Suit of the Party appealed, to "come before the Juſtices; and if he be lawfully convict of ſuch "malicious Abetment, he ſhall be puniſhed by Impriſonment and Reſtitution of Damages, as before is ſaid of the Appellor."

(*a*) The Appeal muſt appear to have been brought maliciouſly; therefore if in an Appeal of Murder the Defendant be found guilty of Manſlaughter or Homicide *ſe defendendo*, neither the Appellor nor his Abettors can be puniſhed. 2 Hawk. P. C. 198. (*b*) In the Conſtruction of the Words *Homicides and other Felonies*, it has been held, that they extend to Offences made Felony by ſubſequent Statutes. 2 Inſt. 384. (*c*) But neither an Acquittal by an Abatement of the Appeal by a bare Nonſuit on a Plea, which ſhews that he is not intitled to the Appeal, nor a Judgment on a Demurrer, nor an Acquittal on an inſufficient Original, nor any other Diſcharge of the Appellee, which does not finally Bar all other Proſecutions againſt him, either at the Suit of the Party or of the King, for the ſame Felony, does intitle him to his Damages. 2 Hawk. P. C. 199. (*d*) If there are ſeveral Appellees, Damages ſhall be aſſeſſed according to the different Circumſtances of their ſeveral Caſes. Dyer 120. pl. 10. 2 Inſt. 386. (*e*) Therefore if the Jury give too ſmall Damages, the Juſtices may increaſe them, and in like Manner abridge them when they appear to be exorbitant. 2 Hawk. P. C. 200. (*f*) The Abettors are only liable in caſe the Appellors be inſufficient; but if the Appellor be found ſufficient to render only Part of the Damages, the Judgment againſt the Abettors ſhall be for the whole. 2 Hawk. 202, 203.

2 Hawk. P. C. 204. Alſo at Common Law, an Appellant ſhall be fined for an ill-grounded Appeal, at the Diſcretion of the Juſtices, in Caſes not provided againſt by this Statute; as upon a Nonſuit after Appearance, or where the Appeal abates

abates by the Folly of the Appellant, or where a Feme Covert ſues an Appeal known by her to be groundleſs; as for the Death of a Huſband whom ſhe knows to be alive.

APPROVER.

AN Approver, or in *Latin*, *Probator*, is one who being indicted of Treaſon or Felony, for which he is in Priſon, confeſſes the Indictment; and being ſworn to reveal all the Treaſons and Felonies he knows, enters before a Coroner his Appeal againſt all his Partners in the Crime within the Realm. H. H. P. C. 192. 3 Inſt. 129. S. P. C. 142. 2 H. H. P. C. 225, 226, 227, 229.

All Perſons may be Approvers, except Peers of the Realm, Perſons attainted of Treaſon or Felony, or (*b*) outlawed, Infants, Women, Perſons *Non Compos*, or in Holy Orders. 3 Inſt. 125. H. H. P. C. 192 (*b*) Whether diſabled by being outlawed in a perſonal Action, *vide* 2 Hawk. P. C. 205. And whether Infants and Women may not be Approvers, as they may bring an Appeal at this Day, though they cannot wage Battle, *vide* 2 Hawk. 205. And that a Man above the Age of ſeventy, or maimed, may be an Approver, though he cannot wage Battle. H. H. P. C. 192.

The Court is not bound of Right to admit any Perſon whatſoever to be an Approver, nor will any Perſon be admitted, unleſs he be actually indicted of Treaſon or Felony, and (*c*) confeſſes the Indictment; neither ſhall a Perſon indicted of Felony continue to be an Approver after an Appeal exhibited againſt him for the ſame Felony; neither ſhall the Appellee of an Approver be himſelf an Approver; for it would falſify the Appeal of the firſt Approver, in ſuppoſing that he had omitted ſome of his Partners; * but alſo becauſe it would cauſe an infinite Delay; for the Appellee of ſuch an Approver might as well become an Approver of others, and ſo on. *Page 130. 3 Inſt. 139. S. P. C. 144. 2 Hawk. P. C. 205. (*c*) That if he hath once pleaded Not guilty, he cannot be an Approver, but ſhall be hanged, becauſe it is found falſe, and his Confeſſion contradicts his former Plea. 3 Inſt. 129. H. H. P. C. 193. S. P. C. 144. But *vide* Finch 387. *cont.* and 2 Hawk. P. C. 205. Q.

A Man can only approve others of the very ſame Crime with that for which he is indicted; and therefore no Man can approve another with having been an Acceſſary to himſelf, becauſe it is an Offence of which it is not poſſible that he himſelf can be guilty; but inaſmuch as an Approver is ſworn to reveal all the Treaſons and Felonies he knows, if he accuſe Perſons of Crimes different from his own, ſuch Accuſation ſeems a reaſonable Ground to carry on a Proſecution againſt them for ſuch Crimes, though it be not of itſelf ſufficient to put them on their Trials. 2 Inſt. 629. Fitz. Coron. 127. 2 Hawk. P. C. 206.

If it appear either by the Confeſſion of the Approver, or by the Return of the Sheriff, or the Teſtimony of Perſons of Credit, that there are no ſuch Perſons as ſome of thoſe appealed *in rerum Natura*, or in the Realm, or in the County whereof they are named in the Appeal, he ſhall be hanged, unleſs the Court in Mercy ſpare him. 2 Hawk. P. C. 209. and the Authorities there cited.

The

The Juſtices of the *King's Bench*, and Juſtices of Gaol-delivery, and Juſtices in Eyre, may admit a Man to be an Approver, becauſe ſuch Juſtices may aſſign a Coroner to take the Appeal; but Juſtices of the Peace cannot admit a Man to be an Approver, becauſe they cannot aſſign a Coroner.

3 Inſt. 130. H.P.C. 194. But whether the Lord High Steward, or Juſtices of Oyer and Terminer can do it without a ſpecial Clauſe in their Commiſſion, authorizing them to aſſign a Coroner, Q. & *vide* 2 Hawk. P. C. 207. 2 H. H. P. C. 229. is expreſs, That a Man cannot become an Approver before Juſtices of Oyer and Terminer, becauſe they cannot aſſign a Coroner.

3 Inſt. 129. H.P.C. 144. 2 Inſt. 629. 2 Hawk. P. C. 207. As ſoon as a Perſon has confeſſed the Indictment, with an Intent to become an Approver, he puts it in the Diſcretion of the Juſtices, either to give Judgment and award Execution againſt him, or to reſpite them till he hath convicted his Partners; if the Juſtices think fit to admit him to be an Approver, they will aſſign a Coroner to receive his Appeal, and will take his Oath to diſcover all the Treaſons and Felonies he knows, and will aſſign him a certain Number of Days to make his Appeal in, during which he ſhall be at Liberty, and ſhall have from the King a (*a*) Penny a Day; alſo he muſt make his Appeal before the Coroner on each Day during the Time limited, and muſt at laſt repeat it *verbatim* in Court; and if the Coroner record his Failure of making his Appeal on any of the Days, or the leaſt Variation in his repeating it in Court, he ſhall have Judgment of Death.

(*a*) See Anci. Dial of Excheq. 426. & Q. Whether he ſhall have the Penny till he has made good his Appeal, by convicting the Appellees, 2 Hawk. P. C. 207.

2 Hawk. P. C. 208. The Coroner may award Proceſs againſt the Appellee, to the Sheriff of his own County, till he come to the *Exigent*, from awarding whereof he ſeems to be reſtrained by *Magna Charta*, *cap.* 17. The *King's Bench* and Juſtices in Eyre, and Juſtices of Gaol-delivery, may award Proceſs into any County to apprehend and try the Appellee; but it ſeems queſtionable, whether *Juſtices* of Gaol-delivery can award Proceſs of Outlawry into a foreign County, as the *King's Bench* and Juſtices of Oyer clearly may.

2 Hawk. P. C. 208. It is at the Election of the Appellee, either to put himſelf on his Country, or wage Battle with the Approver; and if ſeveral Perſons be appealed by one Approver, every one of them has his Election, either to put himſelf on his Country, or to wage Battle with the Approver, who muſt fight them all, or at leaſt till one of them hath vanquiſhed him; after which he cannot maintain his Appeal againſt the Reſt; but if a Perſon appealed of the ſame Felony by ſeveral Approvers vanquiſh one of them, he ſhall be diſcharged againſt all the reſt.

H.P.C. 201. 3 Inſt. 130. S. P. C. 149. If the King pardon either the Approver or Appellee, pending the Appeal, the Approvement ceaſes, and the Appellee ſhall be diſcharged; in the firſt Caſe, becauſe by the Pardon the Felony is extinct, and the Ap-
*Page 131 * prover is no longer liable to be condemned; in the ſecond, becauſe the Approvement is, in Truth, the Suit of the King; and therefore as much in his Power to pardon as an Indictment.

2 Hawk. P. C. 208. Neither the Approver's confeſſing his Appeal to be falſe, nor the Conviction of the Appellee, exclude him from the Benefit of Clergy.

2 Hawk. P. C. 209. See Anci. Dial. of Excheq. 426. As it is in the Diſcretion of the Court, whether they will ſuffer one to be an If an Approver convict all the Appellees, whether by Battle or Verdict, the King, *ex Merito Juſtitiæ*, is to pardon him as to his Life, and alſo give him his Wages from the Time of the Appeal to the Time of the Conviction; but anciently he was not ſuffered to continue in the Kingdom. It is recited by 5 *H.* 4. *cap.* 2. " That divers notorious Felons, for Safeguard of their Lives had become Provers, to the Intent, " in the mean Time, by Brokage and great Gifts, to purſue and have " their Pardons; and then, after their Deliverance, had become more " notorious Felons than they were before; and thereupon it is enacted, " that if any Perſon pray or purſue, or cauſe to be prayed or purſued,

" for

" for any ſuch Felon ſo attainted by his own Confeſſion, to have any " Charter of Pardon, the Name of him that purſues ſuch Charter, be " put in the ſame Charter, making Mention that the ſame Charter is " granted at his Inſtance; and if he to whom ſuch Charter is grant- " ed become a Felon again, the Party who purſued the Charter ſhall " forfeit 100*l.*"

Approver, this Method of late has been ſeldom practiſed; and in many Caſes we have what ſeems to amount to the ſame, by Statute; where pardon is aſſured to Offenders, on diſcovering and convicting their Accomplices. Burn 43. There ſeems however ſome Objection to the Form in which the Pardon to the Accomplice is promiſed, *viz.* upon the Criminal's being apprehended and convicted. The Teſtimony of ſuch an Accomplice would be leſs liable to *Exception*, if the Pardon was granted upon his giving Evidence generally, let the Event of the Trial be what it may. Obſervat. on Stat. 141. 2 Edit'.

Arbitrament and Award.

AN Award is the Determination of Matters in Controverſy, by Submiſſion to Perſons indifferently choſen by the Perſons contending.

Under this Head we ſhall conſider,

(A) The Matter in Controverſy. 132
(B) The Submiſſion; and therein of the different Kinds, and the Revocation thereof, and of the Statute 9 & 10 W. 3. touching Awards. 133.
(C) The Parties to the Submiſſion. 136.
(D) The Arbitrators or Umpire. 137.
(E) The Award itſelf, or final Determination of the Arbitrators or Umpire. 139.

1. That it be made according to the Submiſſion. 139.
2. It ought to be certain. 142.
3. That it ought to be equal, and mutually ſatisfactory. 144.
4. The Award muſt be of a Thing lawful and poſſible. 146.
5. That the Award muſt be final. 147.

*(F) The Conſtruction and Effect of the Award, and herein of the Performance thereof. 148. *Page 132
(G) Of the Pleadings in Awards. 150.

(A) The

(A) The Matter in Controverſy.

Rol. Abr. 242. 14 H. 4. 19, 24. 9 H. 6. 6. 3 H. 4. 6. 11 H. 4. 12. Keilw. 99.

WHERE the Right of Freehold is in Debate, the Property cannot be transferred by an Award; for the Arbitrators are in the Room of the Parties themſelves, and act in their Stead, as far as commiſſioned; whatever, therefore, the Parties can do, may be done by the Arbitrators; but the Parties (*a*) cannot paſs corporeal Inheritances without ſolemn Livery.

Leon. 228. Rol. Abr. 244. 9 E. 4. 44. (*a*) But if the Condition of an Obligation is to ſtand to the Award of *J. S.* touching ſuch Lands, and the Arbitrator awards the Lands to one, and that the other ſhould releaſe to him, if he does not do this, the Obligation is forfeited; if the Arbitrator awards the Land to one, it ſeems the Obligation is not forfeited, though the other do not convey to him to make him a good Title; for the Arbitrator hath not awarded any Act to be done by the Party; and the Award itſelf cannot transfer the Right, and ſo muſt be void; and then the Condition of the Obligation cannot be forfeited; for the awarding the Lands to one cannot be expounded, that the other ſhall inſeoff him. If, where there is no Bond, the Arbitrator award that one ſhall inſeoff the other, it ſeems an Action on the Caſe may be maintained for not doing it; for the Award in itſelf is as good as if there were a Bond, and then there is the ſame Reaſon an Action ſhould lie, as that the Condition of the Obligation ſhould be forfeited; for if ſuch an Award were void, then the Condition of the Obligation to perform it could not be broken. *Vide* the Authorities *ſupra*.

9 H. 6. 60. 14 H. 4 19. 3 H. 4. 6.

An Annuity is not determinable by Award, for it is reckoned in Nature of a Freehold, and therefore cannot paſs without the Deed of the Party.

Rol. Abr. 266. Rol. Abr. 242.

Partition cannot be made by Award, for a Freehold cannot paſs without Livery and Seiſin.

Rol. Abr. 242. 9 Co. 78. 6 Co. 41. Leon. 104.

It has been (*b*) doubted, Whether Leaſes for Years, being Chattels Real, could be transferred by Award? Therefore it ſeems ſafeſt, when the Controverſy relates to theſe, that the Parties are bound in mutual Obligations to perform the Award, and then if the Arbitrators award that one ſhall aſſign, transfer, &c. the Leaſe to the other, if he refuſes, he forfeits his Obligation.

(*b*) An Award of the Arrears of Rent reſerved on a Leaſe for Years, is good. Rol. Abr. 264. Where an Award may be made in Waſte. 6 Co. 44. 9 Co. 78. Cro. Jac. 100. Rol. Abr. 266.

9 H. 6. 60.

The detaining a Charter of Feoffment, as it relates to a real Thing, cannot be ſubmitted, but an Action of Treſpaſs for taking the Charter may be ſubmitted; for Damages only can be recovered for ſuch Taking.

6 H. 4. 6. 8 H. 5. 3. 4 H. 6. 17. Rol. Abr. 264. *cont.*

Debt on Arrearages of Account before Auditors, ſhall not be diſcharged by Award, becauſe it appears of (*c*) Record, and muſt be diſcharged by Matters of as high a Nature.

2 H. 4. 18. (*c*) An Award may be made in Attaint, becauſe not barely founded on the Record, but alſo on the ſuppoſed falſe Oath. 13 E. 4. 1.

Weſt. Symb. Part 2. ſ. 33.

Cauſes Criminal are (*d*) not arbitrable, becauſe they ought to be puniſhed for the common Good.

(*d*) Though the Submiſſion be by Bond, yet the Obligation is void, and the Parties may be puniſhed for entering into ſuch Bonds. 2 Vent. 109.

* Page 133

* Alſo Cauſes matrimonial ſeem not arbitrable, becauſe Marriage ought to be free, and Religion diſallows the ſevering thoſe whom the Church hath joined.

Weſt. Symb. Part 2. ſ. 33. Rol. Abr. 252.

But the Damages a Perſon ſuſtained by a Promiſe of Marriage, or any Thing relating to a Marriage Portion, may be ſubmitted. 16 E. 4. 2.

Debts

Debts due by Specialty cannot be discharged by naked Award; but if the Submission were by Bond the Award would be a good Bar, for one Specialty may be dissolved by another. 1 H. 7. 16. b. Dyer 51. 6 Co. 44. Cro. Jac. 99, 447, 647.

A certain and fixed Debt is not discharged by an Award, for the End and Design of an Arbitration is to reduce uncertain Debts and Duties to a Certainty; and to award a Man a certain Debt is to give him no more, nor do any greater Thing for him than was done before, for now he can have but an Action, and that he might have before; and to give him less than he had before is to do him a manifest Injustice, which the Arbitrator cannot do. 3 H. 4. 4. 4 H. 7. 6. 10 H. 7. 4. Rol. Abr. 264. But if 20l. be due to a Man, and he and another submit all personal Things, &c. to Arbitration, there if the Arbitrator award 10l. it is a good Award, because there were other uncertain Things submitted, and the Arbitrator had Consideration of all, and set one against the other in making the Award, so as perhaps the Debt of 20l. was diminished in Consideration of some Trespasses done by him to the other Party. 10 H. 7. 4. Allen 52. for this *vide* Lev. 292. 2 Sand. 190. 2 Mod. 303. In Debt on Arbitration, whereas the Plaintiff claimed 40l. *pro diversis negotiis*, and sets out the Award; and it was held that the Action lay, for the Debt being *pro diversis negotiis*, it was uncertain what was due for Business. Cro. El. 422. 3 P. Wm. 187. Doug. 690. Cowp. 56.

It is held clearly, that all Chattels Personal, and Personal Actions, such as Trespass, Conspiracy, Maintenance, &c. may be determined by Arbitration, and the Right transferred by naked Award, though the Submission were not by Deed; for these being transferable by the Party himself without any Solemnity, whatever the Parties themselves could do, may be done by the Arbitrators, who are their Substitutes, and stand in their Place; and if on these Submissions without Deed the Arbitrators award one Party a Sum certain, he may bring an Action of Debt for it; but if they award the doing of some other Thing, which is beneficial to him, he must bring his Action on the Case. 22 H. 6. 39. 9 Co. 78. Peytoe's Case. Rol. Abr. 242. Of Submissions made pursuant to a Rule of Court, *vide post*, Let. (B).

The Arbitrators cannot make an Award of Matters different from those which were submitted; therefore if the Submission be of Ewes with Lambs, and after the Submission the Lambs are yeaned, they cannot arbitrate concerning the Lambs. Keb. 600. 2 West. Symb. s. 32.

(B) The Submission; and therein of the different Kinds, and the Revocation thereof.

THE Submission is the Authority given by the Parties in Controversy to the Arbitrators, to determine and end their Grievances; and this being a Contract or Agreement must not be taken strictly, but largely, and according to the Intent of the Parties submitting. West. Symb. Part 2. s. 1, 2.

This Submission may be by Word or Deed; if the Submission be by Word, there is no Remedy to enforce the Party to perform the Award; but reciprocal Actions on the Case, and an Action of Debt will lie, if Money be awarded, for it is in Nature of a simple Contract. 5 E. 4. 7. Keb. 600. 2 Keb. 238. 3 Keb. 64.

If the Submission be without Deed, it may be revoked without Deed, and the Party shall lose nothing, for *ex nuda submissione non oritur actio*. 21 H. 6. 10. 8 Co. 81, 82. But the Party must give Notice of the Revocation. Sid. 281.

Also

*Page 134 * Alſo if the Submiſſion be by Deed, it is of its own Nature (*a*) countermandable, though made irrevocable by the expreſs Words of the Deed, for the Arbitrators being conſtituted and put in the Place of the Parties, by their Conſent, to act for them, they can no longer act than they have ſuch Conſent.

8 Co. 82. Sid. 281. Brownl. 62. 2 Brownl. 290.

(*a*) But it cannot be countermanded without Deed, *quia ſolvitur*, &c. Brownl. 62. If you plead *quod revocavit*, without giving any Notice to the Arbitrators, the Party may take Iſſue upon the Revocation; for not to let them know you have revoked is no revoking; for *de non apparentibus & non exiſtentibus eadem eſt ratio*; but it need not be ſhewn in Pleading, that Notice was given, for there *quod revocavit* neceſſarily implies Notice. 8 Co. 82, 290, 291.

8 Co. 82, 83. Brownl. 62. But where a Man obliges himſelf to ſtand to an Award, if the Party revokes it according to his Power, he hath forfeited his Obligation, for the making the Award becomes impoſſible by his own Default, and therefore the Obligation is ſimple; but if it be without Obligation he forfeits nothing.

38 H. 6. 6. Brownl. 62. If ſeveral Plaintiffs or Defendants ſubmit themſelves to an Award, one cannot revoke the Submiſſion without the other, for joint Acts are conſidered as the Acts of one Perſon, and there can be no Revocation without the Act of that Perſon that made the Submiſſion.

2 Keb. 865. Jones 388. If a Feme Sole ſubmits to Arbitration, and afterwards marries, this is a Revocation of the Submiſſion; and if it be by Bond the Bond is forfeited.

T. Jones 134. If one have Judgment in an Ejectment, and then they ſubmit the Controverſy to Arbitration, but before any Award be made he ſues out Execution, it is a Forfeiture of the Bond, for he is the (*b*) Cauſe no Award can be made.

(*b*) A Matter was referred by Conſent to the three Foremen of the Jury, and before the Award was made, one of the Parties ſerved the Arbitrators with a *Subpœna* out of Chancery, which hindered them from proceeding in the Award; and the Court held this a Breach of the Rule, and granted an Attachment *Niſi*. Salk. 73. pl. 10.

Sid. 290. In Debt upon a Bond to perform an Award, and *Oyer* of the Condition, the Defendant pleads no *Submiſit*, the Plaintiff need not aſſign a Breach, for the Defendant puts the whole Streſs of his Cauſe upon a Matter antecedent to the alledging a Breach; for if there was no Submiſſion there could be no Award, and conſequently no Breach of it.

Salk. 73. pl. 12. (*c*) *Vide* Sid. 54. Raym. 35. where ſuch Rules have been before this Statute. Alſo a Submiſſion may be made a Rule of Court, purſuant to the Statute (*c*) 9 & 10 *W.* 3. *c.* 15. and it is ſaid, that although the Submiſſion be by Bond, yet the Party may have it made a Rule of Court; in which Caſe, it is ſaid, he may proceed on the Bond, and likewiſe have an Attachment for not performing the Award.

Stra. 1. 10 Mod. 332. By the 9 & 10 *W.* 3. *cap.* 15. it is enacted, "That it ſhall and may "be lawful for all Merchants and Traders, and others deſiring to end "any Controverſy, Suit or Quarrel, for which there is no other Re-"medy but by Perſonal Action, or Suit in Equity, by Arbitration, to "(*d*) agree that their Submiſſion of the Suit to the Award or Umpirage

(*d*) An Arbitration Bond had theſe Words, and if the Obligor ſhall conſent that his Submiſſion ſhall be made a Rule of Court, that then, &c. Upon Motion to make his Submiſſion a Rule of Court, it was objected, that theſe Words did not imply his Conſent, but if he would forfeit his Bond, he need not let it be made a Rule of Court; yet becauſe this Clauſe could be inſerted for no other Purpoſe, the Court took theſe conditional Words to be a ſufficient Indication of Conſent. Salk. 72. pl. 8. Lord Raym. 674. Com. Rep. 114.

"of

" of any Perſon or Perſons ſhould be made a Rule of any of his Ma-
" jeſty's (*e*) Courts of Record, which the Parties ſhall chuſe, and to in-
" ſert ſuch their Agreement in their Submiſſion, or the Condition of the
" Bond or Promiſe, whereby they oblige themſelves reſpectively to ſub-
" mit to the Award or Umpirage of any Perſon or Perſons; which A-
" greement being ſo made and inſerted in their Submiſſion, or Promiſe
" or Condition of their reſpective * Bonds, ſhall or may upon produc-
" ing an Affidavit thereof, made by the Witneſſes thereunto, or any one
" of them, in the Court of which the ſame is agreed to be made a Rule,
" and reading and filing the ſaid Affidavit in Court, be entered of Re-
" cord in ſuch Court, and a Rule ſhall thereupon be made by the ſaid
" Court, that the Parties ſhall ſubmit to, and finally be concluded by
" the Arbitration or Umpirage which ſhall be made concerning them by
" the Arbitrators or Umpire, purſuant to ſuch Submiſſion; and in Caſe
" of Diſobedience to ſuch Arbitration or Umpirage, the Party refuſing
" or neglecting to perform and execute the ſame, or any Part thereof,
" ſhall be (*f*) ſubject to all the Penalties of contemning a Rule of Court,
" where he is a Suitor or Defendant in ſuch Court, and the Court, on
" Motion, ſhall iſſue Proceſs accordingly, which Proceſs ſhall not be
" ſtopped or delayed in its Execution by any Order, Rule, Command or
" Proceſs of any other Court, either of Law or Equity, unleſs it ſhall be
" made appear on Oath to ſuch Court, that the Arbitrators or Umpire
" (*g*) miſbehaved themſelves, and that ſuch Award, Arbitration or Um-
" pirage, was procured by Corruption or other undue Means: And
" that any Arbitration or Umpirage procured by Corruption or undue
" Means, ſhall be judged and eſteemed void and of none Effect, and ac-
" cordingly be ſet aſide by any Court of Law or Equity; ſo as Com-
" plaint of ſuch Corruption or undue Practice be made in the Court
" where the Rule is made for Submiſſion to ſuch Arbitration or Umpi-
" rage, before the laſt Day of the next Term after ſuch Arbitration or
" Umpirage made and publiſhed to the Parties."

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(*e*) A Matter being referred by Rule of Court to the Determination of the Judges of Aſſize, it was moved that the Judges Determination might be made a Rule of Court; and *per Holt*, Where a Matter is referred to Arbitrators by Rule of Court, and they make their Award, we will compel a Performance of it, as much as if the Award were Part of the Rule, ſo a new Rule is needleſs. Salk. 71. pl. 6. *Note*; the conſtant Practice is to make the Rule at *Niſi prius* a Rule of the Court above, which is always granted on Motion. (*f*) If one of the Parties revokes the Submiſſion, or hinders the Arbitrators from proceeding in the Award, the Court will grant an Attachment. Salk. 73. pl. 10. But if the Party dies, there is no Remedy by Attachment againſt his Repreſentatives, for the Contempt dies with him. 2 Vern. 444. If the Party excepts to the Award, though it be affirmed, an Attachment will not be granted; for the Non-performance of it, while the Matter was *ſub judice*, was no Contempt. Salk. 73. pl. 11. 2 Ld. Raymond 857. 3 Keb. 446. Alſo the Party muſt be required perſonally to perform the Award, and ſuch perſonal Demand muſt be made out by Affidavit, otherwiſe the Court will not grant an Attachment. Salk. 83. pl. 1. (*g*) On * Motion to ſet aſide an Award, becauſe the Arbitrators went on without giving the Party Time to be heard, or produce a Witneſs, *Holt* ſaid, That the Arbitrators being Judges of the Party's own chuſing, he ſhall not come and ſay, that they have not done him Juſtice, and put the Court to examine it; *aliter* when they exceed their Authority. Salk. 73. pl. 11. But Awards have been frequently ſet aſide, eſpecially in Equity, where the Arbitrators have appeared to have been miſtaken, or have been guilty of Corruption or Partiality; as if they have an Intereſt in the Thing in Controverſy. 2 Vern. 251. So where there are three Arbitrators, and two of them by Fraud or Force exclude the other, or if they have private Meetings, and admit one of the Parties, and give no Notice to the other. 2 Vern. 514. So where they awarded 495l. againſt one of the Parties, for calling the other, who was a Butcher, a *Bankrupt Knave*, to repair his Honour, as they called it. 3 Chan. Rep. 76. 2 Vern. 251. *Vide* Vern. 457. So where the Submiſſion was to Arbitrators, and they had Power to chuſe an Umpire, which they did by throwing *Croſs* and *Pile* who ſhould name him; and for this the Court ſet aſide the Award. 2 Vern. 485. This Statute does not extend to Submiſſion by Rule of Court. Stra. 301. See 2 Bur. Rep. 701.

* This Motion will not be received before Submiſſion be made a Rule of Court. 2 Stra. 1178.

Submiſſions are likewiſe general, as of all Controverſies, Debts, Dues, &c. and here the Arbitrators are not obliged to determine all Matters diſcloſed, but their Arbitration of ſome Things will be good, though they leave other Things undone; but where the Submiſſion is ſpecial or conditional, *ita quod* an Award be made of all Controverſies depending, they ought to determine all Matters whereof they have Notice, becauſe here, by

Cro. El. 839. Cro. Jac. 200, 355. 8 Co. 98. Dyer 216. Rol. Abr. 257. Stra. 1024.

2 Term Rep. 645. Sand. 32. Brownl. 63. *Vide poſtea*, that Awards now receive a more favourable Interpretation than formerly, *vide* 9 Mod. 232. 2 Stra. 1024.

by the expreſs Words of the Authority, I do not own his Determination unleſs all Matters in Controverſy are ſettled; and therefore to determine one without the others is to act contrary to the Authority; but if upon ſuch a Submiſſion the Arbitrators make an Award but of one Thing, it ſhall be intended there were no others to make an Award of, unleſs the other Side ſhew there was, and that the Arbitrators had Notice thereof.

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* (C) The Parties to the Submiſſion.

9 E. 3. 23. 10 H. 6. 14, 19. Latch. 27.

PERSONS that cannot contract cannot ſubmit to Arbitration, therefore Feme Coverts, Perſons compelled by Threats and Impriſonment, Perſons profeſſed in Religion, cannot ſubmit.

Stile. 351. March 77, 78.

The Huſband may ſubmit the Chattels he hath in Right of his Wife to an Award, for he may diſpoſe of them.

21 H. 7. 29. Rol. Rep. 269. Cro Jac. 447.

If the Huſband ſubmits to Arbitration the Chattels, the Wife has as Executrix or Adminiſtratix, this ſhall bind the Wife, becauſe the Wife cannot (*a*) perſonate any one without the Huſband during Coverture.

(*a*) But Q. For by ſome Opinions the Wife, in this Caſe, may ſubmit to an Award without the Huſband, for when the Huſband allows her a Power of Adminiſtration, he muſt ſuffer her to act purſuant to the Truſt repoſed in her, and his expreſs Conſent to her Adminiſtration is a tacit Conſent to all future Actions of that Nature, and conſequently are his own Acts; but whether this makes him liable to a *Devaſtavit* is a greater Queſtion, becauſe they are not properly Acts of Adminiſtration, and conſequently he never conſented to them. *Vide* 10 H. 7. 30. Andr. 117, 181. 5 Co. 27.

13 H. 4. 12. 10 H. 6. 14. March 111, 141. Jones 164. Lev. 17. Rol. Abr. 730.

If an Infant ſubmit to Arbitration, he may execute or avoid it at his Election, as he may all other his Contracts.

3 H. 6. 26. 5 H. 7. 16.

Perſons attainted or outlawed cannot ſubmit to Arbitration, for they have no Property, and cannot by the Law controvert any Thing.

21 E. 4. 13.

A Dean without the Chapter, a Mayor without his Commonalty, the Maſter of a College or Hoſpital without his Fellows, cannot ſubmit to an Award, for the Submiſſion has the Force of a Contract, and they cannot contract without them.

Dyer 21. Rol. Abr. 244. 2 Mod. 228. Salk. 70. pl. 3. Ld. Raym. 246. Skin. 679. 2 Salk. 787. 12 Mod. 129. Carth. 412. Comb. 439.

If one Party and the Deputy or Attorney of the other Party ſubmit to an Award, this is well enough, for the Act of my Deputy is my own Act.

20 H. 6. 12. a. 41. a. Rol. Abr. 268.

If ſeveral Perſons do a Treſpaſs, and one of the Wrong-doers and the Party to whom it is done ſubmit to Arbitration, and an Award is made, the other Perſon ſhall take Advantage of it by Way of Extinguiſhment of the Treſpaſs; the ſame Law where the Party releaſes to one of them; for in both Caſes a Satisfaction really is, or is preſumed to be made, and a Man cannot receive a double Compenſation for the ſame Wrong.

2 Rich. 3, 18. 2 Keb. 886. 22 E. 4. 25. Latch. 208. Rol. Rep. 298.

If ſeveral Perſons on the one Part, and ſeveral on the other, ſubmit generally to any Award, the Arbitrators have not only Power to determine Matters between them jointly, but ſeverally and diſtinctly alſo; and an Award between one only of the one Side and another of the other Side is good; for this is not doing leſs than the Commiſſion warrants, ſince there is an Authority in it to determine Matters diſtinctly between them, for the

Submiſſion

Submiſſion is of all Matters, ſo that it contains as well all Things ſeverally between each of them, as jointly between them all, and perhaps there may be no Cauſe of Award between the others. Brown. 112. Yelv. 203. 3 Bulſt. 6.

Cro. Car. 433. Stile 471. Rol. Abr. 261. Hard. 399. Vern. 259.

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* (D) The Arbitrators or Umpire.

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THE Arbitrators are Perſons indifferently choſen, to determine the Matters in Controverſy according to their own Minds, whether they be Matters of Law or Fact; Infants, Perſons excommunicate, outlawed, &c. may be Arbitrators, for every Perſon muſt uſe his own Diſcretion in the Choice of his Judges, and being at Liberty to chuſe whom he likes beſt, cannot afterwards object the Want of Honeſty or Underſtanding to them, or that they have not done him Juſtice *. Weſt. Symb. Part 2. ſ. 27. Hard. 44. Salk. 73.

* But ſee *ante* 135. n.

The Arbitrators are perſonally truſted with the Authority, and it is not within their Power to aſſign it †; therefore if an Award be to ſtand to the Determination of a Stranger, this is void; but if the Award be, that an Arbitrament made by *J. S.* ſhall ſtand, this is good, becauſe it is their own Award, though it refers to the Act of another; but though the Arbitrators cannot transfer their Power, yet they may award that others ſhall do a miniſterial Act in Subſerviency to their Award; for what is done by ſuch Perſons, is done by them as Servants and Inſtruments of the Arbitrators, and is the Act of the Arbitrator himſelf; as that ſuch a Conveyance ſhould be made as Counſel ſhould direct, ſuch Coſts paid as the Prothonotary ſhould tax, is a good Award. 5 Co. 78. Rol. Abr. 251. Cro. Eliz. 726. Palm. 146. 2 Rol. Rep. 214. Sid. 258. Hard. 45.

If the Submiſſion be to *Randolphus S.* and the Award is made by *Randulphus S.* the Award is not good, becauſe they cannot be taken to be the ſame Perſon, being different Chriſtian Names. Rol. Rep. 271. *Sed qu.* If a Court would ſet aſide the Award for this trifling Miſtake, if it appeared to be the Perſon meant? †But References, by Rules at *Niſi prius*, are frequently made to a particular Perſon, or to *ſuch other*, as he *ſhall name*.

The Arbitrators cannot reſerve to themſelves a further Power, ſince that would enable them to make a double Award, without the Interpoſition of thoſe who impowered them at firſt. Cro. Jac. 315, 584. Hob. 218. Sid. 59.

The Arbitrators cannot make their Award by Parcels at ſeveral Times, for when they have made an Award they have executed their Authority, and can do no more; and therefore if two ſubmit all Debts, Treſpaſſes, &c. and the Arbitrators one Day make an Award of the Debts, and of the Treſpaſſes another Day, this is not good as to the Treſpaſſes, but they may deliberate of one Thing one Day, and of another the other Day, and then make an intire Award of the Whole; alſo an Award made in the Night is good, for the Party's Attendance is not requiſite; but where an Act cannot be done without perſonal Attendance of a third Perſon, it cannot be in the Night. 3 H. 4. 1. b. Rol. Abr. 250. Cro. Eliz. 676.

If a Submiſſion is made to *A.* and *B.* when their Occaſion will permit, convenient Time muſt be given, after Requeſt; and if no Arbitration be then made, the Parties may revoke. Sid. 281. 2 Keb. 10.

If there be a Submiſſion to Arbitration, and if they cannot agree before the firſt of *May*, then the Submiſſion is made to *J. S.* to be the Umpire, to be made before a certain Day then next to come; if the Arbitrators never diſcourſe about the Matter, ſo as there is not any Diſagreement between them, yet if they do not make an Award before the Day, the Umpire may determine the Matter; for theſe Words, *if they cannot agree*, are not to be taken literally, but only that if they do not make an Award, that then, &c. Rol. Abr. 261.

Rol. Abr. 261, 262. Osborne & Rogton. (a) If a Submission be to four, and to the Umpirage of *J. S.* the four and *J. S.* may join in making of the Award; otherwise if their Power had been divided in the Submission; as if it had been to the four, and if they could not agree, then to *J. S.* Bulst. 184. *Vide* Hard. 44. *Sed qu.* In this last Case, if the five join in the Award, is it not the Award of the four?

If the Condition of an Obligation be to stand to the Award of certain Persons, *A.* and *B.* and *J. S.* being Umpire for both Parties, in this Case an Award by *A.* and *B.* is (a) good; for *Umpire*, in the common Signification of the Word, denotes a Person that is to make an End of the Matter, if the others cannot.

*Page 138 Yelv. 203. Sallows *verf.* Gilling. For this *vide* Vent. 50. 2 Keb. 57. Cro. Jac. 400. Moor 349. Rol. Rep. 223, 375. 3 Bulst. 62, 68. Stra. 903.

* If the Condition of an Obligation be to stand to the Award of *A. B. C.* and *D. ita quod* the said Award before such a Day be made in Writing by the said *A. B. C.* and *D.* or any two of them, under their Hands, &c. any two of the Arbitrators, without the Rest, may make an Award; for though by the first Part they are bound to stand to the Award of those four, yet their Power is divided by the subsequent Words, and the *ita quod* is but an Explanation of the Condition, and the Whole makes but one Sentence.

2 Sand. 131. Sid. 428, 455. Rol. Abr. 261. T. Jones 168. *cont.* Raym. 187. Lev. 185. *Vide* 2 Vent. 116.

If the Arbitrators and Umpire have the same Time allotted them to make their Award in the Submission, as to the Umpire it is not absolutely void; for if one of the Arbitrators die, or absolutely refuse to meddle, then the Umpire may determine the Matters, otherwise not; for two different Judges cannot have a concurrent Jurisdiction of the same Thing; and a Disagreement between the Arbitrators at their first Meeting, gives no Power to the Umpire to interpose, because, though they do not agree at their first Meeting, they may at the next.

Rol. Abr. 261. Cro. Car. 263. 2 Sand. 132. Raym. 206. Cro. Car. 263. Lutw. 544. Salk. 70. pl. 2. S. P. *per Holt cont. Vide* 2 Mod. Rep. 169. Ld. Raym. 222, 671. 12 Mod. 120, 512, 513. 2 Barnes 53. Kydd on Awards 51. 3 Term Rep. 592.

The Arbitrators may chuse the Umpire before their own Time is expired, for that is no relinquishing the Arbitration, but a prudent Provision in Case they should disagree; and therefore an Award by them at any Time before their Time expired is good, and an Award by the Umpire in that Time is void.

Mod. Rep. 274. *Vide* Danv. Abr. 542.

The Condition of a Bond was, if the Arbitrators make an Award on or before 19 *Feb.* &c. and if they do not make it before, &c. their Authority doth not determine till after the 19th, and the Award cannot be made by the Umpire before the 20th.

Rol. Abr. 261. Sid. 428. Godb. 241. 2 Sand. 132. *Vide* Salk. 70. *cont. Vide* Lev. 174. and Salk. 72. pl. 2. where it is said, that if the Umpire be named in the Submission, he cannot make his Umpirage before the Time given to the Arbitrators to make their Award be expired.

If the Arbitrators have Time to the 10th of *June*, and if they agree not to nominate one to determine it by the said 10th, here if the Arbitrators chuse an Umpire, that determines their Power; for it seems plainly the Design of the Parties, that either one or the other may determine it by that Time, and not that both shall have concurrent Jurisdictions.

Rol. Abr. 262.

If the Arbitrators make an Award of Part during their Times, the Umpire cannot make an Award of the Rest, unless the Submission be, that if the Arbitrators make an Award of Part, or of none, then the Umpire may make an Award of the Part remaining on the Whole.

2 Vent. 113, 114. Trypit and

If the Condition of an Obligation be to stand to the Award of *A.* and *B.* so as the said Award be made before such a Day; and if they make no Award,

Award, then to ſtand to the Award of ſuch Umpire as the ſaid *A.* and *B.* ſhall nominate, ſo as the ſaid Umpire do make his Award before another Day, and the Arbitrators before the firſt Day make no Award, but afterwards name *C.* to be Umpire, who thereupon immediately refuſes, and the Arbitrators afterwards nominated *D.* who before the laſt Day makes an Award; this is a good Award, for the Nomination of *C.* to be Umpire did not make him ſo; but when he refuſed, it amounted to no more than a bare Propoſal to him; and the Form of Pleading always is *ſuſcepto ſuper ſe onere Arbitri*, ſo that it is the Acceptance makes him Umpire.

Eyres; adjudged by three Judges againſt Pollexfen Ch. Juſt. who held that C. might have proceeded notwithſtanding his Refuſal; and there could not be two concurrent Juriſdictions in ſeveral Perſons. 3 Lev. 263. S. C. *Vide* Salk. 70. pl. 2. where *per Holt.* If the Arbitrators chuſe an Umpire who refuſes, they cannot revoke or chuſe again, for they have executed their Authority; *aliter* if they chuſe him on Condition he do accept; but *Rookſby* doubted whether an expreſs Condition would make a Difference, becauſe it ſeemed to be applied.

* If the Condition of an Obligation be, That whereas *A.* and his Son of one Part, &c. have ſubmitted to the Award of *B.* and *C. ita quod, &c.* before 1 *May*, and if they make none, to the Award of ſuch Umpire as they ſhould chuſe, to be made before the 1 *June*, and the Arbitrators make no Award, but chuſe an Umpire who makes an Award, but *quoad* the Son awards nothing; this is a void Award, for though the *ita quod* be in the Clauſe referring to the Arbitrators, and the Award is made by the Umpire, yet the *ita quod* relates by Conſtruction to the Umpire as well as the Arbitrators. *Page 139 Lev. 139, 140. Bean and Newberry. Keb. 790, 832, 857. S. C.

(E) The Award itſelf, or final Determination of the Arbitrators or Umpire.

HERE we muſt obſerve that the Courts of Juſtice have of late been more liberal in the Conſtruction of Awards than formerly, and that many of the niceſt Diſtinctions to be met with in the Books, are by no Means to be admitted as Precedents in expounding Awards at this Day; and this the Courts do in Furtherance of Juſtice, and for Quieting of Controverſies; however, as an Award is a Judgment, and can only be expounded by itſelf, without the Aid of an Averment of Matters *dehors* to explain the Meaning of the Arbitrators, it is neceſſary that it ſhould appear on the Face of it. 21 E. 4. 39. b. 10 Co. 57. Dyer 242.

1. That it be made according to the Submiſſion.

If an Award be made of any other Thing than what is contained in the Submiſſion, it is void; for no Act is my own, or binding on me, unleſs done by me, or by Commiſſion from me. Plow. 396. Dyer 242.

If Arbitrators award to do an Act to a Stranger, this is good; for the Stranger is put by the Arbitrators in the Place of the Party, and they have Power to award this Act, ſince it is not impoſſible or unequal, and it is relating to the Submiſſion. Moor 3, 359. 10 Co. 131. 3 Leon. 62. Rol. Abr. 248. Hard. 46. Leon. 316.

But an Award that an Act ſhould be done by a Stranger, is void, becauſe he is not within the Submiſſion. Hard. 46. But if he hath any Remedy in Law or Equity to compel the Stranger to do it, the Award is good. Rol. Abr. 248, 249, 263. Stile 152. Where they award that one of the Parties ſhall be bound with Sureties. 3 Mod. 272. Show. Rep. 82. 8 Mod. 212. 10 Mod. 205. 12 Mod. 129. Ld. Raym. 123, 246. Skin. 679. Salk. 70. 2 Salk. 787. Carth. 412. Comb. 439. Vern. 259. 2 Will. Rep. 450. Comyns 183.

10 Co. 131, 132. Rol. Rep. 45, 162, 270. Vandlore and Trip. Rol. Abr. 242. Cro. Eliz. 809. Cro. Jac. 353 447. Poph. 137. Sid. 365.

If two ſubmit to an Award all Actions, and the Arbitrators award a Releaſe of all Actions till the Time of the Award, ſome Books have ſaid that this is void for the Whole, becauſe it extends to Things partly in the Submiſſion and partly to Things out of it, and it is one intire Act; for ſay they, to do that Act they are not obliged, becauſe not within the Submiſſion; and to do an Act relating only to Things contained in the Submiſſion, is another Act from what is awarded; (*a*) others have ſaid that this is not void, unleſs there are ſhewn on the other Side Cauſes of Action ariſing between the Time of Reference and of making the Award, otherwiſe none ſhall be intended; and then the Releaſe only relates to the Things in Submiſſion *.

(*a*) Hob. 190. Sid. 154. Moor 885. Hutt. 29. * The Releaſe ſhould only be extended to the Time of the Reference.

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3 Lev. 188. 2 Mod. 169. Salk. 74. pl. 14. 3 Lev. 413. 2 Lev. 3.

* But it has been reſolved, and ſeems now ſettled, that the Act is not intire, for he may releaſe all Actions to the Time of the Submiſſion; for though there is one Deed of Releaſe awarded, yet that Deed relates to ſeveral Things that are dividable in their own Nature one from the other, and ſo it ſhall be good for what is in the Submiſſion, and void for the Reſidue.

9 E. 4. 44. Rol. Abr. 243.

The Arbitrators cannot bind a Man's Liberty or Right to real Things, where perſonal Things are ſubmitted; and therefore if they award Service for two Years, or a Releaſe of the Right of Lands in Satisfaction for a Treſpaſs, this is void; for no Body can be ſuppoſed to ſubmit more than his perſonal Eſtate to anſwer a perſonal Injury, for that only might be taken in Execution for it by the Common Law; but his perſonal Eſtate may be bound to anſwer it; therefore if the Arbitrators award a Horſe, Money, a Quart of Wine, in Satisfaction for a Treſpaſs, this is good; for here a new perſonal Duty is raiſed inſtead of the former, and to ſatisfy out of the perſonal Eſtate is neceſſarily implied in the Submiſſion, for this is a Means neceſſary to quiet the Matters.

6 Mod. 221. Salk. 76, pl. 19. Rol. Abr. 243. *cont.*

Palm. 107. Rol. Rep. 362. Cro. Jac. 66.

If two ſubmit to award all Quarrels concerning Tithes in a Place certain, and the Arbitrator awards that one ſhall pay to the other 20l. and the other ſhould releaſe to him all Actions; this ſhall be intended all Actions concerning the Tithe, unleſs the contrary appear on the other Side, and the Actions may be ſevered; and this ſhall be good for the Acts in the Submiſſion, and void for the Reſt.

2 Sand. 190. Roberts and Marries.

A Submiſſion of all Debts and Demands, and a Releaſe of all Judgments, Executions, and Extents awarded, is a good Award.

10 H. 6. 18. 3 Bulſt. 65.

A Submiſſion of all Matters between the Plaintiff and another, and an Award made of Things that the Party hath in Right of his Wife, is good; for theſe Things are comprehended under the Words *all Matters*.

3 Bulſt. 312, 313.

A Submiſſion of all Injuries, an Award of all Debts, Duties and Treſpaſſes, a good Award; for whatever is againſt Law is an Injury.

Cro. Eliz. 66, 858. Where the Words *de & ſuper præmiſſis* reſtrain the Award to the Things ſubmitted. Cro. Eliz. 861. 8 Co. 97. Cro. Jac. 200. Rol. Abr. 257. Sand. 32. 6 Mod. 232. A Submiſſion of all Controverſies touching Money laid out for his Wife when ſhe was Sole, at her Requeſt, and the Award of 340l. for all Sums laid out for the Wife when Sole, omitting at her Requeſt: this is void, becauſe they award another Thing than that which is contained in the Submiſſion. Cro. Jac. 640. *

A Submiſſion of all Actions now depending, and an Award of all Actions, good; for it ſhall be intended Actions depending.

* *Qu.* If the Submiſſion be recited in the Award, whether the Award ſhall not bear Reference to the Terms of the Submiſſion, and be conſtrued accordingly: *i. e.* to mean, *at her requeſt*, and be good?

Rol. Abr. 244.

There is a Controverſy between *A.* and *B.* on the one Part, and *C. D.* and *E.* on the other Part, and *C.* for himſelf, and *D.* and *E.* ſubmits the Matter,

Matter, and promiſes to ſtand to the Award; if the Award be that *C.* ſhall pay ſo much in Satisfaction of the Controverſy, it ſhall bind him, though it concerns *D.* and *E.* who are Strangers to the Submiſſion, inaſmuch as the Thing awarded is to be done by him, and not by the Strangers to the Submiſſion.

If there be a Controverſy between the Parſon and his Pariſhioners, whether Tithes ſhall be paid in *Specie* or not, and they ſubmit all Controverſies, and the Arbitrators award that they ſhall pay ſo much a Year for Tithes; this is good, for that was the (*a*) Debate on the Award. Rol. Abr. 254.

(*a*) If the Submiſſion be of a Suit depending in an *Ejectione firmæ*, and the Award be of the Right of the Land, it is not good. Rol. Abr. 246. * If the Submiſſion be of all Actions Perſonal, *Sectis & Querelis*, they cannot make any Award of any Real Suit, for the Word *Perſonal* refers to all that comes after the Copulative; but if the Submiſſion be of all Actions Perſonal, *ac Sectis & Querelis*, they may; for the Word *ac* makes a plain Diſtinction between the ſeveral Parts of it. Rol. Abr. 246. If the Submiſſion be of a Term, and all that belongs to it, and the Award is made of the Rent, which ſhall become due next *Michaelmas*, the Award is not good, becauſe it may be extinguiſhed by Surrender, Eviction, *&c.* before *Michaelmas*. Rol. Abr. 245. If the Submiſſion be of all Actions, they cannot make an Award of Cauſes for Actions; but otherwiſe if the Submiſſion be of all Actions and Quarrels, for the Word *Quarrels* comprehends Cauſes of Action. Rol. Abr. 245.

* A Caſe of this Kind muſt depend on the Words of the Reference, and the obvious Meaning of the Parties.

* If the Submiſſion be of all Controverſies to the Time of the Submiſſion, and the Award be that one of them ſhould deliver up an Obligation made ſince the Submiſſion, in Satisfaction of all Matters, &c. this is good, becauſe the Bond is given only in Satisfaction. *Page 141 Rol. Abr. 246. If the Submiſſion be of all Actions depending between *A.* and *B.* an Award cannot be made of any Action depending by *A.* and his Wife againſt *B.* being out of the Submiſſion. Rol. Abr. 246. This muſt depend on the Intention of the Parties, where that can be collected with Certainty.

An Award may be good, though Part of it be made of a Thing not within the Submiſſion; as if an Award be to pay 1000*l.* and to procure a Stranger to be bound to pay 22. *per Ann.* the Plaintiff muſt lay the Breach in not paying the 1000*l.* for as to the other Part it is wholly void. For this *vide* Leon. 304, 305. Cro. Jac. 149. Poph. 134. 10 Co. 131. 5 Co. 78. Kelw. 43, 64. Rol. Rep. 437. Cro. Eliz. 758, 800, 809, 839. 1 Wood's Conv. 80. Stra. 1024.

If an Award be good for Part, and void for Part, the Plaintiff may aſſign the Breach, that the Defendant did not perform the Thing ſubmitted, *nec performa-vit in aliquo*; for it ſhall refer only to that in the Submiſſion, for the Reſt is void, and not to be performed. 2 Rol. Rep. 46.

If the Arbitrators award on one Side an Act contained in the Submiſſion, and on the other Side an Act out of it, this is a void Award for the Whole; for this is unequal, becauſe there is ſomething on the one Side awarded only, and nothing on the other; for what they intended to ballance it with on the other, appears to be void. Poph. 134. Cro. Jac. 149.

If the Arbitrators award 10*l.* to one of the Parties, and 5*l.* to a Stranger, this is good as to the Party himſelf, and void for the Stranger. 2 Sand. 293. So if a Leaſe be awarded to the Party for Life, the Remainder to *J. S.* the Remainder is void to the Stranger. Cro. Eliz. 758.

An Award may be good, though made of leſs than is contained in the Submiſſion; as if the Submiſſion be of all Actions, Treſpaſſes, Demands and Controverſies, and the Award be made of ſome only, this is good; for no more ſhall be ſuppoſed to be made known to the Arbitrator; and if there be other Cauſes of Action in Being, and they be made known to the Arbitrator, they muſt be ſhewn on the other Side; and this as well where the Submiſſion is conditional by *ita quod*, as where it is abſolute; for the Award being made *de Præmiſſis* ſhall be ſuppoſed to ſettle all Things. Hob. 49. 8 Co. 98. Cro. Jac. 278, 355. For this *vide etiam* Sand. 32. Brownl. 63. 2 Brownl. 310. Sid. 12. Dyer 216, 242. Hard. 45.

If

Dyer [illegible] 2 Rol. [illegible] 24. Bulſt. 110. Rol. Abr. 245. Cro. Jac. 277. 2 Mod. Rep. 7. If the Award be conditioned to be delivered in Writing under Hand and Seal, the Circumſtances muſt be obſerved, or the Award is void; and therefore if it be delivered under Seal only, it is not ſufficient.

that the Arbitrator, if he cannot write, ought to ſet his Mark on the Award. Bulſt. 110.

Rol. Rep. 362. 2 Rol. Rep. 12, 193. Cro. Car. 216, 217. Cro. Jac. 578. Cro. Eliz. 839. Kydd on Awards 119. If two ſubmit all Actions till the ninth of *June, ita quod Arbitrium fiat de Præmiſſis*, and an Award is made of all Actions till the ſeventh, ſome have ſaid this is leſs than the Submiſſion, and void; but the better Opinion is, that this is well enough, eſpecially unleſs there be ſhewn on the other Side an Action ariſing between the ſeventh and ninth.

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2. It ought to be certain.

5 Co. 77. Samon's Caſe. Cro. Eliz. 432. Rol. Abr. 263. Moor 359. Rol. Rep. 271. Dyer 242. Yelv. 78. Burr. Rep. 277, 278. As an Award is in Nature of a Judgment, it ought to be wholly deciſive; for if it doth not determine the Matter, it becomes the Cauſe of a new Controverſy; therefore if the Arbitrators award a Bond for Quiet Enjoyment of Lands, without appointing a certain Sum, this is a void Award, and the Party is not obliged to give Bond to the Value of the Land; for then the Senſe of the Award muſt be ſupplied by Averment; now if it hath the Credit of a Judgment, there can be no Interpretation made of the Award, but by the Words of the Award itſelf; for if it receives its Meaning from any Matters out of the Award, the Mind of the Arbitrators is only gueſt at, and not expreſſed; but the Parties intended to be obliged only by what the Arbitrators themſelves declare to be their Award; and were the Bond to be according to the Value, they cannot aſſign their Power to any Perſon to aſſeſs the Value.

Cro. Jac. 314. Thine and Rigby. So if the Arbitrators award that one Party ſhall give Security to the other for the Payment of 16*l.* this is not a good Award, becauſe it does not appear what Security, whether by Bond, or otherwiſe.

An Award to enter into an Obligation for the Payment of a Sum of Money, without mentioning the Sum, is void for Uncertainty. Lev. 88. Sid. 270.

Rol. Abr. 264. Maſſey and Aubrey. Stile 365. S. C. If the Condition of an Obligation be to ſubmit to an Award all Controverſies between *A.* and *B.* and an Award is made that *A.* ſhall permit *B.* to enjoy certain Leaſes of Lands purchaſed from *J. S.* and that *B.* ſhall pay the Rents, and perform the Covenants, and deliver to *A.* a true Copy of the Leaſes, and pay the Arrears to the Time of the Purchaſe from *J. S.* this is a good Award as to the Rents and Covenants, though not particularly ſpecified; for though generally it is true that an Award is to be interpreted by its own Words, and not by any Matter out of the Award, which doth not appear in the Words; yet when the Words of an Award have Relation to Things certain, out of the Award, theſe Things may be averred; for that is the expreſs Mind of the Arbitrators, which they have expreſsly referred to; but as to the Arrears the Award is void; becauſe they have not referred to any Matter that falls within the Cognizance of *B.* for he cannot compel *A.* or *J. S.* to ſet the Time of the Purchaſe; and an Award of what cannot be certainly done is not a certain Determination.

Rol. Abr. 263. March 18. S. C. If an Award be that one ſhall acquit the other of an Obligation of 200*l.* *aut eo circiter*, and the Party is bound in an Obligation of 105*l.* *aut eo circiter*, this is a good Award.

If an Award be that one ſhall pay the other 6*l.* on the twenty-firſt of *May*, and that the other ſhall releaſe his Right in certain Lands *prædict'*

primo

primo die Maii, omitting *viceſimo*, not good, becauſe there was not any ſuch former Day before-mentioned, and ſo the Mind of the Arbitrators not underſtood. Rol. Abr. 263. Markham and Jennings. Yelv. 97. Brownl. 92. Cro. Jac. 149. S. C.

If an Award be made between *A.* and *B.* touching certain Quarters of Malt delivered by *A.* to *B.* that *B.* ſhall pay to *A.* ſo much for every Quarter, as a Quart of Malt was then ſold for, this is void; becauſe not ſaid at what Market Price; for one Market may be much dearer than another. Rol. Abr. 364. Hurſt and Bambridge.

If *A.* and *B.* Merchants, and *C.* and *D.* with all the other Owners and Mariners, ſubmit to the Award of *J. S.* concerning a Ship taken by Way of Reprizal, and *A.* and *B.* enter into an Obligation on one Side, and *C.* and *D.* on the other Side, and 1000*l.* is awarded to *C.* and *D.* to the Uſe * of themſelves and the Reſt of the Owners and Mariners, this is a good Award, though every Man has not a certain Allotment, for *C.* and *D.* ſubmit jointly in the Name of the Reſt; and therefore an Award of any Thing to them as one Perſon, without Subdiviſion, is good; and *C.* and *D.* being intruſted for the Reſt, they are bound to make a reaſonable Diviſion; if not at Common Law, at leaſt in Chancery. Rol. Abr. 249. Stile 133; 136, 152. S. C. *Page 143

If an Award be made that *A.* ſhall pay *B.* his Days Work and Taſk Work, and *B.* ſhould then pay 25*l.* to *A.* and then they ſhould make each other general Releaſes, this is a void Award, and cannot be helped by Averment that he paid ſuch a certain Sum for Days Work and Taſk Work; becauſe the Award is void in itſelf, by not ſettling the certain Sum; and if that is void upon which the ſubſequent Payment and Releaſes are to be made, the whole Award muſt be void. 2 Sand. 292. Pope and Bret. 2 Keb. 736, S. C.

An Award is made of 40*l.* and mutual Releaſes; but if it ſhall appear to the Arbitrators that one of them ſtands obliged, &c. that then ſo much ſhall be deducted, this makes the whole Award void; for it is uncertain how much will be due; but if the Award had been that if any Bill of Debt appears, it ſhould be deducted, this it ſeems would be a good Award; and though he awards mutual Releaſes, which would make a final End of all, yet it appears it was to be after Payment; and therefore that Part of the Award ſhall not ſtand alone, for that is contrary to the Intent of the Award; ſo if the Arbitrators make an Award with a *Proviſo* at the End of it, That if they do ſuch an Act the whole Award ſhall be void, the whole Award is void; for the Award ought in Preſent to be certain. Cro. Jac. 584. Cro. Jac. 149. 2 Sand. 293. Sid. 59. Hard. 45.

An Award that one ſhall pay Part of the Charge of the Voyage, and allow his Part of the Loſs that ſhall come to the Ship upon Account, is good; for it may be reduced to Certainty. Rol. Abr. 251. An Award that one of the Parties ſhall account with the other, not good, becauſe the Matter not ſettled. Fitz. Abr. Tit. *Award* 37. An Award that one ſhall pay a Moiety *cujuſdam debiti*, &c. held not good, for the Uncertainty. Rol. Abr, 263. *Quære?* And *vide* 6 Mod. 231.

If the Submiſſion be of 200 Acres, called *Kelſtorne Ling*, and the Award be concerning the Waſte Lands in the Town of *K.* this Award is void, and cannot be helped out with an Averment; ſo if Money be awarded to be paid by one, and it is not ſaid in Satisfaction of what he owes the other, that cannot be averred. Dyer 242. Rol. Abr. 263, 231.

If an Award be that one of the Parties ſhall pay to the other ſo much as is due in Conſcience, this is a void Award. Stile 28. Five Pounds awarded for Quit Rents and other ſmall Things, void for the Uncertainty. March 144. * An Award to pay ſo much Money as ſuch Land is worth, void for Uncertainty. Skin. 248.

* *Qu.* If it is a final Payment?

If

6 Mod. Rep. 244. Salk. 76. 2 Salk. 458. 2 Ld. Raym. 1076. Arnote and Breadnel by three Judges

If *A.* commits a Nuisance to *B.* by erecting Scaffolds on his own Ground, and the Arbitrators award that the Scaffolds shall be removed, it must be understood that they are to be removed by *A.* on whose Grounds they are; for though any Person may by Law remove a Nuisance, yet the Arbitrators, who are Judges of Equity as well as Law, must be understood to intend it of him who committed the Nuisance, and therefore the Award not void for Uncertainty.

against Holt, Ch. Just. who seemed of a contrary Opinion.

Cro. Car. 283. 2 Vent. 212. 3 Lev. 18.

An Award to pay the Charges of such a Suit, is good; because it is the Intent of the Arbitrators it should be reduced to a Certainty by the Attorney's Bill, who is the only Person that can know the Certainty *.

Sid. 12. but *vide* 3 Lev. 414. where the Award was to pay all Expences of a Suit, and all reasonable Expences *circa Sectam præd.* and it was admitted *per Cur'* to be void for Uncertainty; but to pay such Costs or Charges as the Master or Prothonotary shall tax, has been always held good. Sid. 358. Carth. 156. Kydd on Awards 135. * And the proper Officer of the Court may tax it.

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Salk. 69. pl. 1. Ld. Raym. 247.

* An Award was, that one of the Parties, he, or his Executors, should release; and my Lord *Holt* inclined to think that it may be construed that *he and his Executors* should release.

Carth. 378. Lutw. 524. 3 Mod. 331. March 18. W. Jo. 431. Cro. Car. 541.

3. That it ought to be equal and mutually satisfactory.

Rol. Abr. 253. 8 Co. 98.

Awards must not be on one Side only; this must be understood thus; That all Controversies being between two Parties, that which is awarded to be done to one must be an Advantage to both, so as to end the Controversy, and discharge one, as well as give Satisfaction to the other; for if it doth not, it is manifestly unjust; and therefore, whenever it appears to the Court that, notwithstanding the Award, the Thing remains a Duty as before, and is not discharged, that apparently is an Award on one Side, and consequently is void; not that where one Party is by the Award to have something paid him, or the like, and not the other, that that Award should be naught; for perhaps nothing may be due to him, and he might be the only Trespasser in the Case.

Rol. Abr. 253. 254. Hob. 49.

Thus in Case of a Trespass submitted, the Arbitrators award that one shall pay the other 3*l.* this is void, because only on one Side, for it is not said for what, and so the Trespass is not discharged, and then the other Party hath no Advantage by the Award; but if it were awarded *de & super Præmissis*, it would be well enough; likewise if the Award had been that he shall pay 3*l.* for a Trespass, it had been good, and yet one only was to do an Act, but then the Trespass by that Award had been (*a*) discharged.

(*a*) But if an Award be that the Obligor in a single Bond shall pay the Money, that had been no Award, without saying that he should be discharged; for Payment, without a Discharge and Acquittance, will not discharge a single Bond. Hob. 40.

7 H. 6. 40. Rol. Abr. 253.

A. and *B.* submit all Actions had by *A.* against *B.* and all Actions by *B.* against *A.* and the Arbitrators award that *A.* shall go quit of all Actions had by *B.* against him, this is naught; because they say nothing as to the other Actions.

Cro. Jac. 214. An Award was

An Award that one should have such Trees, and that the other should give him Security to pay 10*l.* is void; because it is not certain what Security;

rity; and then that Part of the Award being void, the other Part muſt be void too; for elſe it would be an Advantage to one only.

made that one of the Parties ſhould be bound with Sureties, ſuch as the other ſhould approve, in the Sum of 150l. to be paid him at ſuch a Time, and that they ſhould ſeal mutual Releaſes; and the Court inclined that the Award was void; for if the Party did not like the Sureties, he was not to ſeal a Releaſe, ſo it is but an Award of one Side. 3 Mod. 272, 273. 8 Mod. 212. 10 Mod. 205. 12 Mod. 129. Ld. Raym. 123, 246. Vern. 259. 2 Wms. 450. Comyns 183.

If one Party alone be ordered to do ſomething, and nothing elſe appears to the Court, it ſhall be preſumed that he alone was the Wrong-doer, and the Award is good, if it appears that he is by the Award diſcharged of all Actions that might be brought againſt him for that Wrong; but when it appears that they deſign both Parties Satisfaction for the Wrong done each of them, there, if the Satisfaction deſigned one be not well awarded, the whole ſhall be void for the Partiality. Rol. Abr. 253.

A naked Award is no good Plea in Treſpaſs, unleſs ſomething be awarded to the Plaintiff in Amends; for if there be no Treſpaſs, there is nothing about which an Award can be made; and if there be one, and they do not Award Satisfaction, they do not act according to the Deſign of their Inſtitution, for they are not indifferent, and ſo there is no good Award. Brownl. 63. Cro. Eliz. 904. Rol. Abr. 251. 1 Burr. 275. 2 P. Wm. 450.

* If Treſpaſs be of Beaſts taken and detained, and they arbitrate that the Owner ſhall have the Beaſts again, this is void, for it is againſt natural Juſtice to give him his own again without Satisfaction for the unjuſt Taking and Detention. *Page 145

Rol. Abr. 251. So an Award that the Owner ſhall have Parcel of his own Goods. *Vide* 1 Rol. Abr. 252. If an Award be, that whereas the Parties are indebted each to the other 40l. they ſhould acquit each other, a good Award; the ſame Law where each have done the other a Treſpaſs.—Rol. Abr. 252.

An Award that one ſhall go to *Rome* or *Paul*'s, not good, becauſe to no Body's Advantage. Rol. Abr. 252.

An Award that two ſhall intermarry, no good Award, for that ought to be at the Parties Choice; and the Bodies of the Parties are not ſubmitted to the Power of the Arbitrators. 9 E. 4. 44. Rol. Abr. 252.

If the Award give Satisfaction for ſlanderous Words ſpoken of a Man about a Crime which it appears was pardoned, that Award is void; for if the Crime be pardoned, no Harm could come to him by ſpeaking them, therefore the Award is unequal. * Sid. 158. If there be an Award that one ſhall pay ſo much appear to the Court the Award is juſt and equal. Sid. 12. *Vide* 2 Vent. 242. this Caſe cited; and there the Court ſeemed diſſatisfied with this Opinion, and ſaid that *Syderfin* was but a young Reporter. * But it ſhould be pleaded.

If an Award be that if one will make his Law that he did no Treſpaſs, that then he ſhall go quit, not good, for that cannot be pleaded in Bar of an Action; for it ſuppoſes, contrary to the Submiſſion, that there was no Treſpaſs; neither can it be averred that the Award was for the ſame Treſpaſs the Action was brought for, for it ſuppoſes no Treſpaſs. 46 E. 3. 1 [illegible]; 19 H. 6. 3 [illegible]. Rol. Abr. 251. Dyer 356.

There are Controverſies between *A.* and *B.* and *A.* and *C.* as Attorney to *B.* ſubmit to an Award, the Arbitrators award ſo much Money to *A.* and that *A.* and *C.* ſhall releaſe to each other, to the Uſe of each other; this is void, becauſe the Award is on one Side, for *B.* cannot take Advantage of the Releaſe, for that is to the Uſe of *C.* Carth. 412. Bacon [illegible]. Dubarry. Salk. [illegible]. pl. 3. S. C. Ld. Raym. 246.

Skin. 679. Comb. 439. 12 Mod. [illegible].

The

3 Leon. 62. N. Dyer 242. But an Award to pay Money to a mere Stranger is said to be void. Rol. Abr. 247. But *vide* Salk. 74. pl. 13. where by *Holt* it is good, and shall be intended for their Benefit. But an Award that the Parties shall in such Proportion discharge a Debt by Bond in which they are jointly bound, is good, though the Obligee be no Party to the Submission. Rol. Abr. 247. If two Brothers submit to Arbitration, and one of them is awarded to pay so much to his Mother yearly, this is good; for the Payment being to be made to his Mother, shews it to be a Benefit to him. Salk. 74.

The Award may be beneficial to the Party, though a Thing is awarded to be done to a Stranger to the Submission; as if the Arbitrators award that one of the Parties shall pay Money to the Servant of the other.

1 Rol. Rep. 1. An Award is made *super Præmissis*, that one shall pay 20 l. to the other at *Michaelmas* next, and then the other shall release to him all Actions personal; this shall be understood a Release to the Time of the Award, not till *Michaelmas* next. Rol. Abr. 256.

If an Award be to pay so much Money in Discharge of all Actions, a Release shall be intended to be awarded, unless the contrary be shewn on the other Side.

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*4. The Award must be of a Thing lawful and possible.

Rol. Abr. 248. (*a*) If they award a Sum of Money to be paid at a Day past, it is void. 8 E. 4. 1. b. If they award that a Man shall make an Obligation immediately, this is no good Award; for Time is required to the making. 18 E. 4. 21. but *Quære*, and *vide* 2 Brownl. 311. and Salk. 69. pl. 1. See Ld. Raym. 247. Carth. 378. Lutw. 524. 3 Mod. 331. March 18. Jo. 431. Cro. Car. 541. that it shall be done in reasonable Time. (*b*) As an Award that one shall pay 20 l. where he hath not 20 d. is good, for no Contradiction appears in the Award itself. 19 E. 4. 1. Awards that one shall turn the River of *Thames*, kill, steal, forge a Deed, *&c.* are void. Co. Lit. 206.

If the Arbitrators award a Thing (*a*) impossible *ex natura rei*, it is void; but if they award a Thing which cannot be done, but is not in the Nature of the Act itself (*b*) contradictory or repugnant, this may be a good Award; for there is no Construction to be made of the Award, but by the Words thereof.

Rol. Abr. 248. Moor 3, 359. Leon. 316. 3 Leon. 62. Hard. 46.

If an Award be that one shall make a Feoffment to another of an Acre, and immediately after deliver the Charters; this is good, because they may be delivered in the same instant.

An Award that a Stranger shall (*c*) do an Act, is void, because another in his natural Freedom is not supposed within my Power.

(*c*) But an Award to do an Act to a Stranger is good, because it obliges only to an Endeavour; and this shall be supposed to be for the other Party's Benefit. Leon. 140. 10 Co. 131. Rol. Abr. 249. Rol. Rep. 270. An Award to be obliged by Sureties, void as to the Sureties. 2 Sand. 337. 2 Bulst. 262.

Rol. Abr. 249. So an Award that one shall surrender his Copyhold into the Hands of two of the Tenants of a Manor, who shall present it, is good. Rol. Abr. 247.

An Award to levy a Fine is good; for though it is an Act of the Court; yet by the Law and publick Justice of the Kingdom, it is not to be refused to any Man; but if the Award be to command the Justices to do it, this is no good Award, for the Parties in Effect pray Leave to agree from the King himself, which is quite different from the Nature of a Command.

Rol. Abr. 249. Rol. Rep. 6. Cro. Car. 226. 2 Bulst. 39. 3 Lev. 153.

An Award to pay so much *apud domum J. S.* good; for he is not bound to pay it in the House, but as near as he can to it; or it shall be intended a common Inn, and if the Party will not let him pay there, it has been said that the Endeavour is sufficient, for they cannot Award any Thing that will make the Party a Trespasser.

1 Com. Dig. 384. Kydd on Awards 126.

Jones 431. Cro. Car. 541.

An Award that one of the Parties should discharge the other of a Bond in which both were bound to a Stranger, this is a good Award; for it shall be intended that the Money was to be paid at a Day to come; and therefore he

he might then tender it and acquit the other; and if the Day of Payment be paſt, he may pay the Penalty, and compel the other to give a Releaſe in a Court of Equity *.

* And now by Stat. 4. Ann. c. 16. ſ. 12. Payment after the Day of Principal and Intereſt is good.

An Award that one of the Parties ſhall diſcharge the other from his undertaking to pay a Debt to a third Perſon, a good Award; for by the Award he is ſet in the Place of the other Perſon, and the Creditor upon Payment is compellable in Equity to give a Releaſe.

1 Mod. Rep. 9. Beckett and Taylor. 10 Mod. 200. 2 Ld. Raym. 587. Gilb. Eq. Rep. 202. Fitzgib. 54, 168, 270.

Ld. Raym. 123, 246. Skin. 679. Salk. 70. 2 Salk. 787. Carth. 412. Comb. 439. 898, 964, 965. Comyns 114, 183, 328, 547. 12 Mod. 8, 116, 129, 130, 234, 423,

An Award the tenth Day of the Term to ſtay the Suit, and Judgment given in the Action that Term, in an Action for Non-performance, and *Non Aſſumpſit* pleaded, it was moved in Arreſt, that every Judgment given was as of the firſt Day of the Term, and ſo the Award to ſtay the Suit then was altogether impoſſible; but it was held that though this might have been a good Objection upon a ſpecial Demurrer, where it is ſhewn for Cauſe, yet now the Court muſt give Judgment on this Record only; and it doth not appear on this Record when Judgment was given on the other.

Yelv. 35. Hays and Wright.

* If *A.* and *B.* ſubmit to the Award of *J. S.* and he awards that *A.* ſhall pay to *B.* 30*l.* within two Months next following, and that upon Payment thereof they ſhall give mutual Releaſes to one another, and within the ſaid two Months *B.* dies, the Money ſhall be paid to his Executor, who thereupon muſt releaſe, for the Award creates a Duty.

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2 Vent. 249.

5. That the Award muſt be final.

An Award may be good for Part only, but then it muſt be final as to that Part.

19 H. 6. 36. 8 E. 4. 10. Bur. Rep. 277, 278.

An Award that all Suits ſhall (*a*) ceaſe is a final Award; ſo an Award that one of the Parties ſhall not (*b*) ſue an Obligation; for this amounts to an Extinguiſhment of the Debt. An Award that a Suit in Chancery ſhall be (*c*) diſmiſſed, a final Award; ſo if the Arbitrators award a (*d*) *Retraxit*, an Award that one ſhall not (*e*) proſecute nor proceed in ſuch a Term, ſeems to be good; but an Award that one of the Parties ſhall be (*f*) non-ſuit is not good, becauſe the Party may begin again; ſo that each Party ſhall (*g*) diſcontinue their Actions which they have againſt each other; for this is not a final Determination.

(*a*) 2 Mod. 227. Eq. Caſ. Abr. 48. 2 Ld. Raym. 964. 2 Will. Rep. 450. 12 Mod. 130, 423, 589. Barnes 43. 2 Stra. 1024, 1082. Andr. 28. Lev. 58. S. P. 6 Mod. 34. S. P. (*b*) Rol. Abr. 54. (*c*) Salk. 75. pl. 17. 6 Mod. 282. (*d*) 5 H. 7. 22. (*e*) Cro. Jac. 525. (*f*) 19 H. 6. 36. Rol. Abr. 540. 6 Mod. 282. S. P. admitted. (*g*) 5 H. 7. 22.

A conditional Award not good, becauſe not final to determine Matters in Difference; the ſame Law where any Thing is referred to the Arbitrators future Judgment or Expoſition.

Sid. 59. Cro. Ja. 508. Hob. 218. Palm. 110.

If the Arbitrators award general Releaſes within four Days after the Award, and if in ten Days after the Releaſes ſo made the Party diſlike the Award, upon Payment of ten Shillings, the Award ſhall be diſcharged; here the Award is good, and the Proviſo to make void the Award after ſuch Releaſes is altogether void and repugnant; for if the Obligation be once forfeited by Non-performance of the Award, it can never be diſcharged

Poph. 15, 16. Sherry and Richardſon. 2 Rol. Rep. 189. Grove and Saunders.

charged by the Award itſelf; but if the Arbitrators award general Releaſes within four Days after the Award, and if ten Days after the Award made the Parties diſlike the Award, &c. the Award ſhall be void; this Award is not good, becauſe not final and deciſive; for the Parties may diſlike the Award within the four Days.

Salk. 71. pl. 5. Glover and Barrie. *Vide* Sid. 12. That an Award that one of the Parties ſhall make his Acknowledgment before the Mayor of *C.* is good.

If the Arbitrators award that *A.* ſhall beg *B.*'s Pardon in ſuch Manner and ſuch Place as *B.* ſhall appoint; as to this Part the Award is void, for the Arbitrators ought to have made a final Determination of the Matter themſelves, and not to have left the Manner and Place of begging Pardon, which in this Kind of Satisfaction makes the moſt conſiderable Part, to the Judgment of *B.*

Palm. 146. Cro. Jac. 315, 584.

When the Arbitrators award a Thing not ſubmitted, with a Reſervation to themſelves of a future Power of judging of the Matter, and they award a Thing within the Submiſſion, this is good for the Thing within the Submiſſion, for as to that it is final, and void for the Reſidue.

Cro. Jac. 277, 400.

If they arbitrate that all Controverſies ſhall ceaſe, except that concerning one Bond; this is final, for as to the Bond they arbitrate that it ſhall continue in Force.

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*Page 148 * (F) The Conſtruction and Effect of the Award; and herein of the Performance thereof.

2 Brownl. 311. Salk. 69. pl. 1. Ld. Raym. 247. Carth. 378. 2 Vent. 249. Rol. Abr. 257. Cro. Jac. 277. Yelv. 203.

AN Award, as has been ſaid, is to receive a liberal Conſtruction, and to be governed by the Intent of the Arbitrators, where no Inconvenience will enſue; therefore, if the Arbitrators award a Thing to be done, without ſaying within what Time, the Party ſhall have reaſonable Time, becauſe they muſt intend all Things neceſſary to the doing the Thing they award.

If the Award be to pay Money to *J. S.* if he dies, the Money ſhall be paid to his Executors; a Submiſſion of all Actions, and an Award of a Releaſe of all Actions, except a Bond, this is an Award that the Bond ſhall ſtand.

Cro. Jac. 423. Rol. Abr. 250. like Caſe.

An Award that one ſhall enjoy ſuch a Houſe, and pay the Rent, or elſe the Award for enjoying the Houſe to be void, is a good Award; for the Award is abſolute, unleſs upon his own Fault; and the Thing is reſerved to the future Judgment of the Arbitrators.

3 Bulſt. 111, 117. 21 H. 7. 28.

If a Battery is ſubmitted, and the Award is, That one ſhall releaſe, and the other pay him 10*l.* the Releaſe muſt only be underſtood of the Battery, and muſt be firſt performed before the 10*l.* ſhall be paid.

Moor 3. Cro. Eliz. 211. *cont.* Cro. Jac. 423.

If an Award be, that one ſhall make a Leaſe to the other, rendering Rent, the Leaſe is made, but the Rent not paid, the Obligation is not forfeited, for the Award did not reach to the Payment of the Rent, which muſt be recovered by Diſtreſs or Action of Debt; but if the Award had been that he ſhould pay the Rents at ſuch ſet Times, the Obligation would have been forfeited if they had not been paid; and in ſuch Caſe it is a Sum in Groſs, and payable without Demand, for the Party muſt offer it to ſave his Obligation.

8 Co. 98. Sand. 32. Rol. Rep. 362.

It is an eſtabliſhed Rule, that an Award may be good in Part, though void as to other Parts of it; and that the Party is obliged to perform that which

which is well awarded; and excuſed, as to that only which is void; but if an Award is good as to one Party, and void as to what is awarded to the other Party, the Award is void in the Whole. Rol. Abr. 256. Lev. 58.

Leon. 72. Rol. Abr. 244. Hob. 218. 2 Lev. 3. 3 Lev. 413. Cro. Eliz. 758.

If the Arbitrators award one Thing on the one Part, and the Time expires before they award any Thing on the other Part, this is altogether void, and contrary to their Authority, becauſe it doth not finally determine the Things contained in the Submiſſion equally on both Parts. 36 H. 6. 12. 7 H. 6. 40.

If it be provided by the (*a*) Submiſſion that the Award ſhould be notified or delivered to the Parties in Writing, it is no Award till notified or delivered, becauſe it is not according to the Power in the Submiſſion. 8 E. 4. 11, 21. 1 H. 7. 5. Vent. 193.

(*a*) But if there be no ſuch Proviſion, the Parties muſt take Notice of it at their Peril; and if they do not the Act awarded, it is a Forfeiture of their Obligation. 8 E. 4. 18, 21. 1 H. 7. 5. Hob. 51. 8 Co. 92. b. *Vide* Keilw. 175. *cont.*

If ſeveral Perſons of the one Part, and ſeveral of the other Part, ſubmit themſelves to Arbitrament, provided the Arbitrator deliver the Award to the Parties, or one of them, he is not obliged to deliver the Award to one of each Party, but it is ſufficient to deliver it to any of the ſaid Parties. Dyer 218.

* But if two on the one Part, and one of the other ſubmit to an Award, *ita quod arbitrium fiat & deliberetur utrique partium prædict'*, the Delivery of the Award to one on the one Part, and to the other of the other Part, is not ſufficient; for each Party is each intire Party; for each, by Non-performance, incurs the Penalty, and each provides in order to his Performance, that it ſhould be made known to him, if the Submiſſion be by two, ſo that it be delivered to either Party, that is to be underſtood to both; and a Delivery to one only is not good. *Page 149 5 Co. 103. Moor 642. Hungate's Caſe. Cro. Eliz. 885.

If two Men ſubmit to an Award, ſo that it be *paratum deliberari partibus* ſuch a Day, it need not be averred that it was *paratum deliberari, &c.* at the Day, for the Publication of the Award itſelf is ſufficient. Hard. 399. Cro. Car. 541.

If the Submiſſion be general, that the Award ſhall be delivered before ſuch a Day, it may as well be delivered by Word as by Deed; and therefore *non deliberavit in ſcriptis*, in ſuch Caſe, no good Plea. Kydd on Awards 105. Dyer 218. Salk. 75. pl. 15. S. P.

Debt upon an Award by Word only, is within the Statute of 21 *Jac.* 1. *cap.* 16. of Limitations, and muſt be ſued within ſix Years, it is otherwiſe of an Award by Specialty. 2 Keb. 463.

If there be an Obligation to ſtand to an Award, each ought to perform it on his own Part, at the Peril of his Obligation. 21 H. 7. 28. b.

If a Sum of Money be awarded one of the Parties, and that they both ſhall give mutual Releaſes, if he who is to receive the Money refuſes it, yet, upon a Tender and Refuſal, he is as much obliged to ſign a Releaſe, as if he actually received it. Salk. 75.

If Money be awarded and not paid, the Party may either have his firſt Action, or Action of Debt; for if there be Payment, the firſt Wrong was determined; but otherwiſe he cannot plead the Award as a Determination and Bar of the Wrong; for ſince the Award of Arbitrators doth not bind any Man's Property, as Judgments at Law do, it is fit the Party, when he pleads it in Bar, ſhould ſhew an Execution at the Time appointed. 4 H. 6. 1. a. 25. b. 21 H. 7. 28. Rol. Abr. 267. *Vide* Salk. 69. pl. 1. 76. pl. 18. Carth. 117. and *Quære.*

As to the Performance of the Award, if there be no Time limited, it is to be performed in a convenient Time. 20 E. 4. 8. Where the Party ſhall be excuſed by the Act of GOD, *vide* 21 E. 4. 70. Where the Thing awarded to be done, becomes impoſſible by the Act of a Stranger, *vide* 2 Mod. 27, 28. Ld. Raym. 123, 247. Stra. 116. Carth. 378. 3 Mod. 331.

Though

3 E. 4. 10. Though an Award cannot be made Part at one Time and Part at another, yet it may be performed Part at one Time and Part at another; for the Nature of the Thing may require Performance at different Times and Places.

2 Leon. 110, 181. In Debt on an Obligation for performing an Award, by which Award the Parties were to give mutual Releaſes, the Defendant pleaded that he made a Releaſe to the Plaintiff, and delivered it to *J. S.* for his Uſe; and this was held a good Performance of the Award, for the Defendant could not plead *Non eſt factum*, neither could he countermand it; and as the Arbitrators had not appointed any Place where the Releaſes ſhould be delivered, if the Plaintiff ſhould abſent himſelf it would be very inconvenient. Cro. Eliz. 54.

An Award for one Party to deliver a Releaſe or Bond to the other, if that one Party delivers it to *A.* who delivers it to *B.* who tenders it to the other Party, who refuſes, this is a good Performance of the Award.

Rol. Rep. 7, 8. 2 Bulſt. 93 to 96. Cro. Jac. 340. If the Submiſſion be of a Chancery Suit, and the Arbitrators award that the Suit ſhall ſtay, and that one be quit againſt the other for all Matters in the Bill, it is ſufficient Performance to ſay that the other *ſtetit quietus*, and though he did not procure an actual Diſcharge; but where one by Deed is obliged to acquit another of ſuch a Debt, or ſuch a Suit, it is not ſufficient to ſave him harmleſs, but he muſt procure an actual Diſcharge; but the Award here being *quod ſtaret quietus*, means no more than that the Party ſhould be acquitted by Force of the Award itſelf, and not that another Diſcharge * ſhould be procured; and in this Caſe if a new Bill be exhibited, yet that is no Diſturbance to forfeit, without Proceſs iſſuing out, as the *Subpœna*, for till Proceſs the Party is not actually moleſted.

*Page 150

2 Bulſt. 96. If the Award is *quod ſtaret acquietus* from an Information, this is not good unleſs it be actually releaſed, becauſe the King may proſecute it. 2 Bulſt. 96.

But if a Man ſubmits a Rent-charge to Arbitration, and the Arbitrator award *quod ſtaret quietus* of the Rent, he who hath the Rent ought to releaſe the ſame to the other, in Performance of this Award, for to be quit of the Rent ſuppoſes the Demand not in Being.

Cro. Jac. 525. If an Award be not to continue the Suit, if the Party continue it by Attorney, this is a Breach: but if the Attorney continue it without his Knowledge, it is no Breach. Cro. Jac. 525.

An Award that the Plaintiff ſhall not proſecute or proceed in a Suit the ſame Term, the Entry of a Continuance is no Breach of this Award, for otherwiſe the Party can never afterwards go on in this Action.

3 Bulſt. 65. An Award is made to infeoff *J. S. J. S.* comes and deſires the Party to infeoff *J. M.* and him to the Uſe of himſelf; (and it is done) this is a good Performance of the Award, for though the Conſtruction of the Senſe of the Award is to be taken on the expreſs Words, yet what is a Performance of the Award is to be taken according to the Intent of the Arbitrators.

Moor 3. pl. 9. A Man cannot plead generally the Award performed, but he ought to ſet forth the Award, and therein how he hath performed it.

(G) Of the Pleadings in Awards.

49 E. 3. 3. Rol. Abr. 267. IF the Arbitrators award Money to be paid at a Day to come, this is a good Plea in Bar in an Action of Treſpaſs before the Day, becauſe it is *debitum in præſenti*, tho' *ſolvendum in futuro*; and if he might have an Action of Treſpaſs before the Day, and recover, he may have an Action of Debt after the Day, and ſo a double Satisfaction for the ſame Thing.

Note, There is a Difference between an Accord with Satisfaction and an Award; for in an Accord a Man muſt plead preſent Satisfaction, and it is no Plea in Bar to plead an Accord with Satisfaction at a Day to come, for in all perſonal Injuries the Law gives Damages as an Equivalent; and when the Party accepts of an Equivalent, there is no Injury or Cauſe of

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It was formerly held, That in an Award of a Releaſe, a Horſe, a Quart of Wine, to enter into an Obligation, or any other collateral Matter in Satisfaction, without Performance, was no good Plea in Bar; for were it a good Plea in Bar, he could have no Remedy afterwards to compel the Party to do the Thing awarded, for by the Bar the Treſpaſs would be nullified. Rol. Abr. 266. Salk. 76. pl. 19.

But it has been ſince held in an Action on the Caſe upon a ſpecial Promiſe made by the Defendant to deliver a Parcel of Hops to the Plaintiff * on ſuch a Day and Place, on a certain Price agreed on, &c. to which the Defendant pleaded in Bar, that after the Promiſe made, both he and the Plaintiff referred all Matters, and that the Arbitrators awarded that the Defendant ſhould releaſe the Plaintiff, and that he ſhould releaſe the Defendant of all Actions and Demands whatſoever; and alledged, that from the Time of the Award hitherto, he was always ready, and yet is, to releaſe the Plaintiff according to the Award, &c. And upon Demurrer to this Plea, after ſeveral Debates, it was adjudged, that this Award was no Bar to the Action, becauſe nothing was awarded but only mutual Releaſes from each other, ſo that the Award itſelf is no Bar, but the Thing awarded, when executed, would be a Bar; and a Difference was taken where any Thing is awarded in Satisfaction, there the Award itſelf is a Bar before it is performed; but where nothing is awarded but Releaſes on both Sides, there, when the Award is executed, the Releaſe will likewiſe be a Bar: And the Court held, that the Defendant may bring his Action againſt the Plaintiff for not releaſing according to the Award, and therein ought to recover all his Damages and Coſts loſt in the Action againſt him. *Page 151 Carth. 378. between Freeman and Bernard adjudged, *Trin.* 9 *W.* 3. Salk. 69. pl. 1. Ld. Raym. 247. 3 Mod. 331.

S.C. and the Difference there taken, that by awarding a collateral Thing to be done, a new Duty is raiſed, and the old diſcharged, and then it may be pleaded in Bar, though not executed; *ſecus* if a Releaſe only be awarded, which created no new Duty. *Vide* Carth. 188.

The above Caſes muſt be underſtood where the Action was brought before the Time for performing the Award was expired; for if an Award be to pay Money at a Day to come, and the Money be not paid at the Day, and afterwards an Action of Treſpaſs be brought, this is no good Plea in Bar, for no Man can plead this in Bar without ſhewing he has paid the Money; for it is againſt natural Juſtice to make one Default and Wrong an Excuſe for another; but if the Party tender it at the Day, and the other refuſe it, then it is a good Plea in Bar, it being his own Fault, and he hath ſtill a Remedy for the Money. Keilw. 121. Rol. Abr. 267. Dyer 75. Hob. 49. Raym. 450. Salk. 69. pl. 1. Ld. Raym. 247. Carth. 378. 3 Mod. 331.

If in an Action of Debt upon an Award, the Plaintiff declares that the Arbitrators did make an Award that the Defendant ſhould pay unto the Plaintiff 10*l.* this is a good Declaration, though nothing is ſhewn to have been awarded on the other Side; for it is ſufficient for the Plaintiff to ſet forth that Part of the Award which intitles him to his Action; and if the Defendant will impeach the Award for any Thing, he muſt ſhew it ſpecially on his own Part. Leon 72. That the Plaintiff may declare that *inter alia* it was awarded. Lit. Rep. 312.

Vide Mod. 36. Comyns 328, 547. 2 Will. Rep. 450. 3 Will. Rep. 187, 190, 361. Sid. 161. S. P.

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of Complaint, and therefore a preſent Satisfaction is a good Plea; but where the Wrong-doer promiſes a future Satisfaction, the Injury continues till Satisfaction is made, and conſequently there is a Cauſe of Complaint in Being, and if the Treſpaſs were now barred by this Plea, he can have no Remedy for the future Satisfaction, for that ſuppoſes the Injury ſtill to have Continuance; but where Perſons ſubmit to Arbitration, the Arbitrators are Judges of the Injury; and if they award Money payable at a Day to come, that is a good Award, and may be a good Plea in Bar to an Action of Treſpaſs brought in the mean Time, becauſe this thereby becomes an immediate Debt attainable by Law. 5 E. 4. 7. Plowd. 5. b.

Sand. 326. Veal and Warner; but the Court would not give Judgment for the Defendant, but ſuffered the Plaintiff to diſcontinue, becauſe they apprehended it to be only a Trick in the Pleading, for which the Chief Juſtice reprehended *Sanders*, who excuſed himſelf by Reaſon of the Severity of the Award. 2 Keb. 568. S. C.

In an Action of Debt upon a Bond conditioned for the Performance of an Award, the Defendant pleaded that the Arbitrators did make an Award that the Defendant ſhould pay to the Plaintiff 310*l.* and ſhould give to the Plaintiff a general Releaſe, and pleaded that he had paid the Money and given a Releaſe accordingly, but did not ſhew what on the Part of the Plaintiff was awarded to be done; and the Plaintiff replied without ſhewing the other Part of the Award in his Replication, and took Iſſue that the Defendant had not paid the Money; and the Defendant put in an inſufficient Rejoinder, upon which the Plaintiff demurred; and *per Cur'* the Plaintiff cannot have Judgment, becauſe the Award as ſet forth and agreed in Pleading is void; but if the Plaintiff would have helped himſelf, he ought to have ſhewn the other Part of the Award before he had taken Iſſue.

If in Debt upon an Obligation conditioned for the Performance of an Award, the Defendant pleads *nullum fecerunt arbitrium*; and the Plaintiff replies, and ſhews the Award, he muſt alſo ſhew the Breach, without which he hath no Cauſe of Action, for the Obligation is guided by the Condition, and though the Defendant can make no Anſwer to the Breach, * yet it ought to appear to the Court that the Plaintiff hath Cauſe of Action.

*Page 152 Yelv. 152. Cro. Jac. 220. Sand. 102. S. P. *arguendo*, *vide* Stile 429. where it is ſaid that the Plaintiff can aſſign only one Breach.

Sid. 290. (*a*) So if the Defendant pleads a Releaſe. Brownl. 90. Yelv. 79.

But if in Debt upon Bond to perform an Award, and *Oyer* of the Condition, the Defendant pleads *non ſubmiſit*, the Plaintiff (*a*) need not aſſign a Breach, for the Defendant puts the whole Streſs of his Cauſe upon a Matter antecedent to the alledging a Breach; for if there be no Submiſſion there could be no Award, and conſequently no Breach of it.

Leon. 304. Owen 153. S. C. adjudged by three Judges againſt two who held that the Plaintiff ſhould have ſhewn the whole Award, and thereupon the Law would have adjudged one Part void, and not to be done. Leon. 140. S. C. * (*b*) So if the Award be, that the Defendant together with a Stranger, ſhall enter into a Bond, in the Aſſignment of a Breach the Plaintiff muſt not ſay that the Defendant and Stranger did not enter into a Bond, for though both did not, yet the Defendant alone might enter into Bond. Godb. 165. 2 Rol. Rep. 40.

If in Debt upon an Obligation conditioned for the Performance of an Award, the Defendant ſhews that the Arbitrators did make an Award, that the Defendant before ſuch a Day ſhould pay to the Plaintiff 100*l.* or otherwiſe ſhould procure one *A.* being a Stranger, to be bound to the Plaintiff for the Payment of 12*l. per Annum* to the Plaintiff for his Life; and the Defendant pleads that he hath performed the ſaid Award, and the Plaintiff replies, that the Defendant hath not paid the ſaid 100*l.* without ſaying, nor hath procured *A. &c.* yet this is a good Replication, for the Award as to that Part is merely void, and therefore the Plaintiff (*b*) need not take Notice thereof.

* It would have been better if the Plaintiff had ſhewn, that neither the one Thing nor the other had been done.

2 Brownl. 137. (*c*) But where an Award is pleaded in Bar of a Treſpaſs, a Place muſt be laid where the Submiſſion was made. Cro. Eliz. 66. The Plaintiff need not ſet forth the *Profert in Curia*, becauſe it is no Deed. Stile 459. †

In an Action of Debt upon an Award, it is not (*c*) neceſſary for the Plaintiff in his Declaration to lay Time or Place where the Award or Submiſſion were made; but if the Defendant denies either, the Plaintiff may reply, that the Award or Submiſſion was made at ſuch a Place.

† *Sed qu.* At beſt, the ſafeſt Way would be with a *Profert*.

If

If there be a Submiſſion to the Award of *J. S.* ſo that the ſaid Award be made under his Hand and Seal at or before the 5th Day of *September* following, ready to be delivered at the Shop of *J. N.* in the *Exchange, London*, and in an Action of Debt upon an Award made thereupon, the Plaintiff declares that the ſaid *J. S.* under his Hand and Seal the 4th Day of *September* following, *apud Caſtrum Eborum*, did make an Award *ad tunc & ibidem parat'* to be delivered at the Shop of the ſaid *J. N.* in the *Exchange, London*; this is no good Declaration, for the Parties are not bound to take Cognizance of the Delivery elſewhere than at the Place appointed. Cro. Jac. 577. By two Judges againſt the Chief, who held the Publication there, and Allegation that it was ready to be delivered at the ſaid Shop in *London*, was well enough; but it was adjourned. 2 Rol. Rep. 193. S. C. adjourned. 3 Mod. 331. S. C. cited as if adjudged. *Vide* 2 Lev. 68. *

* The Opinion of the Chief Juſtice ſeems beſt.

If in Debt upon an Obligation conditioned for the Performance of an Award, ſo as, *&c.* the Defendant pleads no Award made, and the Plaintiff replies, that *ante exhibitionem billæ, ſcilicet* the 24th of *June* (which was a Day within the Submiſſion) the Arbitrators made an Award, &c. and the Defendant demurs generally, the Plaintiff ſhall have Judgment, for though the Plaintiff ought to have replied, that the Arbitrators made their Award before the Day limited to them, yet this is Form only, and helped by a general Demurrer. Sid. 370.

If in Debt upon a Bond conditioned for the Performance of an Award, ſo as it be made, &c. and ready to be delivered to the Parties, or to ſuch of them who ſhall deſire the ſame; the Defendant pleads *nullum fecerunt arbitrium*, and the Plaintiff replies, and ſets forth the Award, and ſhews a Breach, but doth not ſay that it was ready to be delivered to the Defendant, yet this is a good Replication; for when the Award is made it is ready to be delivered to the Parties, or to ſuch of them who deſire it, ſo that it muſt be deſired; and if denied, the Party may plead that Matter ſpecially. 3 Mod. 330. 11 Mod. 170. 12 Mod. 4, 120, 234, 317. Ld. Raym. 115, 222, 247, 533. 2d. 989, 1039. 2 Vern. 100, 109, 514.

705. 3 Will. Rep. 187, 190, 361. Comyns 114, 328. Barnes 41. 2 Barnes 53, 55, 140. But for this *vide* Letter (F) *ſupra*.

* If in Debt upon an Obligation conditioned for the Performance of an Award in Writing, or by Word of Mouth, the Defendant pleads no Award made, and the Plaintiff replies, that at the Time of the Bond and Award he had an Action againſt the Defendant for ſcandalous Words, and that the Arbitrator *ore tenus* did declare and publiſh his Award in Manner following, *viz.* That the Defendant ſhould pay to the Plaintiff 12 *Guineas*, and all ſuch Money as he had expended *circa proſecutionem placitat' præd'*, *&c.* this is a good Award, and well ſet forth, although the Award doth not mention any Suit before; for he that ſets forth a parol Award is not (*a*) tied to the very Words, but it is ſufficient to ſhew the Effect and Subſtance of what was awarded by Word of Mouth. *Page 153. 2 Vent. 242. Harſon and Liverſey.

(*a*) But if the Award had been in Writing in ſuch Form of Expreſſion, it had not been good. 2 Vent. 242. agreed *per Curiam*.

A Man cannot plead generally the Award performed, but he (*b*) ought to ſet forth the Award, and ſhew how he hath performed it. Moor 3. pl. 9.

(*b*) But if an Award be to pay the Rent mentioned in ſuch an Indenture, the Defendant in pleading Performance need not ſet forth the Indenture, but refer generally to it. 1 Vent. 87. But if it be to be paid in ſuch Manner and at ſuch Times as is expreſſed in the Indenture, then it muſt be ſet forth at large. Vent. 87. So if an Award be to pay Money given by Will. Vent. 87.

In pleading a Countermand to a Submiſſion to Arbitration, it need not be alledged that the Party gave Notice to the Arbitrators, for with- 8 Co. 98.

out that it is no Countermand, and therefore if no Notice be given, Iſſue may be joined upon the Point *quod non revocavit*.

Co. Lit. 265. 2 Sand. 65. (c) And therefore an Action of Debt will not lie againſt the Adminiſtrator whoſe Inteſtate was Party to ſuch an Award. Cro. Eliz. 600.

If the Submiſſion be by Word, though the Award be by Deed, the Party may (c) wage his Law; for though a Deed cannot be diſſolved without Deed, yet a verbal Contract may be diſſolved by Word only; and this in its Original is a verbal Contract.

Salk. 72. pl. 9. Ld. Raym. 715. 12 Mod. 534. Foreland & Marygold adjudged. (d) Sid. 161. Lev. 162. *Vide* Lit. Rep. 313. (e) *Vide* Stile 459. where it is ſaid, that the Plaintiff need not ſet forth a *Profert* thereof *in Curia*, becauſe it is no Deed. But it is the ſafeſt Way. * But the Court would probably give Leave to amend.

If in Debt on a Bond for Performance of an Award, the Defendant pleads no Award, and the Plaintiff ſets forth an Award with a *Profert in Curi'*, and the Defendant craves *Oyer*, and then demurs for Variance between the Award ſet out in the Replication and the *Oyer*, and the Variances appear material, the Defendant muſt have Judgment *; otherwiſe if the Variance had been as to thoſe Parts in which the Award was void; and though in Debt on an Award the Plaintiff (d) need not ſet forth more than makes for him, yet it is otherwiſe in Debt on a Bond, for there the Plaintiff muſt reply the whole Award; and if ſuch Replication be without a *Profert*, the Defendant (e) may reply *nul tiel agard*.

Salk. 76. pl. 18. 2 Ld. Raym. 1076. 6 Mod. 244. Arnitt and Breame.

If an Award be made, that certain Buildings erected on a Wharf, which were a Nuiſance to the Plaintiff, ſhould be pulled down within thirty-eight Days from the Date of the Award, &c. and upon *nul agard* pleaded the Plaintiff ſets forth an Award, but without Date; yet this is well enough, for the Date ſhall be computed from the making the Award, as a Deed takes its Date from the Delivery, though actually dated on another Day.

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* Aſſault and Battery.

* Page 154

(A) What ſhall be ſaid to be an Aſſault. 154.
(B) What ſhall be ſaid to be a Battery. 154.
(C) In what Caſes they may be juſtified; and herein of the Manner of ſetting forth ſuch Juſtification. 155.
(D) In what Manner they are to be puniſhed. 156.

(A) What ſhall be ſaid to be an Aſſault.

Fulton 4. a. 6 Mod. 173. 2 Rol. Abr. 545. Vent. 256. Hawk. P.C. 188.

AN Aſſault is an Attempt or Offer with Force and Violence to do a corporal Hurt to another, as by ſtriking at him with or without a Weapon, or preſenting a Gun at him at ſuch a Diſtance to which the Gun will carry, or pointing a Pitch-fork at him, ſtanding within the Reach of it, or by holding up one's Fiſt at him, or by drawing a Sword and waving it in a menacing Manner.

But

But if *A.* lays his Hand on his Sword, and ſays, that *if it were not Aſſize Time I would not take ſuch Language from you*; this is no Aſſault, for it is plain he did not deſign to do him any corporal Hurt at that Time, and a Man's Intention muſt operate with his Act in conſtituting an Aſſault. Mod. 3. 10 Mod. 187. 2 Keb. 545. Law of Evid. 235. pl. 60. Gilb. Law of Evid. 256.

It ſeems agreed, that at this Day no Words whatſoever, be they never ſo provoking, can amount to an Aſſault, notwithſtanding the many antient Opinions to the contrary *. Hawk. P. C. 134.

*But if very provoking Language is given, without reaſonable Cauſe, and the Party offended is tempted to ſtrike the other, and on Action brought, and the general Iſſue pleaded, few Juries would give Damages to carry Coſts, and few (if any) Judges would certify.

Every Battery includes an Aſſault, therefore, if the Defendant be found guilty of the Battery, it is ſufficient †. Salk. 384. pl. 36. Hawk. P.C. 134.

† But unleſs 40s. Damages are given, or the Judge certifies, the Plaintiff will not have more Coſts than Damages.

(B) What ſhall be ſaid to be a Battery.

ANY Injury whatſoever, be it never ſo ſmall, being actually done to the Perſon of a Man, in an angry or revengeful, or rude or inſolent Manner, as by ſpitting in his Face, or any Way touching him in anger, or violently joſtling him out of the Way, are Batteries in the Eye of the Law ‡. 6 Mod. 149, 172. Ld. Raym. 62, 231. Salk. 407. pl. 2. Sid. 441.

Mod. 3, 36. 3 Lev. 404. Hawk. P. C. 134. ‡ So is treading upon the Toes, or any Kind of corporal Injury, deſignedly done.

But to lay one's Hands gently on another whom an Officer has a Warrant to arreſt, and to tell the Officer that this is the Man he wants, is not a Battery. 2 Rol. Abr. 546. Hawk. P.C. 134.

So if two by Conſent play at Cudgels, and one happens to hurt the other, as their Intent was lawful and commendable, in promoting Courage and Activity, it does not ſeem to amount to a Battery. Dalt. c. 22. Bro. Coron. 229.

So if one Soldier hurts another by diſcharging a Gun in Exerciſe, this cannot amount to a Battery, though if it be done without ſufficient Caution he is liable to an Action at the Suit of the Party injured. * Page 155 Hob. 134. 2 Rol. Abr. 548.

(C) In what Caſes they may be juſtified; and herein of the Manner of ſetting forth ſuch Juſtification.

IF an Officer, having a Warrant againſt one who will not ſuffer himſelf to be arreſted, beat or wound him in the Attempt to take him, he may juſtify it. So if a Parent in a reaſonable Manner chaſtiſe his Child, or a Maſter his Servant, being actually in his Service at the Time, or a School- *Vide* Hawk. P. C. 130. and ſeveral Authorities there cited.

master his Scholar, or a Gaoler his Priſoner *, or even a Huſband his Wife; or if one confine a Friend who is mad, and bind and beat him, &c. in ſuch a Manner as is proper in his Circumſtances; or if a Man force a Sword from one who offers to kill another; or if a Man gently lay his Hands on another, and thereby ſtay him from inciting a Dog againſt a third Perſon; if I beat one (without wounding him, or throwing at him a dangerous Weapon) who wrongfully endeavours with Violence to diſpoſſeſs me of my Land or Goods, or of the Goods of another delivered to me to be kept for him, and will not deſiſt upon my laying my Hands gently on him and diſturbing him; or if a Man beat, wound or maim one who makes an Aſſault upon his Perſon, or that of his Wife, Parent, Child, or Maſter; or if a Man fight with, or beats one who attempts to kill any Stranger; in theſe Caſes it ſeems the Party may juſtify the Aſſault and Battery.

* This muſt mean where the Priſoner attempts to eſcape, or is extremely unruly and violent, and refuſes to retire to Bed, &c. in due Time, but makes an Uproar, Tumult, &c. to the great Diſturbance of thoſe within, &c.

6 Mod. 172.

And on an Indictment the Party may plead Not guilty, and give the ſpecial Matter in Evidence; but in an Action of Treſpaſs he muſt plead it ſpecially.

Sid. 444. 2 Keb. 623. Vent. 70. S.C. Aubrey and James: But for this *vide* Head of Pleas and Pleadings, and Yelv. 89.

In an Action of Battery the Defendant pleads that he was Maſter of a Ship, and that the Plaintiff being his Carpenter and Servant in the Ship, neglected his Duty, and gave him ſaucy Language, and that therefore *moderate caſtigavit*; Plaintiff replies *non moderate caſtigavit*, and Iſſue joined, and Verdict for the Plaintiff; and in Arreſt of Judgment it was inſiſted, that *moderate caſtigavit* was not a pertinent Negative, the proper Iſſue being *immoderate caſtigavit*; but the Court held it well enough, eſpecially after Verdict.

Brownl. 205. Godb. 251. 2 Bulſt. 215. Hob. 221. Yelv. 157. Goldſ. 5. Cro. Eliz. 93, 268. Rol. Rep. 19. Moor 846. 2 Lutw. 1481. Carth. 280, 491. Ld. Raym. 213, 252, 454. Salk. 144. See Comyns 76. 12 Mod. 386. Salk, 397. *

* The general Replication, *De injuria propria, abſque tali cauſa*, is the proper Replication.

Sid. 246. Keb. 884, 921. S. C. between Danny and Lucy. *Vide* Cro. Jac. 251. 3 Lev. 403. Lutw. 925.

In an Action of Aſſault and Battery, and Wounding, it was laid with a *mutilavit & ſiniſtr' Brach' fregit ita quod uſum ſiniſtri brachii amiſit*; to this the Defendant pleaded *de ſon Aſſault demeſne*; and on Demurrer it was ſhewn for Cauſe, that this being a heinous Battery, and amounting to a Mayhem, he ſhould have ſhewn to the Court that the Aſſault was with ſuch Violence, that he could not otherwiſe defend himſelf but by maiming the Plaintiff; and the Pleading ſhould have been, that the Plaintiff *Mayhemaſſet & vulneraſſet* the Defendant *Niſi*, &c. But the Court held the Plea good, and that it was Matter upon Evidence, whether the Aſſault were proportionable to the Battery; for if it were not, the Iſſue would be for the Plaintiff, although the Plaintiff did make the firſt Aſſault; for every Aſſault will not juſtify every Beating, but it muſt be ſuch a one as may draw a probable Danger and Fear upon the Perſon upon whom it is made.

2 Inſt. 316. 2 Hawk. P. C. 159.

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Lev. 282. Sid. 441. Mod. 36. 11 Mod. 229. Ld. Raym. 62. 2 Keb. 597. S. C. between Jones and Treſilian.

* In Aſſault, &c. the Defendant pleaded *ſon Aſſault Demeſne*, and the Plaintiff replied, that he was ſtanding at his Gate, and that the Defendant being on Horſeback offered to ride over him, whereupon he *molliter* aſſaulted the Plaintiff in Defence of himſelf, *quæ eſt eadem*, &c. and on Demurrer to this Replication it was adjudged to be ill, becauſe he thereby had confeſſed that he had made the firſt Aſſault; for he ſhould have pleaded *molliter manus impoſuit* to hinder the Riding over him.

In

In Treſpaſs for Aſſault and Battery, the Defendant juſtifies by a *molliter manus impoſuit* for due Correction of the Defendant as his Servant, and pleads over, that ſince that Time the Plaintiff *exoneravit & relaxavit* (without ſaying *per ſcriptum*) to the Defendant the ſaid Matter; to this Plea it was demurred for Doubleneſs ſpecially; and the Opinion of the Court was, that it was double; for though the Releaſe be not ſufficiently pleaded, yet it is pleaded ſo as Iſſue might be taken upon it, which will make it double *. Sid. 175. Keb. 661. S. C. Bieke and Grove.

* Defendants, in ſuch Caſes, may now plead as many different Pleas, as may be requiſite, by Virtue of the Statute 4 Ann. c. 16. ſ. 4.

(D) In what Manner they are to be puniſhed.

EVERY Perſon guilty of an Aſſault or Battery, is ſubject both to an Action at the Suit of the Party, wherein he ſhall render Damages, &c. and alſo to an Indictment at the Suit of the King, wherein he ſhall be fined according to the Heinouſneſs of the Offence †. Hawk. P. C. 134. A Defendant is not to be held to ſpecial Bail, unleſs the Battery be grievous; in which Caſe the Writ may be marked for ſpecial Bail. Carth. 278. An Action of Aſſault and Battery is within the Statute which gives no more Coſts than Damages. Vent. 256. For the Penalty for aſſaulting of a Servant of a Knight or Burgeſs in Parliament, *vide* the Statute 5 H. 4. c. 6. For puniſhing thoſe who aſſault any coming to Parliament, or to the King's Council, 11 H. 6. c. 11. Concerning an Aſſault on a Privy Counſellor in the Execution of his Office, 9 Ann. c. 11. For which *vide* Tit. *Felony*. For beating or challenging to fight for Money won at Play. 9 Ann. c. 14. and Tit. *Gaming*. For the Offence of aſſaulting in a Church or Church-Yard, ſee 5 & 6 E. 6. c. 4. And that Churchwardens who whip Boys for playing in the Church, or put off the Hats of thoſe that ſit there with them on, or who gently lay their Hands on an excommunicated Perſon to turn him out, are not within the Statute Sand. 13, 14. Sid. 301. For ſtriking within the King's Palace, ſee Hawk. P. C. 57. † In trifling Caſes, and perhaps in moſt, the Attorney General will grant a *Nolle Proſequi*, unleſs the Party will diſcontinue his Action, if brought, or if not, undertake not to bring an Action: If Indictments, tried, and Defendant found guilty, the Court will in general, ſet but a ſmall Fine, unleſs the Party undertakes, not to bring an Action.

* ASSIGNMENT.

*Page 157

AN *Aſſignment* is the Transferring and ſetting over to another ſome Right, Title or Intereſt in Things, in which a third Perſon, not a Party to the *Aſſignment*, has a Concern and Intereſt. How far the Privity of Contract is deſtroyed by the Aſſignment, and what Remedies the Parties may have againſt each other, is ſet down under the Head of *Covenants*; and therefore I ſhall here only conſider,

(A) What

(A) What Things are assignable.

Co. Lit. 214. Rol. Abr. 376. Skin. 6, pl. 7. 26. pl. 1.

A Possibility, Right of Entry, or Thing in Action *, or Cause of Suit, or Title for a Condition broken, cannot be granted or assigned over by Law; for if this were permitted it would promote Maintenance, and prove prejudicial to such as, being able to contend with those with whom the original Contract was, might find themseves depressed by a powerful Adversary.

* Bills of Exchange are assignable by the Law of Merchants, and Notes, by Stat. 3 and 4 Ann. c. 9.

Co. Lit. 232. (a) And by the modern Practice he may sue for it in the Name of the Obligee, as his Attorney; but there should be an express Authority, inserted in the Assignment.

But though a Bond, being a *Chose in Action*, cannot be assigned over so as to enable the Assignee to sue in his (a) own Name, yet he has by the Assignment such a Title to the Paper and Wax, that he may keep or cancel it.

2 Vern. 595. (b) There must be a Consideration paid. 3 Chan. Rep. 90. (c) 2 Vern. 540. But Payment to the Obligee without Notice of the Assignment, is good. Chan. Ca. 232. See Ld. Raym. 683.

Also in Equity a Bond is assignable for a valuable (b) Consideration paid, and the Assignee alone becomes intitled to the Money, so that if the Obligor after (c) Notice of the Assignment pays the Money to the Obligee, he will be compelled to pay it over again.

2 Vern. 428, 692. S. P. 764. S. P.

An Assignee must take it subject to the same Equity that it was in the Hands of the Obligee; as if on a Marriage-Treaty the intended Husband enters into a Marriage-Brokage Bond, which is afterwards assigned to Creditors, yet it still remains liable to the same Equity, and is not to be carried into Execution against the Obligor.

3 Lev. 312. Stephens & Hunham. 4 Mod. 48. Show. 290. 2 Salk. 563. S. C. pl. 1.

If the Administrator of a Conuzee of a Statute extends the Lands, and a *Liberate* is returned, and before Entry or Recovery of the Possession the Administrator assigns his Interest, the Assignment is void, for by the *Liberate* he has accepted the Possession, and is estopped to say the contrary, and then by suffering the Owner of the Lands to continue in Possession, this turns his Possession into a Right, which is not assignable before the Possession be regained by Ejectment or Re-entry, or some lawful Means.

10 Co. 47. For this *vide* Sid. 188. Chan. Ca. 8. 2 Vern. 563.

If there be a Devise of a Term to *A.* for Life, Remainder to *B. B.* cannot in the Life-time of *A.* assign his Interest, because he has but a bare Possibility, for *A.* may outlive the Number of Years. and *vide* Duke of *Norfolk's* Case, 3 Chan. Ca. fo. 1.

*Page 158 (d) Trustee cannot assign his Trust.

* A Personal Trust which one Man reposes in another, cannot be (d) assigned over, however able such Assignee may be to execute it. 4 Inst. 85. *vide* Head of *Trust*; nor a Guardian. Vaugh. 180. Whether a Pawnbroker, by reason of the special Property he has in the Pledge, can assign it, Q. & *vide* 1 Bulst. 31. Owen 124.*

* As the Owner cannot recover the Possession of the Goods, without tendering Principal and legal Interest, why cannot the Pawnbroker assign his Interest?

Vide the several Heads.

Several Things are assignable by Acts of Parliament, which seem not assignable in their own Nature; as Promissory Notes, by 3 & 4 *Ann.* *cap.*

cap. 9. Bail-Bonds by the Sheriff, by 4 *Ann. cap.* 16. *ſect.* 20. a Judge's Certificate for taking and proſecuting a Felon to Conviction, by 10 & 11 *W.* 3. *cap.* 23. *ſect.* 2. a Bankrupts Effects by the ſeveral Statutes of Bankruptcy.

ASSISE.

AN (*a*) Aſſiſe is a Remedy which the Law hath appointed for the Reſtitution of a Freehold, of which the Party has been diſſeiſed, and appears to have been in Nature of a Commiſſion to put the Diſſeiſee in Poſſeſſion by Trial at one Aſſiſes.

(*a*) For the Derivation and Signification of the Word, *vide* Co. Lit. 153. b. 154. b. 159. b. It ſeems to have been of *Norman* Extraction, *vide* Cuſtomier 16. and to have been introduced in the Reign of H. 2. to be a more eaſy and expeditious Method of recovering the Freehold than was obſerved in the Writ of Entry; hence the Writ of Entry was afterwards called a Writ of Entry in the Nature of an Aſſiſe. *Vide* Fleta 214, 215. *Glanvil* ſays it was *Regale quoddam Beneficium clementia Principis de conſilio Procerum Populis indultum.* Glanvil, c. 7. fol. 17.

Aſſiſes are now ſeldom made uſe of except for the Recovery of Offices, being ſupplied by other Actions leſs perplexed, and which yield a more expeditious Remedy; but as they are ſtill in Force, it may be proper to conſider the Nature of them a little, under the following Heads:

(A) Of the Nature of an Aſſiſe, and the Form of the Proceedings on it. 159.
(B) In what Caſes an Action lies. 160.
(C) What Seiſin is ſufficient to maintain an Aſſiſe. 161.
(D) How the Demandant muſt ſet forth his Title. 162.

(A) Of the Nature of an Aſſiſe, and the Form of the Proceedings on it.

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ASSISES (*b*) are twofold. Firſt, An Aſſiſe of a Man's own Poſſeſſion, and that was called an Aſſiſe of *Novel Diſſeiſin*, which was a Commiſſion to the Sheriff to reſerve the Tenements with the Chattels found in them, and put them in Peace till a Jury had tried the Cauſe, who were by ſuch Writ authorized to be returned at the Aſſiſes by the Sheriff; and by the original Practice in this Aſſiſe, the Sheriff uſed to take the Tenements, together with the Chattels found in them, into his own Poſſeſſion, till the Right was tried; but becauſe this proved inconvenient, for that the Sheriff could not keep ſuch Poſſeſſion, and turn it to the beſt Advan-

F.N.B. 177. Fleta, lib. 4. c. 4. f. 222.

(*b*) For Aſſiſes *in conſimilio Comitatus*, *vide* Co. Lit. 153 154. 7 Co. 3. b. 7 R. 2. c. 10. Kelw. 98.

Booth 211. (A methodical good Treatiſe, on the Subject of real Actions.)

Advantage, eſpecially where ſuch an Aſſiſe was long in Dependance, therefore the Practice altered, and the Tenant was continued in Poſſeſſion until Judgment; and by ſuch Writ the Jury were impowered to inquire of Damages, becauſe the Sheriff was to reſeize the Chattels as well as the Frank-tenement; and therefore ſuch Damages being aſſeſſed by the Jury were awarded to the Tenant that recovered, as well as the Frank-tenement.

F.N.B. 195. 2 Inſt. 308. Booth 206.

The ſecond Sort of Aſſiſe is an Aſſiſe of *Mortdanceſter*, which was, where the Father, Mother, Brother, Siſter, Uncle, Aunt, Nephew, or Niece died ſeiſed of the Lands, and a Stranger abated; then the Heir had ſuch Writ, and to ſuch Writ was required an immediate Deſcent, as from Father to Son, or from Brother to Siſter originally; and it ſeems by the Statute of *Glouceſter*, *cap.* 6. it extended to Uncles and Aunts, Nephews and Nieces, becauſe Abatements had frequently happened upon the Death of ſuch Relations; but the more remote Relations were left to purſue their Writ of Entry as at Common Law.

For the Form of the Writ, *vide* Reg. 197.

The firſt Proceſs in this Action is an original Writ iſſuing out of Chancery, directed to the Sheriff, commanding him to return a Jury, (who are called the Recognitors of the Aſſiſe).

Plow. 73, 415. F.N.B. 178. Booth 210, 267. The Demandant is to find Surety to proſecute, and this he may do before the Sheriff, or in Court, if the Sheriff returns that he hath not found Pledges. Booth 267.

F.N.B. 117. Booth 265. (*b*) By *Magna Charta*, c. 12. Aſſiſes are appointed to be taken *in propria Comitatu*; thereupon an Adjournment *in Banco propter difficultatem &c.* is given: but it was held no Adjournment could be made by virtue of this Act, unleſs the Jurors gave a Verdict, whereupon by Weſtm. 2. c. 3. an Adjournment is given in Caſe of a foreign Voucher in an Aſſiſe of *Mordanceſter*, within the Equity of which are all foreign Pleas, Demurrers, and other Pleas and Proceedings, either before or after Verdict in an Aſſiſe. 2 Inſt. 26, 423. *Vide* Rol. Abr. 131.

Aſſiſes are to be taken in the *King's Bench* or *Common Pleas* for the County in which they ſit, and for all others are to be arraigned in their (*b*) proper Counties, but are to be adjourned for Difficulty into the *Common Pleas*, as the Court which has Juriſdiction in all Civil Actions.

*Page 160 Style Reg. 88.

An Aſſiſe is (*c*) *Feſtinum remedium* and to be (*d*) arraigned on the Day the Writ is returnable, on which Day the Demandant is to (*e*) count * and the (*f*) Tenant is to appear and plead (*g*) inſtantly, unleſs the Court thinks proper to allow him an Imparlance, which it is ſaid cannot be without ſhewing good Cauſe.

(*c*) It is called *Feſtinum remedium*. 1. Becauſe the Tenant ſhall not be eſſoined. 2. Shall not caſt a Protection. 3. Shall not pray in Aid of the King. 4. Shall not vouch any Stranger, except he be preſent, and will enter preſently into Warranty; ſo of Receit. 5. The Parol ſhall not demur for the Nonage of the Plaintiff or Defendant. 8 Co. 50. Booth 262. For the Manner of arraigning an Aſſiſe, *vide* 3 Mod. 273. Keb. 3. Comb. 173. (*d*) But where neither the Recognitors nor Plaintiff appeared on the firſt Day, the Court adjourned the Aſſiſe to the next. Salk. 82. pl. 1. (*e*) Otherwiſe he will be nonſuit. Salk. 82. pl. 1. (*f*) If there be ſeveral Defendants, and any one of them do not appear the firſt Day, the Aſſiſe ſhall be taken by Default againſt them. Salk. 83. (*g*) That the Defendant may pray *Oyer* of the Writ and Count, *vide* 2 Bull. 160. and ſhall have an Imparlance to a ſhort Day. Style's Reg. 88. But it muſt be on ſhewing good Cauſe. Salk. 83. pl. 2.

Booth 214. (*h*) And ſuch Plea is not peremptory

When the Plaintiff counts, the Defendant may plead in (*h*) Abatement, and (*i*) over in Bar, or may take the General Iſſue *Nul Tort nul diſſeiſin*.

tho' found againſt him, *vide* Finch of Law 385, Dyer 310. Jones 413. Cro. Car. 520. (*i*) Muſt plead over in Bar at the ſame Time that he pleads in Abatement. Salk. 83. pl. 2.

Booth 313, 314.

If the Tenant pleads a Plea, which ſhews that the Aſſiſe ſhould not be taken, and ſuch Plea is triable by a Jury, the Recognitors of the Aſſiſe may

may try it, and then the Aſſiſe is ſaid *tranſire in Jurata'* and the Aſſiſe and Record adjourned into the *Common Pleas*.

If a flat Bar be pleaded to the Aſſiſe, and Iſſue is joined thereupon, the Jury never inquire of the *Seiſin* or *Diſſeiſin*, but of the Matter pleaded in Bar, and of Damages if the Plea be found againſt the Defendant. Booth 214.

But if the Defendant pleads a colourable Plea, then they are to inquire of the *Seiſin* and *Diſſeiſin*, which is called the taking the Aſſiſe at Large. *Vide* Booth 214, 215. And for colourable Pleas, *vide* Head of *Pleas and Pleadings*; and where the Aſſiſe may or may not be taken at Large, 10 Co. 90. Finch of Law 416. Rol. Abr. 271 to 275.

Alſo if an Infant pleads a flat Bar, and the Bar is found againſt him, yet the Aſſiſe ſhall be taken at Large, becauſe the Law not allowing the Parol to demur in this Action, which was *feſtinum remedium*, the *Seiſin* and *Diſſeiſin* was inquired of, that the Infant's whole Title might appear before the Court. Rol. Abr. 275.

By *Weſtm.* 2. *cap.* 25. a Certificate of Aſſiſe is given, which is a Writ for the Party grieved, by a Verdict or Judgment given againſt him in an Aſſiſe, when he had ſomething to plead, as a Record or Releaſe, which could not have been pleaded by his Baily; or when the Aſſiſe was taken againſt himſelf by Default, to have the Deed tried, and the Record brought in before the Juſtices, and the former Jury ſummoned to appear before them at a certain Day and Place, for a further Examination and Trial of the Matter. *Vide* Booth 215, 287. 4 Co. 4. b. 2 Inſt. 26.

(B) In what Caſes an Aſſiſe lies.

AN Aſſiſe lies for any Thing a *Præcipe quod reddat* may be brought for at Common Law, therefore it lies for an (*a*) Office. 2 Inſt. 412. 8 Co. 47. b. (*a*) An Aſſiſe lies for the Office of Regiſter of the Admiralty; for though their Proceedings are according to the Civil Law, yet the Right of their Offices is determinable at the Common Law. 8 Co. 47. 2 Inſt. 412. S. P. Of the Maſterſhip of an Hoſpital being a lay Fee. 11 Co. 99. b. Of the Office of Filazer. Dyer 114. b. And if a Man be diſſeiſed of Parcel of the Profits of an Office, he may have an Aſſiſe of that Parcel only. 8 Co. 49. b. 2 Inſt. 412. S. P. But for an Office of Charge and no Profit, an Aſſiſe does not lie. 8 Co. 47. b. 49. b. 2 Inſt. 412. S. P. (See however *poſt* D. 162.) An Aſſiſe lies for an Office for Life as well as in Fee. Co. Lit. 47. a.

* It lies for one ſeiſed of Lands, Tenements, (*b*) Rents in Fee-ſimple, Tail, or for Life, and for Tenant by (*c*) *Elegit*, Statute-Merchant, Staple, or Tenant by Recognizance in Nature of a Statute-Staple. * Page 161 (*b*) Does not lie of an Annuity. 1 H. 3. 2. Booth 263. 8 Co. 50. (*c*) By the Statute of 13 E. 1. c. 18. which ſee explained. 2 Inſt. 327, 396.

It lies of Tithes, Penſions, and other Eccleſiaſtical Duties in Temporal Hands; but of a Rent iſſuing out of Tithes barely, no Aſſiſe lies. *Vide* Co. Lit. 159. 32 H. 8. c. 7. Vaugh. 204. *Vide* Danv. 578, 579.

There were at firſt but two Forms of Writs of Aſſiſe of *Novel Diſſeiſin*, either an Aſſiſe (*d*) *de Libero Tenemento*, or (*e*) *de communia Paſturæ*. 2 Inſt. 411, (*d*) So at this Day for a *Proſit apprender* the Writ muſt be general *de libero Tenemento*, and the Plaint ſpecial. 8 Co. 47. Co. Lit. 159. Becauſe no Special Writ is given by the Statute. Dyer 83. (*e*) In antient Time they held themſelves ſtrictly to the Forms in the Regiſter: and therefore becauſe there was no Writ of Common of Turbary, &c. it was held no Aſſiſe lay thereof. 8 Co. 48. a. b.

The

2 Inſt. 411. The Aſſiſe *de Libero Tenemento* did lie of Houſes, Land, Rent, or other Things which lay in *Render*, but for Profits *apprender*, which conſiſted *in Capiendo, Colligendo, Habendo, Recipiendo & Exercendo*, (*a*) no Aſſiſe lay, but a *Quod permittat*, in which there was great Delay, and they who had but an Eſtate for Life could not maintain that Writ.

(*a*) But now by the Statute of Weſtm. 2. c. 25. a ſpeedy Remedy is given in theſe Caſes *de Proficuis, &c. in certo loco Capiend' &c.* An Aſſiſe does not lie of a Way over certain Land, but a *Quod permittat*, for it is but an Eaſement; but otherwiſe if it were appurtenant to Land. 8 Co. 46. 34 Aſſ. 13. For an Aſſiſe a *ſovent Diſtreſs*, *vide* Keilw. 20. 2 Inſt. 413, 414. F. N. B. 178.

(C) What Seiſin is ſufficient to maintain an Aſſiſe.

Vide 2 Rol. Abr. 463. AS the Writ of Aſſiſe reſtores the Party to the actual Seiſin of his Freehold, for ſo are the Words of the Writ, *facias Tenementum illud ſeiſiri, &c.* conſequently the Party that brings this Writ muſt found it upon an actual Seiſin, which he has been diveſted of, for otherwiſe this Remedy is not commenſurate to his Caſe.

Lit. Sect. 565. Co. Lit. 315. 4 Co. 9. 10 Co. 127. Therefore if there be Lord and Tenant by Rent-ſervice, and the Lord grants the Services to another, and the Tenant attorns by a Penny, this being given by Way of Attornment, is not ſufficient Seiſin to ground an Aſſiſe on; *ſecus* if the Penny had been given by Way of Seiſin of the Rent.

Vide Rol. Abr. 270, 271. Kelw. 110. If the Leſſor dies, and after the Leſſee for (*b*) Years is ouſted, the Heir of the Leſſor ſhall have an Aſſiſe of *Novel Diſſeiſin*, and not of *Mortdanceſtor*, for the Leſſee's continuing in Poſſeſſion after the Death of the Leſſor, was in Right of the Heir.

(*b*) If Tenant at Will be ouſted, the Leſſor may have an Aſſiſe. 21 E. 3. 34.

Kelw. 109. If a Man leaſes for Years, the Remainder over in Fee, and after the Tenant for Years is ouſted of his Term, he in the Remainder may have an Aſſiſe, becauſe the Freehold was in him at the Time of the Diſſeiſin.

Rol. Abr. 270. The taking of 3*d.* of *A.* for a *Capias* againſt *B.* is a ſufficient Seiſin of the Office of Filazer *de Banco*.

*Page 162 * If one be committed by the Houſe of Commons to *A.* who before and long after was in Poſſeſſion of the Office of Serjeant at Arms to the Houſe, and the Priſoner compounds with *B.* for the Fees, and gives him twenty Shillings, this is a good Seiſin of the Office by *B.* for he cannot be diſſeiſed thereof but at his Election; adjudged, and held likewiſe, that proving that *B.* being in the Lobby of the Houſe of Commons, took hold of the Door of the Houſe, and laid his Hands upon the Mace, then being in the Hands of *A.* to take it, but hindered by *A.* was good Evidence both of a Seiſin and Diſſeiſin.

2 Lev. 108. Cragg and Norfolk.

Lev. 108. The Serjeant of the Mace to the Houſe of Commons in an Action upon the Caſe for a Diſturbance, recovered Damages; and whether this was a ſufficient Seiſin, the Damages being recovered in (*c*) Satisfaction of the Fees, and he then being out of Poſſeſſion of his Office, was doubted;

(*c*) If a Tenant refuſes to do Suit of Court, and the Lord recovers Damages againſt him, this is a ſufficient Seiſin of the Suit, becauſe the Damages are given as an Equivalent, and in Satisfaction for the Suit. 4 Co. 9. b. So if a Return irrepleviſable be awarded, that is a good Seiſin of the Rent for which the Diſtreſs was taken; becauſe ſuch Return is an abſolute Condemnation of the Pledges; and being given as an Equivalent for the Rent, ſhall be looked upon as the Rent itſelf. 4 Co. 9. b. 2 Rol. Abr. 464.

ſome

ſome of the Judges inclining one Way, and ſome the other; and it was intended to have been found Specially; but the Plaintiff being unwilling to ſtand to it, was nonſuit.

(D) How the Demandant muſt ſet forth his Title.

IT is a common Learning, that in an Aſſiſe the (*b*) Plaint (*c*) need not be ſo certain as in other Writs, becauſe the Judgment is to (*d*) recover *per viſum recognitorum*; and if the Plaint be but ſo (*e*) certain that the Recognitors may put the Demandant in Poſſeſſion, it is ſufficient. Dyer 84. (*b*) The Plaint in an Aſſiſe is as a Count in other real Actions, and muſt ſet forth Seiſin and Diſſeiſin within 30 Years, purſuant to the Statute 32 H. 8. c. 2. Booth 212. (*c*) Stile 30. Like Point *per Rol.* Ch. Juſt. (*d*) So though by Default, and the Damages releaſed; for by Intendment they had the View before the Aſſiſes. 2 Bulſt. 159. Godb. 247. Cro. Jac. 334. (*e*) But a Plaint *de uno Tenemento* is not good. Stile 77. (It is uncertain, being a Genus.) But in an Aſſiſe the Plaint may be *de annuo redditu unius robæ vel* 20s. Dyer 84.

In an Aſſiſe of Rent in *D.* the Tenant cannot plead that in the ſaid County there are (*f*) two *D.*'s, without any Addition to diſtinguiſh them, becauſe the Plaintiff ſhall recover *per viſum Juratorum*. Jenk. 33. By all the Judges of England.

(*f*) So if two *D.*'s, and none without Addition, *per* Dyer 84. *b.*

In an Aſſiſe for an Office newly erected and conſtituted, the Demandant in his Plea muſt ſhew what Fee or Profit is granted for the Exerciſe thereof, for this Office cannot have a Fee or Profit appurtenant to it, as an ancient Office may; and for an Office without Fee or Profit no Aſſiſe lies. 8 Co. 49. Webb's Caſe.

But in an Aſſiſe for an antient Office, the Demandant in his Plaint need not ſhew what Fee or Profit is belonging to it; for it ſhall be intended there is ſome Fee or Profit. 8 Co. 49.

In an Aſſiſe for a Rent-charge or Seck, the Demandant (*g*) muſt make a Title in his Plaint, otherwiſe in an Aſſiſe of Land, for there Poſſeſſion without any other Title is (*h*) ſufficient. Jenk. 42. (*g*) Dyer 85. b. S. P. 6 Co. 56. S. P.

(*h*) Where in a Writ of Entry in Nature of an Aſſiſe, the Demandant counted of a Gift in Tail to himſelf, and of his Seiſin and Diſſeiſin; but was compelled to declare upon a Seiſin and Diſſeiſin only, becauſe that was the ancient Form. *Vide* 2 Ander. 100.

* In an Aſſiſe for a Portion of Tithes, the Demandant in his Plaint muſt make a Title, for the Seiſin only is not ſufficient, no more than in the Caſe of a Rent, or other Profit in the Soil or Fee of another, which commences againſt common Right; for in all theſe Caſes of Neceſſity the Commencement thereof muſt be alledged by him who will make Title thereto, whether he be Privy or a Stranger; for it is againſt Reaſon to charge the Inheritance or Freehold of another, without ſhewing ſome ſubſtantial Foundation thereof. *Page 163 Dyer 58. adjudged.

In an Aſſiſe for an Office, the Demandant in his Plaint muſt ſet forth a Title. 3 Mod. 373. Savier and Lenthal; by which Book it appears, that the Demandant not being ready to ſet forth a Title, the Aſſiſe was adjourned till the next Day, when he appeared and ſet forth a Title, and Proceſs was prayed againſt the Defendants; but by Salk. 82. S. C. the Demandant was nonſuited the ſecond Day for not counting; and the Court told him he might bring a new Aſſiſe. Comb. 173. S. C. and the Plaintiff nonſuited. *Vide* Dyer 114. pl. 63. 149. pl. 81. 152. pl. 9. 8 Co. 45. b. See 10 Mod. 125.

ASSUMPSIT.

4 Co. 92. Moor 667.

AN *Assumpsit* is an Action the Law gives a Party injured, by the Breach or Non-performance of a Contract legally entered into; it is founded on a Contract either expreſs, or implied by Law, and gives the Party Damages in Proportion to the Loſs he has ſuſtained by the Violation of the Contract.

But here it muſt be obſerved, that the Law diſtinguiſhes between a General *Indebitatus Aſſumpſit* and a Special *Aſſumpſit*; for though they come unde the Denomination of Actions on the Caſe, and the Party is to be recompenſed in Damages alike in both, yet the firſt ſeems to be of a ſuperior Nature, and will lie in no Caſe but where (*a*) Debt will lie; but for a particular Undertaking, or collateral Promiſe to diſcharge the Debt or Duty of another, a Special *Aſſumpſit* muſt be brought.

(*a*) And therefore it will not lie upon a Wager, nor againſt the Acceptor of a Bill of Exchange, for his Acceptance is but a collateral Engagement; but it lies againſt the Drawer himſelf; for he was really a Debtor by the Receipt of the Money. Salk. 23. pl. 3. 6 Mod. 128. 2 Ld. Raym. 1034. 3 Salk. 14, 175. Holt 329. 12 Mod. 81. 5 Mod. 14. 2 Show. 82. Carth. 336. It will not lie againſt a Father, at whoſe Requeſt the Plaintiff lent Money to the Son. Carth. 446. Salk 23. pl. 5. S. C. but if it had been an *Indebitatus* for ſo much Money paid by the Plaintiff at the Requeſt of the Defendant, unto his Son, it might have been good; for then it would have been the Father's Debt; *Per Holt* Ch. Juſt. Carth. 446. If two come to a Shop, and one buys, and the other, to gain him Credit, promiſes the Seller, If he does not pay you, I will, this is a collateral Undertaking, but if he ſays, Let him have the Goods, I will be your Pay-maſter; or, I will ſee you paid, this is an Undertaking for himſelf, and he ſhall be intended to be the very Buyer. Salk. 72. pl. 14. 2 Ld. Raymond 1085. Barnard. K. B. 13. Fitzgib. 302. pl. 7. *Vide* Title *Agreements*, where ſeveral Contracts and Promiſes are made void by the Statute of Frauds and Perjuries. 29 Car. 2. cap. 3. *

* And ſee in the Explanation of this Stat. 2 Ld. Raym. 1085. See alſo Com. Dig. 1 V. 157, 8. and 6 V. 13. F. 3.

Under this Head we will conſider,

(A) In what Caſes an Aſſumpſit is the proper Action. 164.

(B) What Words create ſufficient Certainty in a Promiſe. 168.

* Page 164 * (C) What is a ſufficient Conſideration to create an Aſſumpſit. 170.

(D) Where the Conſideration ſhall be ſaid to be executed, or continuing. 173.

(E) Where the Promiſe ſhall be void, the Conſideration being againſt Law. 174.

(F) Where the Conſideration and Promiſe ſhall be ſaid to be ſufficiently ſet forth and averred. 177.

(G) What may be pleaded as a good Diſcharge and Performance of the Promiſe. 179.

(A) In

(A) In what Cases an Assumpsit is the proper Action.

IF *A.* and *B.* having Dealings with each other, make up their Accounts, and *B.* is found in Arrear, and promises to pay the Ballance, an *Assumpsit* lies against him, and *A.* need not bring a Writ of Account. Cro. Jac. 69. Yelv. 70. S. P. Rol. Abr. 7.

S. P. Rol. Rep. 396. Bulst. 208. Moor 854.

So if *A.* gives (*a*) Money, or delivers Goods to *B.* to merchandize therewith, and *B.* promises to render an Account, *Assumpsit* lies on this express Promise, as well as Account. Salk. 9. pl. 1.

(*a*) Where it was objected, that a Sum of Money given to merchandize with, could not be demanded of the Party as a Duty till he had neglected or refused to apply it according to the Trust, held, that it was aided after Verdict. *Salk.* 9. pl. 2. If a Man receives a Sum of Money to lay out to a particular Use, and lays out Part of it accordingly, an Action of Account only lies; but if no Part of it is laid out, an *Assumpsit* lies. 2 Show. 301. pl. 304. Ruled on Evidence by Justice *Jones*, in the Absence of the Chief Justice *. *Vide* Head of *Account*.

* *Sed Qu.* Why not *Assumpsit*? and *vide post* 166.

So if a Tenant, being in Arrear for Rent, settles an Account of the Arrears with his Landlord, and promises to pay him the Sum in which he is found in Arrear, an *Assumpsit* lies on this Promise. Rol. Abr. 9. Bro. Account 81. Raym. 211.

2 Keb. 813. *Vide* Style 131, 283. Cro. Jac. 602. A Diversity where the Account was for Rent alone, and where for that *inter alia*, and *vide* Allen 73. Style 473. 2 Lev. 110. Vent. 268. Where it is said, that the Account alters the Nature of the Debt *.

* *Qu.* If in all Cases where an Account is settled and the Balance struck, supposing the Demand does not arise by Deed, will not the Law imply a Promise, whereon an Action of *Assumpsit* may be maintained within an express Promise? And will not *Assumpsit* lie, in every Case, on an Account stated, where there is an express Promise to pay, if the Plaintiff prefers that Mode of Action?

But if the Obligor in a Bond, without any new Consideration, as Forbearance, &c. promises to pay the Money, an *Assumpsit* will not lie, but the Obligee must still pursue his Remedy by Action of Debt ‡. Rol. Abr. 8. Hutt. 34. Cro. Eliz. 240. seems *contra*.

So if a Man leases for Years, reserving Rent, an *Assumpsit* will not lie, because it favours of the Realty. Rol. Abr. 7. So though the Lease be determined. Rol. Abr. 7. *Qu.* If there be an express Promise to pay the Rent? And *vide* Cro. Eliz. 859. Style 463. Sid. 279. 2 Keb. 8. Cro. Car. 343. Lev. 179. and 3 Lev. 150. where it is resolved, that on an express Promise *Assumpsit* will lie, but not on a Promise in Law. *Vide* Rol. Abr. 8. where it is held clearly, that an *Assumpsit* will lie on a Promise to pay a Sum in Gross.

‡ Is not Forbearance a good Consideration, whereon to maintain *Assumpsit*? Though Debt on the Bond is preferable.

If *A.* is possessed of a Term for Years in certain Lands, under a certain Rent, the Inheritance whereof is in the Wife of *B.* and *C.* in Consideration that *B.* will procure *A.* to assign this Lease to him, assumes and promises that he will pay the Rent to *B.* during the Remainder of the said Term; if *B.* accordingly does procure *A.* to assign, and the Rent is Afterwards Arrear, *B.* upon this Promise may have an Action * against *C.* in his own Right, notwithstanding the Rent grew due in the Right of his Wife †. Leon. 48.

* Page 165

† It is an express Undertaking, and the procuring the Assignment, a new Consideration.

If

Cro. Jac. 598. If in an Action on the Caſe the Plaintiff declares *quod locaſſet* to the Defendant a certain Warehouſe, the Defendant promiſed to pay 8*s.* for every Week he occupied the ſame, and avers that he occupied the ſame for 27 Weeks, and had not paid, *&c.* the Action lies, for this is not a Rent, but a mere Promiſe in Conſideration of the Occupation †.

†Where the Demiſe is not by Deed, the Rent may be recovered in an Action on the Caſe. 11 Geo. 2. c. 19. ſ. 14.

3 Lev. 261. Shuttleworth and Garret. 3 Mod. 239. Ld. Raym. 502. 5 Mod. 439. If a Lord of a Manor aſſeſſes a Fine upon a Copyholder for his Admittance, and dies, his Executor upon the *Aſſumpſit* in Law may bring an Action for it, becauſe it depends not upon the Inheritance, but is *quaſi* a Fruit fallen; adjudged by three Judges againſt *Holt*, Ch. Juſt. who ſaid, that it being a Duty ariſing out of an Inheritance, Cuſtom and Tenure, it was not fit to be thruſt into a Declaration in an *Aſſumpſit* ‡.

440. 444. Comb. 151. Show. 35. 3 Mod. 239. 3 Lev. 261. Carth. 90. S. C. ‡ *Qu.* If the Opinion of *Holt* Ch. J. was not right?

2 Lev. 174. Mayor of London and Gory. Carth. 92. S.C. cited as good Law, An *Indebitatus Aſſumpſit* lies for Money by Cuſtom due for Scavage; adjudged upon a ſpecial Verdict, by which it was found, that the Sum demanded was due by Cuſtom, but that there was no expreſs Promiſe to pay it.

though the Duty might be ſaid to be the Inheritance of the Lord Mayor: But *per Holt*, it ariſes out of Things in the Perſonalty. *Vent.* 398. S. C. adjudged: though objected, the Cuſtoms of the City are confirmed by Parliament, and ſo this is a Duty by Record. An Aſſignee of Commiſſioners of Bankrupts may bring an *Aſſumpſit*, and yet the Debt is aſſigned by virtue of an Act of Parliament. Vent. 298. *per Cur'*. 3 Keb. 677.*

* The Aſſignee ſtands in the Place of the Bankrupt.

2 Leon. 179. 2 Vent. 175. S. C. cited. Hard. 485, 486. And *per* Hale, if Debt lay an *Indebitatus* would lie. If a Man by Grant of the King hath Fines *pro licentia concordandi*, and one will not pay a Fine, he may have an *Indebitatus Aſſumpſit* for it.

Neither Debt nor a general *Indebitatus Aſſumpſit* will lie againſt the Acceptor of a Bill of Exchange, for his engaging is but a collateral Promiſe, on which a ſpecial Action on the Caſe lies, founded on the Cuſtom of Merchants, but Debt on a general *Indebitatus* may be brought againſt the Drawer, as for Money received for the Uſe of the Party.

Salk. 23. pl. 713, 758, 822. 3 S. P. Mod. 285. Ld. Raym. 175. 2 Ld. Raym. 753, 759. Lev. 298. 2 Keb. 695. S. C. Salk. 125. S. P. agreed. 2 Lutw. 1594. S. P. agreed.

Vent. 153. Alſo if *A.* delivers Money to *B.* to pay over to *C.* and gives *C.* a Bill of Exchange drawn upon *B.* and *B.* accepts it, *C.* may have an *Indebitatus Aſſumpſit* againſt *B.* (*a*) as having received Money to his Uſe, but muſt not declare only on the Bill of Exchange accepted.

(*a*) So if Goods are received.

Rol. Abr. 32. *Vide* Title *Merchant and Merchandize.*

3 Lev. 118. Eggleton and Lewin. (*b*) Where an *Indebitatus* was brought for 20*l.* won at a Game called Hazard, 2 Vent. 175. The Plaintiff declared upon an *Indebitatus Aſſumpſit* for 20*l. quas ei Solviſſe debuiſſet pro denar' per ipſum ad* (*b*) *jocum vocat' Chartas Pictas de Defendente per Querent' lucrat' & acquiſit'*; and whether ſuch a general *Indebitatus* lay for Money won at Play, *dubitatur*, upon a Writ of Error *in Cam. Scacc.* upon a Judgment by Default; and tho' a Caſe was cited wherein in *B. R.* 32 *Car.* 2. it had been adjudged that ſuch Action lay, and the greater Part of the Juſtices now inclined to be of that Opinion; yet ſome of them ſaid they would give no more Encouragement to ſuch Actions than needs muſt.

It was adjudged it lay, and that it might as well as if *pro opere* and *labore*. *Vide* Salk. 23. that a general *Indebitatus* will not lie, though a ſpecial Action on the Caſe will: and Title *Gaming* †.

† *Qu.* If any Kind of Action will be for Money won at any Game prohibited by Law, eſpecially ſince the Statutes of 9 Ann. c. 14. and 18 Geo. 2. c. 34. which *vide*; or for Money won at any Game in thoſe Statutes?

A

An *Indebitatus Aſſumpſit* lies for 20*l.* forfeited by the Ordinances and Conſtitutions of a Company, for not ſerving in the Office of Steward of the Company, according to a By-Law by them made. 2 Lev. 252. Barber-ſurgeons of London and Pelſon, adjudged upon Demurrer.

* If the King grants the Office of Comptroller of the Cuſtoms to *A.* and *B. durante beneplacito*, and *A.* dies, and afterwards the King grants the ſaid Office to *C.* and yet *B.* under Pretence of Survivorſhip exerciſes the ſaid Office, and receives the Profit thereof, *C.* may have an *Indebitatus Aſſumpſit* for ſo much Money had and received to his Uſe. * Page 166 2 Mod. 260. adjudged upon a ſpecial Verdict between Arris and Stukely. 2 Jones 126, 127. 2 Lev. 245. S. P. between Howard and Wood, where the Defendant, under Pretence of Title, received the Fees belonging to the Plaintiff, as Steward of a Court Baron.

So if one receives my Rent under Pretence of Title, I may have an *Indebitatus Aſſumpſit* againſt him. 2 Mod. 263. and there ſaid *per Cur'*, That wherever an Account lies, an *Indebitatus* will lie.

So where *A.* took out Adminiſtration to a Perſon ſuppoſed to have died inteſtate, and appointed *J. S.* his Attorney, who received Money, *&c.* and paid it to the Adminiſtrator; afterwards a Will appearing, the Letters of Adminiſtration were called in, and the Executor brought an *Indebitatus Aſſumpſit* againſt the Attorney; who objected, 1. That he acting only as Attorney for him, who in Fact was Adminiſtrator, the Receipt of the Money was not his, but the Adminiſtrator's: And 2dly, That the Action ought to have been a ſpecial *Aſſumpſit*, the Money being received by ſpecial Authority, and that expreſsly to the Uſe of another. But the Court held, that the Authority being void, it was a Receipt of ſo much Money for the Uſe of the Plaintiff on an implied Contract, for which an *Indebitatus Aſſumpſit* well lies. Salk. 27. pl. 14. Jacob and Allen at Guildhall, *coram* Trevor Ch. Juſt.

If a Feme Sole marries a man, who in Truth is married to another Woman, and he makes a Leaſe of her Lands and receives the Rents, ſhe may bring an *Indebitatus Aſſumpſit* againſt him for ſo much Money received to her Uſe: Adjudged after Verdict, though objected, that he having no Right to receive, the Tenant remained ſtill liable, and he had his Remedy over againſt the Huſband; but the Court held, that he being viſibly a Huſband, the Tenant was diſcharged, at leaſt that the Recovery in this Action would diſcharge the Tenant, as it would be a Satisfaction to the true Leſſor. Salk. 28. pl. 18. adjudged Hil. 6. Ann. in B. R. Haſſer and Wallis.

If a Sheriff levies Money upon a *Fieri Facias*, the Plaintiff may (*a*) have an *Indebitatus Aſſumpſit* againſt him for ſo much Money received to his Uſe. Comb. 430. *per Holt*, Ch. Juſtice. (*a*) So if the Sheriff dies, an Action lies againſt his Executor. Salk. 12. pl. 2. Ld. Raym. 40. *Vide* Cro. Car. 297. 4 Mod. 403.

If *A.* takes an Apprentice, and receives 30*l.* with him, for which he is to teach him his Trade, and make him Free of the City of *London*, and being no Freeman himſelf, the Boy is bound likewiſe to a Freeman; admitting that by the Cuſtom of *London* the laſt Binding will not make him Free without actual Service, yet an *Indebitatus Aſſumpſit* will not lie, nor has the Party any Remedy, unleſs for the Cheat, or on a ſpecial Action on the Caſe for not making him a Freeman. Comb. 341. Dewbery and Chapman.

If three are bound in an uſurious Obligation, and one of them pays Part of the Money, and afterwards the Obligee brings Debt againſt one of the Obligors, who avoids the Bond for Uſury, yet the Obligor who paid Salk. 22. pl. 2. Ruled by Treby Ch. Juſtice, at

Guildhal', between Tomkins and Barnet. paid the Money cannot (*a*) maintain an *Indebitatus Assumpsit* for it, for he is *Particeps criminis*, and having parted with his Money freely, he comes within the Rule *volenti non fit Injuria*.

Skin. 411. pl. 7. S. C. 6 Mod. 161. S. P. Comb. 447. S. P. (*a*) So where one was employed as a Solicitor, and had Money given him to bribe the Custom-house Officers, which he laid out accordingly; and an *Assumpsit*, being brought against the Solicitor for this Money, it was held it lay not. Salk. 22. pl. 2. cited to have been adjudged. Skin. 412. S. P.

*Page 167 * But if *A.* pays Money to *B.* upon a Mistake, as thinking that there was so (*b*) much due on Account, *&c.* he may maintain an *Assumpsit* for it.

Salk. 22. pl. 2. (*b*) *Vide* Comb. 447. Where a Person pays Money for Fees which were not due, and where one sells Goods that were not his own *.

* An Action for Money had and received will lie.

Skin. 412. 6 Mod. 161. S. P. (*c*) And whether he parts with his Money by Mistake, or though Fraud in the Receiver, it is the same Thing. Skin. 412. Salk. 22. S. P. So if a Man pays Money upon a Policy of Assurance, (*c*) supposing a Loss when in Truth there was not any, he may bring an *Indebitatus Assumpsit* for so much Money received to his Use.

6 Mod. 161. *per* Holt, Ch. Just. who said, That many such Actions have been maintained for Earnests in Bargains, *&c.* So if *A.* gives Money to *B.* to pay *C.* upon *C.*'s delivering up Writings, *&c.* and *C.* will not do it, an *Indebitatus* will lie for *A.* against *B.* for so much Money received to his Use.

Carth. 208. Hil. 3 W. and M. Stokeld *v.* Collingson. Comb. 186. S. C. If one be named a Commissioner to examine Witnesses in a Cause depending in Chancery or Exchequer, who officiates accordingly, he may bring an *Assumpsit* for his Labour and Pains; for though he is to be considered as an Officer of the Court, yet he is not compellable to attend against his Will, nor does the Trust reposed in him make his taking a Reward Bribery, for the Party is to take Care to name such as will serve, and it is but reasonable it should be at the Charge of him for whom he officiates.

Carth. 95. Duppa and Gerrard. Show. Rep. 78. S. C. Lies for Fees due to the Usher of the Black Rod. 2 Stra. 747. See 12 Mod. 607. The Gentlemen Ushers and Daily Waiters to the King brought an *Assumpsit* against the Defendant, in which they declared, That all Gentlemen Ushers, Daily Waiters, *&c.* Time out of Mind, had used to have a Fee of 5*l.* of every Person who voluntarily accepted the Honor of Knighthood, and that the Defendant (on such a Day) had voluntarily accepted Knighthood, and thereupon became indebted to them in 5*l.* and in Consideration thereof had promised to pay the Money, which he had not performed; and upon a Demurrer to this Declaration, it was adjudged this Action would lie for this Duty.

Vide Title Trover and Conversion. Where a Man comes to buy Goods, and they agree upon a Price and a Day for the Payment, and the Buyer takes them away, an *Assumpsit* for the Money is the proper Action, for *Trover* will not lie for the Goods, because the Property was changed by a lawful Bargain, and by that Bargain the Buyer was to convert the Goods before the Money was due; but if a Man comes to buy Goods, and they agree upon a Price for present Money, and the Buyer takes the Goods away without Payment, *Trover* lies, because the Property is not altered, and therefore the Taking away the Goods without Payment of the Money, is an injurious Taking, for which the Action lies; but if a Man sells Goods on Payment of Money on a Day to come, and the Money be paid, and the Goods not delivered, *Trover* lies, because the Property is in the Buyer.

Carter 233. Dickenson and Hole- If a Man and a Woman being unmarried, mutually promises to marry each other, and afterwards the Man marries another Woman, by which he

* ren-

*renders himſelf incapable of performing his Contract, an *Aſſumpſit* lies, in which the Woman ſhall recover Damages; for though Matrimonial Cauſes are regularly cognizable in the Spiritual Courts, yet the Contract in the preſent Caſe being Executory, and revoked by the Huſband by the ſubſequent Marriage, could not be inforced by Eccleſiaſtical Cenſures, as a Contract *in Præſenti* may; hence therefore, there being no adequate Remedy in the Spiritual Courts, and Marriage being an Advantage, and the Loſs of it a Temporal Loſs, it is fit that there ſhould be a Remedy in the Temporal Courts, otherwiſe there would be a Failure of Juſtice. *Page 168

croft. Rol. Abr. 22. S. P. Leon. 147. S. P. Stile 295. S. P. Keb. 866.

S. P. Sid. 180. S. P. adjudged. 6 Mod. 172. S. P. *Vide* Carth. 467. Salk. 24. pl. 5. Ld. Raym. 386. 12 Mod. 214. 5 Mod. 511. Where on ſuch a Contract the Man brought an Action againſt the Woman; and it was objected that it would not lie, becauſe Marriage was no Advancement to him as it was to a Woman; but this Diſtinction was exploded. Such Promiſes are good, though the Time of Marriage be not agreed on; but in ſuch Caſe it is neceſſary, to intitle the Party to his Action, to alledge that he offered to marry her, and that ſhe refuſed. Carth. 467.* This Action muſt be founded on reciprocal Promiſes; and therefore if the Promiſe be on one Side only, it does not bind, being only *nudum Pactum*. Salk. 24. But if a Man of full Age, and a Female of fifteen, promiſe to intermarry, and afterwards he marries another, an Action lies againſt him; for though ſuch Promiſe may be ſaid to be voidable as to the Infant, yet it ſhall be good againſt the Perſon of full Age, who ſhall be preſumed to have acted with ſufficient Caution; otherwiſe this Privilege allowed Infants, of reſcinding and breaking through their Contracts, which was intended as an Advancement to them, might turn greatly to their Prejudice. Trin. 3 Geo. 2. adjudged between Holt and Ward. 2 Stra. 850, 937. Barnard K. B. 209. Fitzgib. 175, 275. *Vide* Head of *Infants*.

* This muſt mean, where the Defendant remains Sole, at the Time of commencing the Action.

(B) What Words create ſufficient Certainty in a Promiſe.

ALL Promiſes and Contracts are to receive a favourable Interpretation; and ſuch Conſtruction is to be made, where any Obſcurity appears, as will beſt anſwer the Intent of the Parties; otherwiſe a Perſon, by obſcure Wording of his Contract, might find Means to evade and elude the Force of it. Hence it is a general Rule, that all Promiſes ſhall be taken moſt ſtrong againſt the Promiſor, and are not to be rejected, if they can by any Means be reduced to a Certainty: Therefore,

If *A.* in Conſideration that *B.* will marry his Daughter, aſſumes and promiſes to give with her a Child's Part, and that at the Time of his Death he will give to her as much as to any of his Children, except his eldeſt Son; this is a good Promiſe, for though a (*a*) Child's Part in itſelf is altogether uncertain, yet being to give as much as to any of his Children, the Promiſe is certain enough, it being averred what the younger Son had.

Poph. 148. 2 Rol. Rep. 104. S. C.

(*a*) But if a Citizen of London promiſes a Child's Portion, this of itſelf is certain enough; for by the Cuſtom there it is known how much each Child ſhall have. 2 Rol. Rep. 104. *per* Montague, Ch. Juſt. *Vide* Rol. Abr. 14. S. P. Rol. Rep. 43, 193, 266. Cro. Jac. 404, 417. 3 Bulſt. 236. Several Caſes to this Purpoſe.

But if there be a Diſcourſe between the Father of *A.* and *B.* in Relation to a Marriage between the ſaid *A.* and the Daughter of *B.* and *B. tunc & ibidem* affirms and publiſhes to the Father of *A. quod daret ei qui maritaret* his ſaid Daughter with his Conſent 100*l.* and after *A.* marries the Daughter of *B.* with his Conſent; yet this Affirmance and Publication

Rol. Abr. 6.

of *B.* ſhall raiſe no Promiſe upon which an Action upon an *Aſſumpſit* may be brought, (*b*) becauſe theſe Words do not include any Promiſe.

(*b*) But by Noy 11. S. C. adjudged, becauſe the Words in the Declaration were *Aſſeruit* and *Publicavit* and it was not averred or ſhewn to whom; and *vide* Rol. Rep. 275. Cro. Jac. 386. 3 Bulſt. 94, 95. When a Promiſe *firmam facere, Angliæ*, to make good a Portion, amounts to a Promiſe to pay. *Vide* 2 Rol. Abr. 738, pl. 2.

Rol. Abr. 6. Cro. Jac. 306. S. C. (*c*) Where to warrant a

If a Bill of Exchange be drawn on a Merchant, and he ſets his Name to it, this, by the Cuſtom of Merchants, (*c*) amounts to a Promiſe to pay it.

Debt amounts to a Promiſe to pay it, *vide* 2 Rol. Abr. 718.

Rol. Abr. 14, 15. Barnard and Simon.

If a Man promiſes another, in Conſideration that he will aſſign to him a certain Term, to pay him 10*l.* this is a good *Aſſumpſit*, though the Time of Aſſignment and Payment be not appointed; for the 10*l.* ſhall be paid in a convenient Time after the Aſſignment, which alſo muſt be done in convenient Time, and he ſhall not have Time during his Life.

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*So if *A.* be indebted to *B.* for certain Things to him ſold, and *C.* comes to *B.* and promiſes him that if *A.* ſhall not pay him the Money, that then he himſelf will pay it, an Action upon the Caſe lies for *B.* againſt *C.* upon this Promiſe, if *A.* does not pay the Money in a convenient Time*.

Rol. Abr. 15. 27. S. C.

* *Qu.* If an Action will lie, the Conſideration being executed and the Promiſe ſeeming to be within the Statute of Frauds, 29 Car. 2. c. 3. *Vide* Com. Dig. 1 V. 157. F. 3. 159. F. 6. and ſee *poſt* 173. D.

Rol. Abr. 15

If *A.* is indebted to *B.* in 10*l.* and upon this *C.* promiſes that in Conſideration that he will forbear *A.* till ſuch a Day, if *A.* does not pay him the ſaid Day, he himſelf will pay him the ſaid Day; this is a good Promiſe, upon which *B.* may have an Action againſt *C.* for though *A.* had the whole Day to pay it, and ſo it was impoſſible for *C.* to pay it the ſame Day, if he did not pay it, yet the Subſtance of the Promiſe is to pay, and the Time limited being impoſſible, is void, and then it ought to be paid on Requeſt.

Cro. Eliz. 643.

If *A.* is indebted to *B.* in 10*l.* by Obligation, and *A.* dies, and makes *C.* his Executor, and *C.* in Conſideration *quod daret diem ſolutionis pro uno Anno*, promiſes Payment if *C.* does not pay it; an Action on this Promiſe will lie againſt him, (*d*) for though in proper Senſe a Day cannot be given upon the Bond, yet it ſhall be taken according to common Parlance, *viz.* deferring the Day of Payment.

(*d*) The Plaintiff declared upon a Promiſe to aſſign the Shop of the Defendant, and *transferre negotiationem, &c.* All. 67. Stile 111.

Cro. Car. 194. Pointer and Pointer adjudged.

If *A.* in Conſideration that *B.* will marry his Daughter, aſſumes and promiſes to give *B.* twenty *French* Pieces; this is a good Promiſe, for this, according to our uſual Speech, ſhall be intended *French* Crowns, which are the common Coin of *France*, and here known.

Sid. 270. Pleaſe and Palfrey. Keb. 776. S. C.

If the Plaintiff declares, That whereas there was a Communication between the Plaintiff and Defendant, concerning the Bark of certain Wood, and that thereupon it was agreed that the Defendant ſhould give to the Plaintiff two Shillings *per* Seam for all the Bark of ſuch Wood as the Plaintiff ſhould cut, and that thereupon the Defendant aſſumed and promiſed to have ready upon a certain Day Articles purpoting the Agreement, and an Obligation for the Performance thereof, *&c.* the Declaration is not good, becauſe not ſaid in what Sum the Obligation was to be; and a certain Sum cannot be intended, becauſe the Number of Seams are altogether uncertain; but being (*e*) after Verdict upon the General Iſſue, it was adjudged for the Plaintiff; but *per Cur'*, upon Demurrer, or the ſpecial Iſſue, it had been naught.

(*e*) Hob. 69, 70. Like Point adjudged. Brownl. 11. S. P. adjudged.

But

But if there be an (*b*) Agreement to enter into an Obligation for Performance of a Thing of certain Value, without mentioning in what Sum it shall be (*c*) according to the Value. Sid. 270. *per Cur.*

(*b*) So upon a Covenant to enter into a Bond that *B.* shall enjoy such Lands, it shall be intended in a Sum to the Value of the Land. Samon's Case, 5 Co. 78. a. Cro. Eliz. 432 (*c*) Of double the Value. Cro. Jac. 116. adjudged. Hetl. 89. like Point *dubitatur*.——When for Payment of Money. Lev. 88.

In an *Assumpsit*, the Plaintiff declared that the Defendant in Consideration, *&c.* six Months before the Return of King *Charles* the Second, assumed to pay 20*l.* to the Plaintiff, if *Charles Stewart foret Rex Angliæ infra* 12 *Menses tunc prox' sequent'*; and adjudged a good Promise, for the Words shall be taken according to the Subject Matter, *viz.* that the King that was then out of Possession, should be in Possession within six Months. Lev. 33. Keb. 56, S. C.

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* (C) What is a sufficient Consideration to create an Assumpsit. * Page 176

CONsideration is defined a Cause or Occasion meritorious, that requires a mutual Recompence in Fact or in Law. Hard. 72. Dyer 336. b.

Therefore if a Man promises so much Money at a Day to come to (*d*) build a House or a Church, without Consideration, this is a naked Promise, and will not oblige. Doctor and Stud. 211, 213, 215, Kelw. 50.

Rol. Abr. 9, 10. (*d*) But if a Carpenter promises to repair my House before a certain Day, and he does not do it, by which my House falls, I shall have an Action upon the Case. 19 H. 6. 49. Rol. 9. S. C.——So if a Carpenter undertakes to build a House for me, and does it ill, an Action on the Case lies against him. Rol. Abr. 9. Kelw. 78. S. P. So if a Person undertakes to remove a Quantity of Brandy from *Brook-Market* to *Water-Lane*, and by Reason of his Neglect, one of the Casks breaks, an *Assumpsit* lies against him, though it is not averred that he was a common Porter, or that he had any Reward. Salk. 26. pl. 12. 2 Ld. Raym. 909. Com. Rep. 133. 8 Salk. 11. *Coggs* and *Barnard*. *Vide* Title *Bailment*.

Also idle and insignificant Considerations are looked upon as none at all; for wherever a Person promises without a Benefit arising to the Promisor, or Loss to the Promisee, it is looked upon as a void Promise. 2 Bulst. 269.

If a Lessee for Years, in Consideration the Lessor will forbear to distrain Corn in the Shocks, assumes and promises to pay all such Rent as is Arrear, the Consideration is void, (*e*) because such Corn is not distrainable. Stile 305. said. Hard. 73. S. P. cited as to have been adjudged. (*e*) *Vide* Title *Distress*, that such Corn is now distrainable.*

* Therefore an Action would not lie on such a Promise.

If the Plaintiff declares, that in Consideration the Defendant was indebted to him in 20*l.* the Defendant did assume and promise to deliver several Cattle to *J. S.* to the Use of the Plaintiff, and that the Defendant had not delivered the Cattle accordingly, *&c.* the Consideration is void, because it does not appear that the Debt was to be discharged thereby; and if not, the Plaintiff notwithstanding might bring his Action for the Money, so that the Promise is but *nudum pactum**. Stile 330. adjudged between Goodwin and Butlin.

* See the Doctrine as to *nudum pactum*, fully entered into and well laid down and explained in the Case of *Pillans and Rose*, v. *Van Mierop and Hopkins*, 3 Burr. 1670, *&c.*

Leon. 297. Cro. El. 138. Like Point cited.

If *A.* in Consideration that *B.* will deliver to him a Recognisance to read over, assumes and promises within six Days to re-deliver the same to *B.* or to pay him 1000*l.* this is a good Promise, upon which *B.* may have an Action against *A.* for the Consideration is sufficient.

Cro. El. 67. 150. S. C. adjudged; but the Promise there was in Consideration, *&c.* to pay a Rent-charge.

If *A.* demises certain Lands to *B.* rendering Rent, and *B.* assigns to *D.* after which Rent becomes due, and *D.* in Consideration that *A.* will shew him a Deed, by which it may appear that such Rent is due, assumes and promises to *A.* forthwith to pay the same; if *A.* does shew *D.* the Indenture of Lease, by which it appears that such Rent is due, *A.* shall have an Action upon this Promise against *D.* for when any Thing, though never so small, is to be done by the Plaintiff, it will be a Consideration sufficient to ground an Action.

Cro. Car. 70. like Point adjudged. Cowp. 230, 290. 2 Term Rep 479.

Leon. 103. 4 Leon. 31. adjudged. (*a*) Note; Both Promises must be made at the same Instant, else they will be *nuda pacta*.

If *A.* is Lord of a Manor, and a Controversy arises between *A.* and *B.* concerning a certain Copyhold which *B.* claims to hold of the said Manor, whereupon they submit to the Judgment and Award of *J. S.* and in Consideration that *A.* (*a*) had promised to abide thereby, *B.* assumes and promises that if the said *J. S.* shall adjudge the Copy insufficient, that then he the said *B.* will forthwith deliver up to *A.* the Possession thereof; this is a good Consideration, the Promise being (*b*) reciprocal, and to avoid Variances and Suits.

Hob. 88. Cro. El. 137. 2 Jones 168. Cowp. 290. (*b*) 4 Leon. 3. the like Point. March 75. like Point. *per Cur'*. Cro. El. 543. like Point adjudged, 889. like Point *per Cur'*. Hob. 88. like Point adjudged. 2 Mod. 33. like Point adjudged. Comyns 89. pl. 59. 98. pl. 67. Ld. Raym. 235, 662. Salk. 171. pl. 3. Gilb. Eq. Rep. 252. Ld. Raym. 620, 664. 8 Mod. 42. 10 Mod. 153, 223. 12 Mod. 214, 421, 455, 460. *&c.* 503. Will. Rep. 288. 3 Will. Rep. 65. pl. 16. Vern. 83, 223. 2 Vern. 212, 478, 560, 721. Ch. Prec. 388. Stra. 648, 653. Salk. 140. pl. 6.

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Leon. 192. adjudged. Cro. El. 163. S. C. adjudged. Cowp. 600.

*If the Father of *A.* and *B.* lying sick, declares his Intention to devise a Rent of 4*l.* *per Ann.* to his younger Son during his Life, and thereupon *A.* the eldest Son, in Consideration that the Father will not charge his Lands therewith, assumes and promises to *B.* to pay the said Rent; whereupon the Father forbears to charge the Land, and dies, and the Land descends to *A.* discharged of the said Rent, this is a good Consideration.

Rol. Abr. 19. Moor 857. S. C. adjudged by three against one. Brownl. 18. S. C. adjudged. Hob. 10. S. C. adjudged by three against one. Hut. 39. S. C. cited.

If *B.* the Daughter of *A.* be Heir apparent to *C.* and *D.* promises to *A.* the Mother, in Consideration that she would (*c*) consent and agree that the said *B.* her Daughter should marry his Son, that he would give to the said *A.* 100*l.* upon which *A.* consents, and the Marriage takes Effect; this is a good Consideration, for Nature has given the Power of disposing to Parents, and in Nature their Children are bound to obey them.

(*c*) In Consideration the Plaintiff would give his good Will and Furtherance to a Marriage. Moor 595. pl. 808.——Where Marriage Brokage Bonds, and other Considerations, to procure Marriages are made void in Equity, *vide* Abr. Eq. 89, 90. and Tit. *Marriage*.——In Consideration the Plaintiff would procure the Consent of her Master for the Defendant to have a Shop in his House, *&c.* a good Consideration. Godb. 216.—In Consideration the Plaintiff would procure the Consent of the Lessor, that the Lessee might assign his Term, *&c.* Hut. 39. adjudged a good Consideration.—In Consideration that the Mother of *A.* would permit her Son to serve him for such a Time. Rol. Abr. 20. adjudged.

Rol. Abr. 21, 22, adjudged.

If *A.* being on a Treaty with *B.* for the Purchase of certain Lands from *B.* comes to *B.*'s Wife, and promises her in Coonsideration that she would not hinder the Bargain, that he would give her 10*l.* or a Riding-Suit; this is a good Consideration, and the Husband and Wife may have an *Assumpsit* on this Promise.

If

If *B.* in Consideration that *A.* at the special Instance and Request of *B.* would permit *B.* to have and hold a Messuage and Land, then in the Occupation of *B. una cum profituis et commoditatibus inde provenientibus* to his own Use, promises to pay him 13*s.* at *Michaelmas* after, for Rent for the Premisses, and also at the said Feast to deliver the Possession of the Premises to *A.* in as good Repair as it was at the Time of the Demise: this is a good Consideration to maintain an Action, though it does not appear that *A.* had (*a*) any Estate therein at the Time of the Promise, and though it appears that *B.* was then in Possession thereof. Rol. Abr. 23.

(*a*) Cro. El. 856. S. P. *cont.* but 2 Rol. Rep. 435. like Point adjudged. Vent. 211, 212. like Point adjudged. Hard. 366. S. P. *dubitatur.* 4 Leon. 2. like Point adjudged. *Vide* 2 Keb. 81, 82. Sid 323, like Point adjudged. 2 Keb. 182. adjorn. Lev. 204. adjudged, and *vide* 2 Lev. 33.—But upon Evidence it must be proved what Estate the Plaintiff had, so that it may appear that there was a Consideration. 2 Rol. Rep. 435. But after a Verdict for the Plaintiff, the Court will intend it was proved. Vent. 211. Lev. 179.

But if *A.* in Consideration that *B.* will make an Estate at Will to him, such as Counsel shall devise, promises, &c. this is no good Consideration, for that he may presently after the Estate made determine it. Rol. Abr. 23. Poph. 183. S. C. cited.

If *A.* having several young Children, lies sick, and *B.* in Consideration that *A.* after his Death will commit the Education of his Children, and the Disposition of his Goods, during their Minority, to him, assumes and promises to *A.* to procure certain customary Lands to be assured to one of the Children; whereupon *A.* appoints *B.* Overseer of his Will, and that his Goods should be under the Disposition of *B.* *A.* dies, and *B.* by Virtue thereof, takes Possession of the several Goods of *A.* If *B.* does not procure such Lands to be assured accordingly, yet shall the Executor of *A.* have no Action against *B.* for here is no Consideration, inasmuch as the Power which *B.* had given him, was only *pro educatione liberorum*, *and no (*b*) Profit to himself; and though such Overseers do too often make their Advantage, yet that is contrary to their Trust, and such a Fraud as the Law will not presume. 3 Leon 88. adjudged between Smith and Smith. *Vide* 3 Leon. 129. *cont.* *Page 172

(*b*) But if one Executor, in Consideration the other would relinquish the Executorship, assumes, &c. this is good. *Vide* Rol. Abr. 49. Bulst. 185.

If there be certain Controversies between *A.* and *B.* and they submit to the Award of *J. S.* who among other Things is about to award that *B.* shall deliver up to *A.* two several Obligations, wherein *A.* was bound to *B.* whereupon *B.* in Consideration that upon the Request of *A.* the Clause in Relation to the Delivery up of the Obligations shall be left out of the Award, assumes and promises to *A.* to deliver them up to *A. gratis*, &c. this is a good Consideration, the Clause being omitted *ad specialem instantiam ipsius A.* 3 Leon. 105. adjudged.

If *A.* pawns Goods to *B.* upon Condition of Redemption at a Day certain, and after the Day the Goods being not redeemed, *B.* says he will sell them, upon which *D.* says, if he will stay the Sale of them but for three Days, he will pay the Money and have the Goods; if *B.* does stay the Sale accordingly, *B.* may have an Action against *D.* upon this Agreement, for this was in Nature of (*c*) a Sale; and if *D.* had paid the Money, he might have brought *Detinue* for the Goods. Rol. Rep. 215. adjudged, Capper and Dickenson.

(*c*) So where *A.* in Consideration that he had paid and delivered to the Defendant twenty Pieces of hammer'd Money, being twenty old Shillings, at his Request, he the Defendant promised to pay him twenty Shillings new Money; and it was objected that the Property was not altered; *sed non allocat'*; for a Delivery, in Consideration of being paid the Value, is a Sale. Salk. 25. pl. 11. 2 Ld. Raym. 895.

If *A.* and *B.* are both Sollicitors for the Office of Under-Sheriff, and *A.* in Consideration that *B.* will desist, assumes and promises to *B.* that if he the Cro. Jac. 6 Parker and Brown adjudged

the ſaid *A.* obtains the ſaid Office, that he the ſaid *A.* will pay unto *B.* 20*l.* for a Horſe, &c. this is a good Conſideration.

Winch 89. *A.* has Lands in *D.* in which Pariſh *B.* is Rector, and *B.* in Conſideration that *A.* will plant his Lands with Hops, and ſo better the Tithes, aſſumes and promiſes to allow him 40*s.* for every Acre ſo planted; and whether this is a good Conſideration, becauſe the Tithes cannot be bettered by the Planting of the Hops, but by the Growing of them, *dubitatur**.

* It ſeems a ſtrange Reaſon, Muſt not the *Planting* imply the *Growing*?

Sid. 89. adjudged between Scot and Stevens, Lev. 71. S. C. Rol. Rep. 27. S. P. *per Croke.* If *A.* together with *B.* is bound to *C.* for the proper Debt of *B.* &c. and *A.* pays the Money, and *B.* dies and makes *D.* his Executor, and *D.* in Conſideration that *A.* will forbear to ſue him till ſuch a Time, aſſumes and promiſes to repay him; this (*c*) Conſideration is good, though *D.* was liable in Equity only †.

(*c*) So if the Conſideration be that the Plaintiff ſhall releaſe an equitable Intereſt only. *Wells* and *Wells.* Vent. 40. 1 Lev. 272. In Conſideration the Plaintiff would forbear to ſue for a Legacy. 2 Lev. 3. Vent. 120. † *Qu.* Was not *D.* liable in an Action of *Aſſumpſit*, for Money laid out and paid by *A.* for Teſtator in his Life-time?

Lev. 257. Bolton and Fenner adjudged. Sid. 392. S. C. adjudged. If the Plaintiff declares that he was poſſeſſed of ſeveral Seamens' Tickets for Wages due to them, and had ſolicited the Treaſurer of the Navy to pay them, who had ordered the Defendant his Clerk to pay them, and the Defendant, in Conſideration the Plaintiff would not give his ſaid Maſter any further Trouble about the Payment thereof, aſſumes to pay them; this is a good Conſideration, for though it does not appear the Plaintiff had any Intereſt in the Money, or Authority to receive it; and it was objected, though he might not Trouble the Maſter further, yet the Owners might; yet after Verdict for the Plaintiff, it was adjudged for him; for it cannot be intended but that the Plaintiff had an Intereſt in the Tickets, or Authority to receive the Money, elſe the Treaſurer would not have ordered the Payment thereof.

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Mod. 25. adjudged between Smith and Bowen. *If *A.* in Conſideration that *B.* an Infant, hath promiſed to permit *A.* to carry away ſo much of his Graſs, &c. aſſumes and promiſes to pay *B.* 6*l.* the Conſideration is good, and *B.* may maintain an Action againſt *A.* upon this Promiſe, notwithſtanding *B.* may avoid his Promiſe.

2 Stra. 959. S. C. cited and agreed. Vent. 51. S. C. adjudged. Yelv. 134. like Point *per Cur'*, Sid. 41 Keb. 1. S. P. *vide* Head of *Infants.*

Vent. 297. adjudged between Curtis and Collingwood. 2 Lev. 119. S. C. adjudged, the Conſideration being that the Biſhop would abſolve the Mother of the Defendant at the Requeſt of the Defendant, which the Biſhop would not have done, if the Plaintiffs had not accepted the Promiſe of Payment. If *A.* and *B.* are Churchwardens of *D.* and *C.* at the Proſecution of *A.* and *B.* is excommunicated for not paying a Tax for the Reparation of the Church of *D.* and *C.* in Conſideration that the Biſhop, at the Requeſt of *A.* and *B.* would abſolve him, aſſumes and promiſes to pay unto *A.* and *B.* ſo much, if *C.* is accordingly abſolved; *A.* and *B.* may have an Action upon this Promiſe againſt *C.* for it cannot be intended but the Abſolution was at the Inſtance of *A.* and *B.* and by Reaſon of the Promiſe to pay them the Money.

Rol. Abr. 29. *Vide* Danv. 58, and the Notes there. If *B.* is indebted to *A.* in 20*l.* and *C.* is indebted to *B.* in the like Sum, and *C.* promiſes *A.* in Conſideration that he is content to accept the ſaid Sum by the Hands of *C.* and to ſtay for this for four Days, that he will pay him the ſaid Sum; this is a good Conſideration for *A.* to maintain an Action upon the Caſe againſt *C.*

If

If *A.* is indebted 20*l.* to *B.* and dies, and his Executor, in Conſideration that *B.* will forbear him for a reaſonable Time, promiſes to pay him the Debt; this is a good Conſideration to have an Action, with an Averment that he forbore him for a certain Time. Rol. Abr. 26. But where a Promiſe by an Executor or Adminiſtrator, or an Heir, to pay on Forbearance, makes a good Conſideration, *vide* the ſeveral Titles, and Danv. 51, 52, &c.

(D) Where the Conſideration ſhall be ſaid to be executed, or continuing.

A Conſideration altogether executed and paſt is not good to maintain an *Aſſumpſit*; but if it were moved by a precedent Requeſt it is good, and doth amount to a Promiſe; for it is not reaſonable that one Man ſhould do another a Kindneſs, and then charge him with a Recompence; for this would be obliging him whether he would or no, and bringing him under an Obligation without his own Concurrence. Rol. Abr. 11, 12. Several Caſes to this Purpoſe.

Therefore if the Servant of *A.* be arreſted in *London* for a Treſpaſs, and *J. S.* who knows *A.* bails him, and after *A.* for his Friendſhip, promiſes to ſave him harmleſs, and *J. S.* comes to be charged; yet this is no Conſideration to ground an *Aſſumpſit* on, becauſe the Bailing, which was the Conſideration, was paſt and executed before. Dyer 272. Rol. Abr. 11. 2 Leon. 225. Owen 144. Yelv. 41. 2 Stra. 933. 2 Barnard. K. B. 55.

(*a*) But it had been otherwiſe if the Maſter had before requeſted him to become Bail for his Servant, and the Bailing had been after. Dyer 172. Rol. Abr. 11. (*a*) Hob. 106.

S. C. and S. P. cited and agreed, becauſe the Promiſe is not naked, but couples itſelf with the precedent Requeſt, and the Act of the Party procured by that Requeſt. 2 Leon. 225. S. C. cited and agreed. Cro. Car. 409. S. C. and S. P. cited and agreed *per* two Juſtices *arguendo*.

*So if a Man requeſts another to labour for his Pardon, &c. and after he has done his endeavour, if the other ſays, in Conſideration that he has laboured for his Pardon at his own Charge, he promiſes to pay him ſo much, &c. this is a good Conſideration. *Page 174. Rol. Abr. 11. Stile 465. Dyer 355. Moor 866. Brownl. 8. Hob. 105.

If *A.* ſerves *B.* for a Year, but has (*b*) nothing for his Service, and afterwards at the End of the Year, *B.* for his good and faithful Services, aſſumes to pay him 10*l.* *A.* may have an Action upon the Caſe, upon this Promiſe, againſt *B.* for the Conſideration is good*. Leon 225. Godb. 32. Cro. Eliz. 4[illegible]. (*b*) But if a Servant has Wages given him, and after his Service ended, his Maſter *ex abundantia* promiſes to pay him 10l. more, he ſhall not have an Action on this Promiſe, becauſe there is no precedent Conſideration. 2 Leon. 225. Hutt. 84.

* In this Caſe the Law preſumed a Promiſe to pay what was reaſonable, and the Defendan 's Subſequent Promiſe aſcertained the Sum.

If *A.* leaſes Lands to *B.* for a certain Term of Years, rendering Rent, and after ſome of the Years expired, and the Rent paid, *A.* in Conſideration that *B.* had occupied the Land and paid his Rent, aſſumes to ſave him harmleſs againſt all Perſons for his Occupation paſt and to come; if afterwards the Cattle of *B.* are diſtrained *Damage-feaſant*, he may have an Action Leon. 102. Pearl and Edwards adjudged. Cro El. 94. 1 Com Dig. 142.

S. C. adjudged, and said the Consideration that

Action upon this Promise against *A.* for the Occupation, which is the Consideration, continues.

he was in Possession, and had paid, and was to pay his Rent, was a sufficient Cause for *A.* to defend his Possession for the Time to come.

2 Leon. 111. adjudged between March and Rainsford. Leon. 102. S. P.

If there be a Communication between *A.* and *B.* concerning a Marriage to be had between *A.* and the Daughter of *B.* upon which *B.* offers him 200*l.* with his Daughter in Marriage; but they cannot agree upon the Day of Payment, and afterwards *A.* steals away the Daughter of *B.* and marries her without the Consent or Knowledge of *B.* and after *B.* agrees thereto, and in Consideration of this Marriage assumes to pay 100*l.* to *A.* this is a good Promise, upon which *A.* may have an Action against *B.* for the (*a*) natural Affection of the Father, and the (*b*) Advancement of the Daughter, makes this a Consideration (*c*) continuing.

(*a*) A good Consideration to raise an Use, but not an *Assumpsit*. Cro. Eliz. 756. agreed *per Cur'*. Cart. 141. *arguendo*. (*b*) Marriage is always a continuing Consideration. 2 Leon. 224. *per Anderson*, Godb. 31. Cro. Car. 409. Hut. 84. Cro. Eliz. 741. (*c*) A Serjeant at Law gives Counsel to *A.* who afterwards, in Consideration thereof assumes to pay him 40*l.* an Action lies thereupon. 2 Leon. 111. *per Popham*. Cro. Eliz. 59. said.

2 Keb. 99.

In Consideration that he had paid Money for the Defendant, and obtained a Release of his debt, was held a continuing Consideration, because the Benefit of it was continuing to the Party.

(E) Where the Promise shall be void, the Consideration being against Law.

As all Considerations are deemed insignificant and void, that are not of some Benefit to the Promisor, or Loss to the Promisee; so if they are wicked and ill in themselves, or unlawful by being prohibited by some Act of Parliament, they are void; therefore,

Rol. Abr. 16. Rol. Rep. 313. S. P. adjudged, the Consideration

If an Officer, who by the Duty of his Office is obliged to execute Writs, promises, in Consideration of Money paid him, to serve a certain Process, an *Assumpsit* will not lie on this Promise; for the Receipt of the Money was Extortion, and the Consideration unlawful*.

being, that he would serve a *Ne exeat Regnum*, * Observe the Terms of the Proposition: "Who "by the Duty of his Office is obliged." *Qu.* If it might not be otherwise, if he was not obliged, or if he was to use extraordinary Labour, Care, Attention, &c. or be at any extraordinary Expence?

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* So if an Executor sues Execution by *Elegit*, and *B.* a Stranger, as a Friend to the Executor, in Consideration that the Sheriff would forthwith execute the said *Elegit*, and of 6*d.* to him by the Sheriff paid, promises to pay him 60*l.* upon which the Sheriff executes the Writ; yet no Action lies, because the Consideration is (*d*) against Law; for the Sheriff ought to do his Duty without Reward, and this 60*l.* is no discharge of the Fees due to the Sheriff, being given by a (*e*) Stranger, and not expressed for them.

Rol. Abr. 16. Cro. Jac. 103. S. C. adjudged. (*d*) So if a Sheriff suffer one that

he has arrested to escape, on the Promise of a Stranger, to be paid so much Money, yet no Action lies on this Promise. Salk. 28. pl. 17. *Vide* Head of *Sheriff*. (*e*) Otherwise where given by the Plaintiff himself. Rol. Abr. 26. *Sed Qu.* 2 Burr. 794. 2 Will. 133. Cowp. 69. 1 Term Rep. 418. 4 Term Rep. 148.

But

But if a Man brings a *Capias* that he has againſt *A.* to the Sheriff, and prays him that he will make *J. S.* his ſpecial Bailiff, and promiſes him that if he will make him his ſpecial Bailiff, that if *A.* eſcapes from the Bailiff, that he will bring no Action for the Eſcape againſt him; this is an *Aſſumpſit* upon which an Action lies, if he brings any Action againſt the Sheriff for the Eſcape. Rol.Abr.16. Leon. 132. 3 Leon.227. Cro. El.178. Owen 97. S. C.adjudged. 1Term Rep. B. R. 419.

So where the Sheriff takes Goods in Execution upon a *Fieri facias*, and a Stranger promiſes the Officer to pay him the Debt, in Caſe he will reſtore them; this is a lawful Conſideration, for by the *Fieri facias* he may ſell the Goods, and this in Effect is doing no more. Salk. 28. pl. 17.adjudged on Demurrer. Love'sCaſe.

If *A.* in Conſideration of ſome Benefit, promiſes not to ſet up or follow the ſame Trade with the Plaintiff in ſuch a Town, this is a good Promiſe; but if the Promiſe were not to ſet up or follow the ſame Trade in any Part of the Kingdom, it would be void. *Vide* Rol. Abr. 16, 17. Cro. Jac. 326, 596. 2 Bullt. 136. Jones 13.

Forteſc. 297. March 77. 2 Rol. Rep. 201. 2 Ld. Raym. 1456. 2 Stra. 739.

If *A.* being a Clerk, promiſes *B.* in Conſideration that *B.* will procure him to be Rector of a Donative Church, with Cure of Souls, to pay 10*l.* to *B.* this is no good Conſideration to maintain an Action, for this is Simony, and an Offence againſt the Laws of GOD and Man*. Rol.Abr.18. Cro. Car. 337, 353. 361. S. C. Cowp. 39.

* *Qu.* If the Promiſe is made to any one but the Patron, and the Patron is not to have any Benefit, Whether an Action would not lie, as it might be intended as a Reward, for Labour, &c.?

If *A.* levies a Plaint in the Court of *Stepney* againſt *B.* upon which a Precept is directed to *C.* the Bailiff there, to attach the Goods of *B.* and thereupon *C.* attaches certain of the Goods of *B.* and *A.* in Conſideration that *C.* will deliver thoſe Goods to him to deliver at the next Court, aſſumes and promiſes to ſave *C.* harmleſs, &c. the Conſideration is void, being againſt Law; for the Bailiff ought not to deliver them to the Plaintiff. Jones 341. S. C. adjudged. Cro.El. 230. Mead and Bigot adjudged. 3 Leon.236. S.C.adjudged.

If *A.* being ſeiſed of Lands in Fee, enters into a Recognizance to *B.* and after makes a Feoffment of thoſe Lands to *C.* who, in Conſideration that *B.* will aſſign to him the Recognizance, aſſumes and promiſes to pay him 80*l.* this is a good Promiſe, for the Conſideration being to aſſign to the Tertenant, it operates by Way of Diſcharge, and is clearly lawful; otherwiſe of an Aſſignment to a Stranger**. Cro.El.551. Barrow and Gray. 1Term Rep. C. B. 30. 3Term Rep. 88.

** *Qu.* As to what is alledged, reſpecting a Stranger?

If *A.* brings *B.* to a common Inn, of which *C.* is Hoſt, and affirms to *C.* that he hath arreſted *B.* by Virtue of a Commiſſion of Rebellion, and in Conſideration that *C.* will keep *B.* as a Priſoner by the Space of one Night, aſſumes and promiſes to ſave *C.* harmleſs, &c. if *B.* recovers againſt *C.* in an Action of falſe impriſonment, *C.* may have an Action againſt *A.* upon this Promiſe; for though the Conſideration, *viz.* the keeping of *B.* was unlawful, yet becauſe it did not appear to *C.* to be ſo, the Promiſe to ſave him harmleſs was good. Hut. 55. adjudged between Fletcher and Harcourt. Winch. 48. S.C. adjudged; but Hobart ſaid perhaps there may be a Diverſity where a Public Officer, and where a private Man (as in the principal Caſe) makes the Arreſt; but becauſe the Defendant had pleaded *Non Aſſumpſit*, which implied that the Impriſonment was lawful, he agreed Judgment ſhould be given for the Plaintiff.

But

*Page 176 Hut. 56. Winch. 49. * But if it appears that the Act which is to be done is unlawful, as if *A.* in Consideration that *B.* will beat *C.* promises to save *C.* harmless, the Consideration is void.

S. C. and S. P. *per Hutton.* 2 Lev. 174. like Point adjudged, where the Defendant, in Consideration of 20s. assumed to pay 40s. if he did not beat *J. S.* out of such a Close.

Yelv. 197. adjudged between Marten and Blithman. 2 Bulst. 213. and Godb. 250. If *A.* is in Execution at the Suit of *B.* and *C.* in Consideration that the Gaoler will permit *A.* to go at large, assumes and promises to (*a*) him that *A.* shall pay the Debt at a certain Day, and that he the said *C.* will save the Gaoler harmless, the Promise is void, because the Consideration is against Law.

S. C. adjudged, the Promise being to pay the Gaoler Money. Het. 175. S. P. 10 Co. 102. S. P. agreed *per Wrey* Ch. Just. and that if such Promise was not void by the Common Law, it is made void by the Statute 23 H. 6. c. 9 —Cro. Eliz. 199, adjudged, 3 Leon. 208. adjudged. (*a*) But such Promise to the Plaintiff is good, for he may lawfully discharge him. Cro. Eliz. 190. adjudged.

Sid. 132. Keb. 483. S. C. Lev. 98. S. C. adjudged, *Nisi* the Promise being to deliver him or pay 10l. and the Action being brought by the Plaintiff himself, who declared upon a Promise to the Bailiff *ex parte queren'*; so that if he was out of Custody, it must be intended by the Assent of the Plaintiff, because the Promise was made to the Bailiff *ex parte querentis*; and by bringing the Action he hath affirmed his Assent. If *A.* is arrested, and *C.* in Consideration that the Bailiff will suffer *A.* to continue in the House of *C.* till the next Morning, assumes and promises then to deliver him in safe Custody to the Bailiff; the Consideration is lawful, for it shall not be intended that the Bailiff was ever absent from *B.* so that it could be no Escape.

Mod. 166. Gilb. Evid. 68. Cro. Eliz. 469, 470. *bis.* Like Point where the Consideration was to take such Oath before the Mayor of *London.* If the Father of *A.* was indebted to *B.* and *A.* promises *B.* that if he will bring two Witnesses before a Justice of Peace, who upon their Oaths shall depose that the Father of *A.* was so indebted to *B.* that then he will Pay it; if *B.* does produce his Witnesses, &c. he may have an Action upon this Promise against *A.* for the Consideration is not unlawful, nor the Oath prophane; adjudged by two Judges against *Vaughan*, who held that such an Oath, illegally administered and taken, was within the Statute of prophane Swearing.

Eret and *Pretiman* like Point, Sid. 283. adjudged. Raym. 153. adjudged. Keb. 26, 44. adjudged; where the Consideration was to take such Oath before a Master in Chancery. 2 Sid. 123. like Point adjudged; where the Oath was to be taken before a Master in Chancery; and a like Point there cited to have been adjudged, where the Oath was to be taken before a Judge of Assise,

Sid. 212. Keb. 744. If *A.* obtains a Judgment against *B.* in the Marshal's Court, and afterwards, in Consideration of Money in Hand paid assumes and promises to assign this Judgment to *C.* this is a good Promise, for it is lawful so to do, and the Intent must be that it shall be assigned according to common Usage, *viz.* by Letter of Attorney, so that *C.* may take out Execution in the Name of *A.* which may be done without any Maintenance.

2 Jones 284. adjudged between Morris and Chapman. Carter 223. S. C. adjudged. If *A.* obtains a Judgment against *B.* and thereupon takes out an *Elegit*, and delivers it to the Under-Sheriff, who by Virtue thereof seizes certain Goods of *B.* and afterwards the Under-Sheriff, in Consideration that *A.* will take out a new *Elegit*, and deliver it to him, he promises to cause and procure the said Goods to be found by Inquisition, and to deliver the same to such Person as *A.* shall appoint, &c. this Promise is against Law, being to do a Thing against the Duty of his Place, by which he is bound to return an indifferent Jury; and though Part of the Promise was to do a lawful Act, yet since that depended upon the other Part, which was illegal, the Whole is naught*.

* As to Considerations *void in Part.* See Com. Dig. 1 V. 154. B. 13.

(F) Where the Conſideration and Promiſe ſhall be ſaid to be ſufficiently ſet forth and averred.

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THE Plaintiff muſt ſet forth every Thing eſſential to the Giſt of the Action, with ſuch Certainty, that it may appear to the Court that there were ſufficient Grounds for the Action; for if any Thing material be omitted, it cannot appear to the Court, whether the Damages given by the Jury were in Proportion to the Demand, or whether the Party was at all intitled to a Verdict.

But for this *vide* Head of Pleas and Pleadings.

Therefore in an Action upon the Caſe, the Plaintiff (*a*) cannot declare *quod cum* the Defendant was indebted to the Plaintiff in ſuch a Sum, and that the Defendant, in Conſideration thereof, *ſuper ſe Aſſumpſit* to pay, &c. without (*b*) ſhewing the Cauſe of the Debt.

10 Co. 77. For this Point *vide* Hob. 5. Godb. 186. Cro. Jac. 207, 213, 642. Hob. 18. Moor 854. pl. 1167. Hetl. 106. Rol. Rep. 391. Bulſt. 67, 3 Bulſt. 207. Cro. Jac. 397. Hard. 132. but Palmer 171. *per Croke* and *Chamberlain*, there is a Diverſity where the Promiſe is to pay at a Day to come, and where not; for the Promiſe to pay at a Day to come, implies a Forbearance in the mean Time; and *vide* Rol. Rep. 396. (*a*) Such a Declaration is not made good by Verdict. Cro. Car. 6, 31. Sid. 182. and *vide* Brownl. 14. Poph. 31. Jenk. 293. (*b*) The Plaintiff declared that the Defendant was indebted to the Teſtator of the Plaintiff in 20*l*. *quas ei ſolviſſe debuit ſecundum agreement' inter eos habit'*. 2 Lev. 162. Judgment was ſtaid after Verdict, for the Agreement might be by Deed. *Vide* Carth. 276.

So if in an *Aſſumpſit* the Plaintiff declares that, in Conſideration *quod procuravit J. S.* to ſurrender a Meſſuage, &c. the Defendant *ſolveret* to the Plaintiff 10*l*. the Declaration is not good, for there is no Promiſe laid, *ſuper ſe Aſſumpſit*, or *agreavit* being omitted; and nothing here that imports a Promiſe or Contract,

Sid. 246. adjudged; Lev. 164. S. C. adjudged *Niſi* Raym. S. C. adjudged *Niſi*. Keb. 878.

Super ſe Aſſumpſit on an *Inſimul computaſſet* was left out, and a Difference was endeavoured to be taken where the Law raiſes the Promiſe, and where it is a ſpecial Promiſe; and that in the firſt it ſhould not be needful; but the Court held it neceſſary in both, for the Law does not (*c*) create a Promiſe in any Caſe in Pleading, but gives ſufficient Evidence to a Jury to find a Promiſe,

2 Keb. 97. Sid. 306. (*c*) 6 Mod. 131. S. P. *per* Holt. *Vide* Head of Pleas and Pleadings.

But in this Action the Law requires no greater Certainty in the Allegations than the Nature of the Thing requires; therefore if a Contract be made in general Terms, the Declaration may likewiſe be general. Hence a *Quantum Meruit* for *diverſa veſtimenta & omnia alia materialia adinde ſpectantia*, is good,

So if in an *Aſſumpſit* the Plaintiff declares that, in Conſideration the Plaintiff would find and provide for a ſick Man all ſuch Neceſſaries as he ſhould want; the Defendant aſſumed and promiſed to pay, &c. and avers that he had found him Neceſſaries amounting to ſuch a Sum, &c. this is a good Declaration, without ſhewing in particular what thoſe Neceſſaries were, for that would make the Record too prolix.

3 Bulſt. 31. adjudged between Crips and Bainton. Rol. Rep. 173. S. C. adjudged; and that rather becauſe it was after Verdict. *Vide* Tit. *Error*.—This Manner of declaring is certainly good, and every Day's Practice.

If in an *Indebitatus Aſſumpſit* the Plaintiff declares that the Defendant was indebted to the Plaintiff in 10*l*. for the (*d*) Feeding and Agiſtment of

Hob. 5. adjudged and affirmed upon a Writ of Error *in Cam. Scacc.* Rol. Rep. S. C. adjudged and affirmed. (*d*) *Indebitatus* for Tithes, *Wright* and *Beal*, Lev. 141. Sid. 223. after Verdict adjudged good, and intended ſevered, upon a ſpecial Contract,

Beaſts,

*Page 178 (a) So an *Indebitatus* lies *pro opere per antea facto.* Sid. 425. Vent. 44. 2 Keb. 552. Mod. 8. adjudged.

* Beafts, and for Wheat & *aliis* (a) *mercimoniis per prædict'* the Defendant *habit' & recept'*; this is a good declaration, for though it be not ſufficient to ſay that he was indebted generally, becauſe that may be for Rent upon Leaſes, or Debts upon Specialties, yet this is certain enough, for as well the Wares and Merchandizes, as the Paſturing and Wheat, are Perſonal Things, for which an *Aſſumpſit* may be brought.

——*Pro præmio*, on a Policy of Inſurance. 2 Lev. 153.

Carth. 276. adjudged. Paſch. 5 W. & M. in B. R. between Hibbert & Courthope. Vent. 44. S. P. Sid. 425. S. P. 2 Keb. 552. Mod. 8. S. P.

So in an *Aſſumpſit* the Plaintiff declared *pro opere & labore* generally, without ſetting forth what Sort or Manner of Work or Labour it was; and though it was objected that it ſhould be ſet forth particularly, ſo that it may appear to the Court to be lawful Work, yet the Court held it well enough; and that the only Reaſon why the Plaintiff is obliged to ſhew wherein the Defendant is indebted, is, that it may appear to the Court that it is not a Debt on (b) Record or Specialty, but only upon ſimple Contract; and any general Words, by which that may be made to appear, are ſufficient.

10 Mod. 81, 295. 12 Mod. 16, 250, 308, 324. Fitzgib. 302. (b) For Damages recovered in an *Aſſumpſit*, will be no Bar to an Action of Debt grounded on a Record or Specialty. Cro. Car. 6. Leon. 155. Cro. Eliz. 242.

Moor 854. adjudged. Rol. Rep. 391. S. C. adjudged.

If in an *Aſſumpſit* the Plaintiff declares, that whereas the Defendant had received 24*l.* of ſeveral Perſons, to the Uſe of the (c) Plaintiff, in Conſideration thereof the Defendant did aſſume and promiſe to pay, &c. this is a good Declaration, without (d) ſhewing of what Perſons in particular he received the Money, (e) becauſe the Conſideration is executed and not traverſable*.

(c) So an *Indebitatus* for Money received by the Hands of *J. S.* to the Uſe of the Defendant. Mod. 42. adjudged good after Verdict; and ſaid they would intend it Money lent. 2 Keb. 615. adjudged, and *vide* Rol. Rep. 391. Cro. Jac. 690. (d) So an *Indebitatus* lies for 40*l. pro diverſis denar' ſummis ei præſtitis ac pro diverſis denariorum ſummis de ead'* the Plaintiff *recept' & habit' ac pro quodam pecuniæ ſumma*, by the Plaintiff, at the Requeſt of the Defendant, to *J. S. Solut'*, without ſhewing in particular how much he was indebted for each Cauſe, for that is not material, he being indebted ſo much in *toto*. Cro. Jac. 245. Yelv. 517. Brownl. Ent. 71. (e) Where the Conſideration is executed, it is only Inducement, and needs not preciſely be alledged as to Time or Place. Cro. Eliz. 715.

* The common Method now uſed is to declare for Money had and received by the Defendant, to the Uſe of the Plaintiff, without mentioning of whom, or by whoſe Hands received, and this is the beſt Method of declaring: As the Plaintiff may give in Evidence all Money received, which under a particular Declaration could not be done, if any of the Payers were omitted. This general Form of Action is, in many Caſes, equivalent to a Bill in Equity, for an Account, &c.

Cro Car. 116. Holmes and Savil adjudged. Hetl. 106, 113. S. C. adjudged. Poph. 177. Latch. 141. Palm. 442. Yelv. 70. Rol. Rep. 396. S. P. Doug. 4. 727. 1 Term Rep. 42. 2 Term Rep. 479.

If in an *Aſſumpſit* the Plaintiff declares *quod cum* there were ſeveral Reckonings and Accounts between the Plaintiff and Defendant; and at ſuch a day, &c. *inſimul computaverunt'* for all Debts, Reckonings and Demands; and the Defendant upon the ſaid Account was found to be in Arrear the Sum of 20*l.* in Conſideration whereof the Defendant promiſed to pay, &c. this is a good Declaration, without ſhewing it was *pro mercimoniis*, or otherwiſe, wherefore he ſhould have an Account; for an Account may be for divers Cauſes, and ſeveral Matters and Things may be included and comprized therein, which in *Pede compoti* are reduced to a Sum certain; and thereupon being indebted to the Plaintiff, it is ſufficient to ground an Action,

3 Mod. 190. adjudged. 8 Mod. 70, 240, 356, 380. 10 Mod. 145, 185, 210, 239, 300, 313. 11 Mod. 273. 12 Mod. 434. Ld. Raym. 148, 284, 408, 669. 2 Ld. Raym. 838, 982, 1222, 1517. Salk. 24. pl. 7. Com. Rep. 115. 12 Mod. 512. Salk. 22, 25. pl. 10. 2 Salk. 422. 7 Mod. 143. Hob. 216. 3 Keb. 469. S.P. adjudged.

If in a *Quantum Meruit* for Meat, &c, the Plaintiff declares upon a Promiſe, to pay ſo much *Quantum rationabiliter valerent*; this is a good Declaration,

claration, though general; and though objected that it ought to have been *valebant* †.

† Either Way will do.

If in an *Assumpsit* the Plaintiff declares, that the Defendant, in Consideration of, &c. *inter alia*, did assume to pay, &c. this is no good Declaration, because he ought to set forth the whole Promise, which is intire. All. 5. adjudged. *Vide* March 100. Hob. 88.

If in an *Assumpsit* the Plaintiff declares, that in Consideration the Plaintiff had promised to deliver a Cow to the Use of the Defendant, the * Defendant did assume and promise, &c. this is a good Declaration, without (*a*) any Averment of the Delivery of the Cow, (*b*) because there is (*c*) Promise for Promise. *Page 179

(*a*) And if in such Case the Plaintiff doth aver a Performance, the Defendant can take no Issue thereupon. Cro. Eliz. 543. And an ill Averment will not hurt. Lev. 88, 293. (*b*) Where there are mutual Promises, the Plaintiff need not aver a Performance of his Part. Yelv. 134. Rol. Rep. 336. Vent. 41. Hard. 102, 103. March 75. Cro. Eliz. 703. Lev. 20, 293. Cro. Eliz. 137. Leon. 186. Salk. 29. pl. 30. (*c*) Both these Promises ought to be made at the same Time, else they will be *nuda Pacta*. Hob. 88. Cro. Eliz. 137. Leon. 186. Cowp. 290.

(G) What may be pleaded as a good Discharge and Performance of the Promise.

AN *Assumpsit* is an Action founded on a Contract, the Non-performance of which is a Fraud and Injury to the Plaintiff; and therefore the Defendant must shew that there was no Contract, or that the Contract was void and without Consideration, or that he hath performed it, and is therefore discharged. *Vide* Head of Pleas and Pleadings. Where Infancy, Coverture, a Release, the Statute of Limitations, or more Money lost at Gaming than the Statute allows, are good Bars, *vide* the several Titles; and where they must be pleaded, or may be given in Evidence, Title *Evidence*.

If in a *Quantum Meruit* for Medicines, the Defendant pleads that he had paid the Plaintiff (*d*) *tot & tantas denariorum summas*, as the said Medicines were worth, without shewing what Sum in (*e*) certain he hath paid; this is no good Plea* March 77.

(*d*) In an *Assumpsit* for Fees and Money laid out, the Plaintiff avers that he had laid out 27*s.* and the Defendant pleads that he had paid all Fees and Money laid out, without shewing what he had paid. Rob. Ent. 56. (*e*) Where the Defendant may plead generally, that the Plaintiff *exoneravit eum* of the said Promise. Cro. Car. 383. 2 Rol. Abr. 408. pl. 1.

* *Qu.* If on special Demurrer, such Plea is not bad, as amounting to the general Issue?

If in an *Assumpsit* the Plaintiff declares that the Defendant did assume and promise to pay to the Plaintiff so much Money, and also to carry away certain Wood before such a Day; the Defendant as to the Money cannot plead that he paid it, and as to the Carriage of the Wood *non Assumpsit*; (*f*) for the Promise being (*g*) intire cannot be apportioned †. March 100. adjudged, and after a Verdict for the Plaintiff upon *non Assumpsit*, a Repleader was awarded. (*f*) Brownl. Ent. 58, 59. In an *Assumpsit* to pay 24*s. per* Hogshead for Ale, &c. the Plaintiff shews, *licet* 43*s.* was due to him *secundum ratam prædict'*, &c. and the Defendant *quoad* 24*s. de*, &c. pleads *non Assumpsit*, and as to the Residue a Tender, and thereupon Issue is joined; and *vide* Thomp. Ent. 66. Rob. Ent. 40. (*g*) ** The Defendant pleads the Promise was conditional, and traverses that it was absolute, as the Plaintiff had declared. Thomp. Ent. 74. Rob. Ent. 97. ‡

† *Qu.* Therefore, if he should not have pleaded *non Assumpsit* to the whole? ** *Non Assumpsit* to Part and Tender, to the Residue is good. ‡ *Qu.* If such Plea is good, if it does not amount to the general Issue, and if the general Issue would not have been the proper Plea?

If

2 Mod. 43, 44. adjudged. 12 Mod. 214, 460, 517, 537. Ld. Raym. 386, 680. Salk. 24, pl. 6. 171. pl. 3. Carth. 467, 666, 733.

If the Plaintiff declares upon an *Indebitatus Assumpsit*, and upon a *Quantum Meruit*, and the Defendant pleads, That after the said several Promises made, and before the Action brought, the Plaintiff and Defendant came to an Account concerning divers Sums of Money, and that the Defendant was found in Arrear to the Plaintiff 30*l.* and thereupon, in Consideration that the Defendant promised to pay the said 30*l.* the Plaintiff likewise promised to release and acquit the Defendant of all Demands; this is a good Plea, for by the Account the first Contract is merged.

3 Mod. 278. 5 Mod. 411. Fitzgib. 202, 302. Comyns 98. Ld. Raym. 122, 235, 664. 2 Ld. Raym. 968. Stra. 422, 426, 573, 615, 648, 653. *Milward* and *Ingram*, 1 Mod. 205. and the same Authorities, S. C. adjudged: But *North* Chief Just. there said, That if there had been but one Debt between them, the Entry into an Account for that would not determine the Contract.

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Rol. Abr. 32. 2 Rol. Rep. 19, 39. S. P. adjudged. Cro. Jac. 483. S. C. adjudged.

* The Defendant cannot plead that he revoked his Promise; as if *A.* is in Execution at the Suit of *B.* and *J. S.* desires *B.* to let him go at large, and that he will satisfy him; to which *B.* agrees, though *J. S.* before any Thing is done in Pursuance of this Promise and Agreement, comes to *B.* and tells him, that he revokes his Promise, and that he will not stand to it; yet such Revocation cannot be pleaded in Bar to the Action.

3 Lev. 244. adjudg. between *How* and *Beech*, upon a Writ of Error in *Cam' Scacc'*, and the first Judgment affirmed accordingly.

So if in an *Assumpsit* the Plaintiff declares, that in Consideration the Plaintiff would solicit a Business for the Defendant, which he had with *J. S. & finem adinde poneret*, the Defendant did assume, *&c.* and that he had solicited and employed much Care and Pains, *&c.* but before he could *finem inde ponere*, the Defendant countermanded him, the Action lies; though it was objected, that such Employment is always countermandable; and if the Plaintiff had bestowed Pains, and in Part done the Thing before the Countermand, he might have had a *Quantum Meruit* for what he had done, but not an *Assumpsit* for the Whole; yet it was resolved by the Court, that if after Part done the Defendant countermands it, the Plaintiff shall have an Action for the Whole, and upon the Trial the Jury ought to give as much in Damages as the Business done deserves.

Yelv. 22. *Shelbur* and *Scotford* adjudged. 2 Rol. Rep. Like Point *dubitatur.*

If *A.* being possessed of a Horse, lends him to *B.* and *B.* assumes and promises to re-deliver the Horse to *A.* by a Day, before which Day the true Owner of the Horse *contra voluntatem B.* (*a*) takes him from *B.* this Matter, by Reason of the precedent Property, is *quasi* an Eviction of the Horse from the Possession of *B.* and shall (*b*) discharge *B.* of his Promise.

(*a*) So if the Horse dies. Jones 179. (*b*) If one assumes to purchase Lands at the best Price he can, the Promise to purchase is absolute; but the Price must be as reasonable as he can. Lev. 3. *per Twisden.* But *per Foster* Ch. Just. he is not bound to Purchase unless the Owner will sell.

ATTACHMENT.

Lamb. Eiren. lib. 1. cap. 16.

AN *Attachment* is a Process that issues at the Discretion of the Judges of a Court of Record, against a Person for some Contempt, for which he is to be committed, and may be awarded by them upon a bare Suggestion, or on their own Knowledge, without any appeal, Indictment or Information; for though by the Statute of *Magna*

Magna Charta, none are to be impriſoned *Sine Judicio Pariũ, vel per Legem Terræ*, yet this ſummary Method of Proceeding being abſolutely neceſſary to the Furtherance and Execution of Juſtice, ſeems to have been long practiſed, and is certainly now eſtabliſhed as Part of the Law of the Land. *Vide* 2. Weſtm. 2. c. 2.

As ſeveral Matters relating to this Head fall more properly under others, I ſhall only in this Place conſider;

(A) In what Caſes an Attachment is to be granted. 181.

(B) How the Perſon againſt whom it is granted is to be proceeded againſt, and how to be diſcharged. 182.

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* (A) In what Caſes an Attachment is to be granted. *Page 181

ALL Courts of Record have a Diſcretionary Power over their own Officers, and are to ſee that no Abuſes be committed by them, which may bring Diſgrace on the Courts themſelves; therefore if a Sheriff, or other Officer, ſhall be guilty of a corrupt Practice in not ſerving a Writ; as if he refuſe to do it unleſs paid an unreaſonable Gratuity from the Plaintiff, or receive a Bribe from the Defendant, or give him Notice to remove his Perſon or Effects, in order to prevent the Service of any Writ; the Court which awarded it may puniſh ſuch Offences, in ſuch Manner as ſhall ſeem proper, by Attachment. Dyer 218. 2 Hawk. P. C. 142. *Vide* Head of Sheriff.

But if there be no palpable Corruption, nor extraordinary Circumſtance of wilful Negligence or Obſtinacy, the Judgment whereof is to be left to the Diſcretion of the Court; it ſeems not uſual to proceed in this Manner, but to leave the Party to his ordinary Remedy againſt the Sheriff, either by Action, or by Rules to return the Writ, or by an *Alias* and *Pluries*, which if he have no Excuſe for not executing, an Attachment goes of courſe. Hob. 64, 264. Noy 101. F. N. B. 38. Finch. 237.

Alſo Sheriffs and other Officers are liable to an Attachment for an oppreſſive or illegal Practice in the Execution of a Writ; as uſing needleſs Force, Violence or Terror, treating Perſons under an Arreſt baſely and inhumanly, extorting Money from them, &c. or making an Arreſt without due Authority, as by Colour of a Blank (*a*) Warrant, filled up without the Privity or ſubſequent Agreement to the Sheriff. 11 H. 6. 42. (*a*) Noy 101. Moor 770. 2 Rol. Abr. 278. But there may be ſome ſpecial Circumſtances which may induce the Court to excuſe it, as that the Practice was ſo, and that it was done to prevent the Party's having Notice of the Arreſt. 2 Hawk. P. C. 143.

Alſo an Attachment is grantable for a corrupt Practice, in not executing a Writ effectually; as if a Sheriff having levied a Debt on an Execution imbezils the Money. 2 Hawk. P. C. 143.

Alſo an Attachment is grantable in Diſcretion for a falſe Return to a Writ, but this is not (*b*) uſually done without ſome viſible Corruption, or extraordinary Circumſtances of Malice, Hardſhip or Oppreſſion. Hawk. P. C. 143. (*b*) For an Action on the Caſe lies againſt the Sheriff; *vide* Title *Sheriff*.

Attornies

Vide Title Attornies, and 2Hawk. P. C. 144, 145.

Attornies are liable to an Attachment, and have been puniſhed in this Manner in numberleſs Inſtances; as for proſecuting or defending a Suit without Directions from the Party, for baſe and unfair Dealings towards their Clients, in the way of Buſineſs; as for protracting Suits by little Shifts, demanding Money for buſineſs never done, (*c*) detaining their Clients Writings, or their Money recovered and received by them; for barely attempting to (*d*) forge a Writ, or other Matter of Record; for giving (*e*) Directions to a Sheriff what Perſons he ſhall return on a Panel; or for endeavouring to impoſe on the Court; for putting to Proceſs Name of Attorney of *K. B.* without Authority. *Bur. Rep.* 20. Againſt an Under-Sheriff, for improperly executing the Rule of the Court. 2 *Bur. Rep.* 797, *&c.*

(*c*) But may detain Money or Writings till paid his juſt Fees. Salk. 87. pl. 5.

(*d*) Cro. Car. 74. Dyer 241. pl. 50.

(*e*) Moor 882. pl. 1237.

Vide 2 Hawk. P. C. 145. And how Jurors are puniſhable, *vide* Head of *Juries*.

Alſo all other Officers of Courts of Record are in like Manner puniſhable for diſobeying the Commands of ſuch Courts, or for executing them oppreſſively, or otherwiſe miſdemeaning themſelves in their Offices.

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2 Hawk. P. C. 151. *vide* Title Gaol and Gaoler.

* Gaolers are puniſhable in this ſummary Way, for groſs Miſbehaviour in their Offices, by the Courts to which they more immediately belong; alſo by diſobeying a *Habeas Corpus* iſſuing out of a Court which has Authority to award it; and by the Court of *King's Bench*, for uſing Priſoners barbarouſly and inhumanly.

Keb. 484. Palm. 564. 6 Mod. 90. *vide* Title Courts, and their Juriſdiction in general.

The Court of *King's Bench*, as it hath a Superintendency over all Inferior Courts, may grant an Attachment againſt the Judges of ſuch Courts, for oppreſſive, unjuſt or irregular Practice, contrary to the obvious Rules of Natural Juſtice; as for denying a Defendant a Copy of the Declaration, or going on to Trial without giving him Notice, or Time to make his Defence, or for compelling him to give exorbitant Bail, or for taking unreaſonable Diſtreſſes, or for taking Money for vitious Pleading; for proceeding after a Prohibition, *Certiorari*, *&c.*

Salk. 84. pl. 4.

Attachments have been granted for ſpeaking contemptuous Words concerning the Rules of the Court, and that in the firſt Inſtance, without any Rule made on the Party to ſhew Cauſe why ſuch Attachments ſhould not be granted; for it would be in vain to ſerve him with a Second Rule, who had deſpiſed the Firſt.

Mod. 21. 10 Mod. 333. 12 Mod. 234, 257, 317, 525, 533, 585. Stra. 695. 2 Wms. 450.

An Attachment is the proper Remedy for Diſobedience of the Rules of Court; as of thoſe made in Ejectment, Arbitrament, *&c.* So where a Defendant in Account, being adjudged to account before Auditors, refuſes to do it, unleſs they will allow Matter diſallowed by the Court before; or where one refuſes to pay Coſts taxed by the Maſter, whoſe Taxation the Law looks upon as a Taxation by the Court.

Barnes 40, 41. 2 Barnes 55, 140. Salk. 71. pl. 6.

Salk. 84. pl. 3.

But an Attachment is not uſually granted for Diſobedience of a Rule of *Niſi Prius*, unleſs it be firſt made a Rule of Court; nor for Diſobedience of a Rule made by a Judge at his Chambers, unleſs it be entered; nor for Diſobedience of any Rule without Perſonal Service*.

* But if a Party ſecretes himſelf, and there is great Reaſon to believe it is to avoid being ſerved with a Rule, the Court will on Affidavit grant a Rule to ſhew Cauſe why Service at the laſt Place of Abode, ſhould not be deemed good Service, and permit ſuch Rule *Niſi*, to be ſerved, by leaving the ſame at the laſt Place of Abode.

2 Hawk. P. C. 154. Forteſ. 267. Granted on

Alſo an Attachment is proper for Abuſes of the Proceſs of the Court; as for ſuing out Execution where there is no Judgment; bringing an Appeal for the Death of one known to be alive; making uſe of a Proceſs of a ſuperior

ſuperior Court, as a Stale to bring a Defendant within the Juriſdiction of an inferior one, and then dropping it; uſing ſuch Proceſs in a vexatious, oppreſſive, or unjuſt Manner, without Colour of ſerving any other End by it. the firſt Motion for uſing the Proceſs of the Court contemptuouſly. Stra. 185. For Caſes of Contempt, ſee Stra. 384, 510, 593. 2 Ld. Raym. 1364. 2 Strange 899, 1000, 1094. Andr. 275. 8 Mod. 245 *.

* For trifling Contempts the Court will not grant Attachments.

(B) How the Perſon againſt whom an Attachment is granted is to be proceeded againſt, and how diſcharged.

ATtachments are uſually granted on a Rule to ſhew Cauſe, unleſs the Offence complained of be of a flagrant Nature, and poſitively ſworn to; in which laſt Caſe the Party is ordered to attend, which he muſt do in Perſon; as muſt every one againſt whom an Attachment is granted; and if the Party attending the Court upon ſuch a Rule to anſwer it, or appearing upon an Attachment, be apparently guilty, the Court in Diſcretion, on Conſideration of the Nature of the Crime, and other Circumſtances, will either commit him immediately, in order to anſwer Interrogatories to be exhibited againſt him, concerning the Contempt complained of, or will ſuffer him to enter into a Recognizance to anſwer ſuch Interrogatories; which if they be not exhibited within four Days, the Party may move to have the Recognizance diſcharged; otherwiſe he muſt anſwer them, though exhibited after the four Days; but in all Caſes, if he fully anſwer them he ſhall be diſcharged as to the Attachment, and the Proſecutor ſhall be left to proceed * againſt him for the Perjury, if he thinks fit; but if he deny Part of the Contempts only, and confeſs other Part, he ſhall not be diſcharged as to thoſe denied, but the Truth of them ſhall be examined, and ſuch Puniſhment inflicted, as from the Whole ſhall appear reaſonable; and if his Anſwer be evaſive as to any material Part, he ſhall be puniſhed in the ſame Manner as if he had confeſſed it. 2 Hawk. P. C. 141. Salk. 84. pl. 3. 2 Jones 178 *Page 183

ATTORNEY.

AN Attorney is one ſet in the Place of another, and is either Public, as an Attorney at Law, whoſe Warrant is *Talis ponit loco ſuo talem Attornatum*; or Private, who has Authority given him to act in the Place and Stead of him by whom he is delegated, in private Contracts and Agreements; which Authority muſt be by Deed, that it may appear that the Attorney has purſued his Commiſſion. Of this all Perſons are capable, and therefore may be executed by Monks, Infants, Feme Coverts, Perſons attainted, outlawed, excommunicated, Villains, Co. Lit. 52. 6 Co. 58. Hob. 9. Rol. Rep. 3. Of a *Reſpon-ſalis* and his Power, and how diſuſed ſince the ſeveral Statutes that

have given Power to make Attornies, *vide* Co. Lit. 128. a.

Villains, Aliens, &c. for this being only a naked Authority, the Execution of it can be attended with no manner of Prejudice to the Persons under such Incapacities or Disabilities, or to any other Person, who by Law may claim any Interest of such disabled Persons after their Death.

But the Person (*a*) here treated of is an Attorney at Law, who is appointed to Prosecute and Defend for his Client, and is considered as an Officer belonging to the Courts of Justice; concerning whom there are several Statutes and Resolutions.

(*a*) For private Attornies *vide* Tit. Authority and Power.

(A) Of admitting Persons to act as Attornies, and the Qualifications necessary for such Persons. 184.

(B) Who may appear by Attorney, and in what Cases. 185.

(C) Of Retaining an Attorney, what shall be an Appearance; and herein of the Warrant of Attorney. 186.

(D) Of the Power of an Attorney, when appointed; and the Regularity of his Proceedings. 188.

(E) Of the Determination of his Power; and herein of dismissing or changing him. 189.

(F) Of his Fees and Disbursements, and the Remedy for the Recovery of them. 190.

(G) Of the Privileges which an Attorney has. 191.

(H) Of Offences and Misbehaviours for which he is punishable; and herein of the Form of the Proceedings against him. 192.

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(A) Of admitting Persons to act as Attornies, and the Qualifications necessary for such Persons.

Vide 2 Inst. 249, 377. Co. Lit. 121. 8 Co. 58. 2 Mod. 83. When first of Record, *vide* Statute

BEFORE the Statute *Westm.* 2. *cap.* 10. all Attornies were made by Letters Patent under the Great Seal, commanding the Justices to admit the Person to be Attorney to such an one; since which there have been several (*b*) Statutes and Rules made for the better Regulation of Attornies.

(*b*) 3 E. 1. c. 41. which see explained 2 Inst. 249. 6 Ed. 1. c. 8. explained 2 Inst. 311. 13 Ed. 1. c. 10. explained 2 Inst. 377. 27 Ed. 1. 7 R. 2. 14. 3 H. 7. 1. 23 H. 8. c. 3. 29 El. c. 5. 31 El. c. 10. Relating to Cases in which Persons may prosecute or defend by Attorney; by the 4 H. 4. c. 18. are to be inrolled, and sworn to execute their Office truly. By the 1 H. 5. c. 4. no Under-Sheriff to practice as an Attorney. 33 H. 6. c. 7. For restraining the Number of Attornies in *Norfolk*, *Suffolk* and *Norwich*, *vide* 2 Inst. 250. 32 H. 8. c. 4. 18 El. c. 14. 4 An. c. 16. Relating to the Filing of Warrants of Attorney. By the 3 Jac. 1. c. 7. are to sign Bills of Fees, and produce Tickets of Money given to Counsel; *vide post*: Letters (F. 190) By the 4 W. and M. c. 4. must enter common Bail for his Client; *vide* Tit. Bail. By the 13 W. 3. c. 6. must take the Oaths, By the 12 G. 1. c. 29. made perpetual by 21 G. 2. c. 3. acting as an Attorney after a Conviction for Forgery or Perjury, to be transported.

By

By the 2 *Geo.* 2. *cap.* 23. made perpetual by 30 *Geo.* 2. *cap.* 19. *ſect.* 75. it is enacted, "That no Perſon from and after the firſt Day of *December* "1730, who was not duly admitted as an Attorney, purſuant to the "Directions of the Statute, ſhall be permitted to act as an Attorney, or "to ſue out any Writ or Proceſs, or to commence, carry on, or defend "any Action or Actions, or any Proceedings, either before or after Judg- "ment obtained in the Name or Names of any other Perſon or Perſons, "in any of his Majeſty's Courts of Record, unleſs ſuch Perſon ſhall have "been bound, by Contract in Writing, to ſerve as a Clerk for and dur- "ing the Space of five Years, to an Attorney duly and legally ſworn and "admitted; and unleſs ſuch Perſon ſhall have continued in ſuch Service "during the ſaid Term of five Years; and unleſs ſuch Perſon ſhall be "allowed of, admitted and inrolled by a Judge of the ſaid Courts, and "ſhall have taken the following Oath, *I A. B. do ſwear, that I will "truly and honeſtly demean myſelf in the Practice of an Attorney, according to "the beſt of my Knowledge and Ability.* And in caſe any Perſon ſhall in "his own Name, or in the Name of any other Perſon, ſue out any Writ "or Proceſs, or commence, proſecute or defend any Action or Suit, or "any Proceedings in any of the Courts of Law or Equity, as an Attorney "or Solicitor, for, or in Expectation of any Gain, Fee or Reward, with- "out being admitted and inrolled; every ſuch Perſon for every ſuch "Offence ſhall forfeit and pay 50*l.* to the Uſe of ſuch Perſon who ſhall "proſecute him for the ſaid Offence, and is hereby incapable to main- "tain any Action or Suit in any Court in Law or Equity, for any Fee, "Reward or Diſburſements, on account of proſecuting, carrying on or "defending any ſuch Action, Suit or Proceeding; and that no Attorney "or Solicitor ſhall have more than two Clerks at a Time, except the "Prothonotaries and Secondary of the *King's Bench*, who may have "three Clerks. Alſo a ſworn Attorney ſuffering any to act in his Name, "ſhall himſelf be diſabled to act, and his Admittance in "any Court ſhall from thenceforth ceaſe and be void: Provided (*a*) "That an Attorney or Solicitor ſworn in any one Court, may, by the "Conſent of an Attorney or Solicitor ſworn in any other Court, which "Conſent muſt appear in Writing, ſigned by the Attorney or Solicitor, "in the Name of ſuch Attorney ſue any Writ, Proceſs, or commence, "carry on, * proſecute or defend any Action or Actions, or any other "Proceedings in ſuch Court, notwithſtanding ſuch Perſon is not ſworn "or admitted to be an Attorney of ſuch Court."

Vide the Statute, and the ſame clauſes with reſpect to Solicitors practiſing in Courts of Equity; and 23 Geo. 2. c. 26. ſ. 15. whereby Solicitors may be admitted Attornies without Stamp, or Fee. Taking a Turnkey for an articled Clerk diſallowed, and the Articles cancelled. Bur. Rep. 291.

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(*a*) Attorney who gives another Leave to practice in his Name, is anſwerable for what he does in his Name. 12 Mod. 666.

An Attorney ſworn and admitted in any of the Courts at *Weſtminſter*, may Practice in any Inferior Court, unleſs ſuch Court by Charter or Preſcription is reſtrained to a certain Number of Attornies, and has a Power to exclude all others. Vent. 11. Sid. 410. Mod. 23.

Alſo if an Attorney of any Inferior Court is refuſed the Privilege of acting, or turned out by the Judge or Steward, a *Mandamus* will lie to reſtore him. Lev. 75. Sid. 94. Keb. 349. Raym. 14.

vide Tit. *Mandamus.*

(B) Who may appear by Attorney, and in what Caſes.

THE Statute of *Weſtm.* 2. *cap.* 10. gives to all Perſons a Liberty of appearing by Attorney without any Letters Patent, which it ſeems they were formerly obliged to take out, otherwiſe they were to appear 2 Inſt. 240. Co. Lit. 128. 8 Co. 58.

2 Mod. 83. Of Infants appearing in Perſon, by Guardian or Attorney, *vide* Head of *Infants*.

each Day in Court in their proper Perſons; for the Command of the Writ being to appear, was always intended to be in proper Perſon.

(*a*) 2 Hawk. P. C. 273. *Vide* Rol. Rep. 190. 2 Bulſt. 299. (*b*) 3 Inſt. 312. (*c*) 2 Hawk. P. C. 141. and *vide* Title *Appeal*.

But in a (*a*) Capital Caſe the Party muſt always appear in Perſon, and cannot plead by Attorney; alſo in Criminal Offences, where an Act of Parliament requires that the Party ſhould appear in Perſon; ſo in (*b*) Appeal, or on an (*c*) Attachment.

That the Appellant and Appellee muſt both appear in Perſon. 3 Mod. 268. Fitzgib. 95. 10 Mod. 86. 11 Mod. 216. pl. 4. 12 Mod. 20, 65. 2 Ld. Raym. 1288, 1289. Holt 355. Comyns 257. 4 Mod. 99. 2 Jones 210.

Lev. 146. Kelw. 165. Dyer 346. Cro. Jac. 462. 3 Inſt. 125. 2 Hawk. P. C. 275. March 113. A Clerk in Court may confeſs an Indictment for his Client. 6 Mod. Rep. 16.

On an Indictment, Information or Action for any Crime whatſoever under the Degree of Capital, the Defendant may by the favour of the Court, appear by Attorney; and this he may do as well before Plea pleaded, as in the Proceedings after, till Conviction.

By the 18 *Eliz. cap.* 5. *par.* 1. it is enacted, "That every Informer "upon any penal Statute ſhall exhibit his Suit in proper Perſon, and "purſue the ſame only by himſelf, or by his Attorney in Court, and that "he ſhall not uſe any Deputy or Deputies at all.

By the 29 *Eliz. cap.* 5. *par.* 21. it is recited, "That divers of her "Majeſty's Subjects dwelling in the remote Parts of the Realm, had been "many Times maliciouſly troubled upon Informations and Suits exhibit-"ed in the Courts of the *King's Bench*, *Common Pleas* and *Exchequer*, upon "penal Statutes, and had been drawn up upon Proceſs out of the Coun-"tries where they dwell, and driven to attend and put in Bail, to their "great Trouble and Undoing; and for Reformation thereof it is enact-"ed, That if any Perſon or Perſons ſhall be ſued or informed againſt "upon any penal Law, in any of the ſaid Courts where ſuch Perſon or "Perſons are bailable by Law, or where by the Leave or Favour of the "Court ſuch Perſon or Perſons may appear by Attorney; in every ſuch "Caſe the Perſon or Perſons ſo to be impleaded or ſued, ſhall and may, "at the Day and Time contained in the firſt Proceſs ſerved for his Ap-
*Page 186 "pearance, appear by *Attorney of the ſame Court where the Proceſs is "returnable, to anſwer and defend the ſame, and not be urged to per-"ſonal Appearance, or to put in Bail for the anſwering ſuch Suits."

Cro Jac. 616. Sir William Read's Caſe. (*d*) But if an Adminiſtrator brings Error upon an Outlawry of his Inteſtate for Murder, he may appear by Attorney, for though the Party himſelf muſt have appeared in Perſon, that he might have ſtood *Rectus in Curia*, and anſwered the Matter of Fact; yet in this *Caſe*, that Reaſon fails. March 113. *vide* the Statute 7 H. 4 c. 13. By which a Judge may examine into the Inability of a Perſon outlawed, to appear, and the Court diſpenſe with a perſonal Appearance; and Cro. Jac. 462. where on Affidavit of Sickneſs, the Court allowed of an Appearance by Attorney; *vide* the 4 and 5 W. and M. c. 18. That Perſons outlawed may appear by Attorney, except for Treaſon or Felony, and reverſe the ſame without Bail. *Vide* Title *Outlawry*.

If one be outlawed upon an Indictment for not repairing a Bridge, and thereupon admitted to bring a Writ of Error, he (*d*) muſt appear, and in Perſon aſſign his Error; ſo adjudged and agreed by all the Clerks of the Crown-Office in Sir *Wm. Read*'s Caſe; and tho' the Court greatly pitied Sir *William*, becauſe he was ninety Years of Age, and very infirm, and had kept his Chamber for a Year and more, yet they held that it could not be done by Attorney, being againſt the Courſe of the Court, and doubted whether the King's Privy Seal would help him; and he was thereupon brought from his Houſe ten Miles from *London*, in an Horſe-Litter, upon Mens Shoulders to the Bar and came into Court and aſſigned his Error, and put in Bail to proſecute.

If Husband and Wife are sued, the Husband is to make an Attorney for her. 2 Sand. 213. Bridg. 73.

See Title Baron and Feme. *Vide* 6 Mod. 86.

If an Ideot doth sue or defend, he cannot appear by Guardian, *Prochein Amy*, or Attorney, but must appear in proper Person; but otherwise of him who becomes *Non compos mentis*, for he shall appear by Guardian if within Age, or by Attorney if of full Age. Co. Lit. 135. b. 2 Inst. 390. 4 Co. 124. Palm. 520. 2 Sand. 335. *Vide* Title *Ideots and Lunaticks.*

In an Attachment of Privilege by the Marshal, he shall have no Attorney because present in Court. 6 Mod. 16.

(C) Of Retaining an Attorney, what shall be an Appearance; and herein of the Warrant of Attorney.

AN Attorney is not compellable to appear for any one, unless he take his Fee, or back the Warrant; after which the Court will compel him to appear. Salk. 87. pl. 4. An Attorney, on Sight of a Writ against Husband and Wife, undertook to appear for them, but afterwards would not do it; a Declaration was delivered, which he received *de bene esse*, and Judgment was entered for want of a Plea; and the Court set it aside for Irregularity, but ordered the Attorney to be laid by the Heels; and it was said, That if an Attorney undertakes to appear, and afterwards will not do it, upon Summons before a Judge he shall be compelled to do it. 6 Mod. 86, Str, 693. 12 Mod. 251.* Bound by his Undertaking to appear for an Infant. Stra. 114.

* Or by Motion in Court.

If before a Writ be taken out an Attorney promise to appear to it, and after it is taken out and shewed to him, he ought to appear, but that is no actual Appearance; but if such Undertaking be after the Writ is actually taken out, it is an Appearance. 6 Mod. 42, *per* Holt Ch. Just. *Vide* Comb. 299. 3 Will. Rep. 277. Barnes 1, 32. Stra. 402.

* Where an Attorney takes upon him to appear, the Court looks no farther, but proceeds as if the Attorney had sufficient Authority, and leaves the Party his Action against him. *Page 187 Salk. 86. pl. 3. *per* Holt said to be the Practice of the Court.

If an Attorney appears, and Judgment is entered against his Client, the Court will not set aside the Judgment, though the Attorney had no Warrant, if the Attorney be able and responsible, for the Judgment is regular, and the Plaintiff is not to suffer when in no Default; but if the Attorney be not responsible or suspicious, the Judgment will be set aside, for otherwise the Defendant has no Remedy, and any one may be undone by that Means. Salk. 88, pl. 7. 6 Mod. 16. S.P. That an Action will lie against an Attorney for appearing without a Warrant.

3 Mod. 205. And for that Reason an Attachment denied. Comb. 2. *vide infra* Letter (H. 192.)

A Warrant

Rol. Abr. 290. A Warrant of Attorney may be entered at any time before Judgment, or before a Writ of Error brought.

For this *vide* 18 Eliz. c. 14. That after Verdict in any Court of Record Judgment shall not be stayed or reversed for want of a Warrant of Attorney; and *vide* 32 H. 8. 30. and 4 An. c. 16. s. 3. That the Plaintiff's Attorney shall file his Warrant the same Term he declares, and the Defendant's Attorney the same Term he appears, on Pain of forfeiting ten Pounds, and also suffering such Imprisonment as by the Discretion of the Justices of the Court, where any such Default shall happen to be, shall be thought convenient. *Vide* Rol. Rep. 186. March 122. Goldsb. 91. Brownl. 46. Hetley. 59. Bulst. 21. Cro. Jac. 277. *Vide* Title *Error*.

Fares. 47. *per Curiam.* No Man, though by Consent of Parties, can be Attorney of both Sides, for the Consent of Parties cannot change the Law.

Salk. 89. pl. 11. 402. pl. 10. 2 Salk. 603. 3 Salk. 369. 2 Ld. Raym. 821, 1252. If the Attorney in the original Action, acts as Attorney in the Proceedings against the Bail without any (*a*) new Warrant, this is Error*; for though any Person may take out a *Scire Facias*, yet upon the Return a Plea commences, and a new Warrant of Attorney ought to have been entered, because this is a new Cause and different Record.

7 Mod. 3. 5 Mod. 397. Carth. 447. *Barr.* and *Atwood*. (*a*) If the Tenant makes an Attorney *in Banco*, and after Conuzance of this Plea is demanded by a Franchise, and granted, the Attorney shall continue Attorney for him in the Franchise also, without other making, and he is his Attorney there *in facto*, without other Removal; for the Conuzance is granted to hold Plea as the Justices ought, if this had not been granted. 21 E. 3. 45. b. 61. 21 Ass. Pl. 17. Fitz. Tit. Receit 133. Rol. Abr. 290. S. C. So if after Conuzance granted a Re-summons be sued for the Failer of Right there in the Court where this was granted, he continues Attorney for him there also upon the first Retainer. Rol. Abr. 290. If Judgment be given *in Banco* against the Demandant, and this is reversed in *B. R.* for Error in the Process, the Attorney which the Tenant had in the first Plea, shall continue his Attorney now in *B. R.* to answer to the Original. Rol. Abr. 290.

* *Sed Qu.* If the Court on Motion would not give Leave to file a Warrant of Attorney?

2 Show. Rep 161. pl. 147. Keb. 593. In debt on a Bail-Bond, the Principal gave a Warrant of Attorney to appear for himself, and likewise ordered the same Attorney to appear for the Bail, who were his Neighbours; the Attorney appeared accordingly, and for want of a Plea, Judgment was had against the Principal and Bail; but upon motion set aside as to the Bail, the Principal's Order not being a Warrant to appear for more than himself, and it being by Ignorance of the Law, and not a wilful Act, the Judges discharged the Attorney as to any Contempt †.

† *Qu.* If the Courts would now set aside the Judgments against the Bail, if they were regularly served with Process, unless they had a good Defence?

Moor 711. But if the right Name be no where entered, the Court cannot amend. If there be a Mistake in the Attorney's Name, it may be amended by the Warrant of Attorney, for the Warrant of Attorney being precedent, will amend the Roll, and the Court will take Notice that it is the same that appeared.

3 Bulst. 202. *Vide* Salk. 88.

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(D) Of the Power of an Attorney when appointed, and the Regularity of his Proceedings.

Comb. 40. Rol. Abr. 3 8. Ro. Rep. 366. THE Authority of an Attorney, when appointed, continues until Judgment, and for a Year and a Day afterwards to sue out Execution, and for a longer Time if they continue Execution; but if not, the Judgment

Judgment is ſuppoſed to be ſatisfied; and to make it appear otherwiſe, the Plaintiff muſt (*a*) again come into Court, which he either does by *Scire facias*, or an Action of Debt on the Judgment. Stile 426.

(*a*) And then a new Authority is neceſſary. Salk. 86.

By the 2 *Geo.* 2. *cap.* 23. *ſect.* 22. it is enacted, "That every Writ and "Proceſs for arreſting the Body, and every Writ of Execution, or ſome "Label annexed to ſuch Writ or Proceſs, and every Warrant that ſhall be "made out upon any ſuch Writ, Proceſs, or Execution, ſhall before the "Service or Execution thereof, be ſubſcribed or indorſed with the Name "of the Attorney, Clerk in Court, or Solicitor, written in a common "legible Hand, by whom ſuch Writ, Proceſs, Execution or Warrant re-"ſpectively ſhall be ſued forth; and where ſuch Attorney, Clerk in Court, "or Solicitor, ſhall not be the Perſon immediately retained or employed "by the Plaintiff in the Action or Suit, then alſo with the Name of the "Attorney or Solicitor ſo immediately retained or employed, to be ſub-"ſcribed or indorſed, and written in like Manner; and that every Copy "of any Writ or Proceſs that ſhall be ſerved upon any Defendant, ſhall "before the Service thereof be in like Manner ſubſcribed or indorſed "with the Name of the Attorney or Solicitor who ſhall be immediately "retained or employed by the Plaintiff in ſuch Writ or Proceſs."

All Warrants for confeſſing Judgments taken by any Sheriff or Bailiff from any Perſon in his or their Cuſtody by Arreſt, if not executed in the Preſence of ſome ſworn Attorney of either Court, and his Name ſet or ſubſcribed thereto as a Witneſs, ſhall not be good or of any Force, and upon Oath made that the ſame was not done, the ſame ſhall be ſet aſide, and the Sheriff or Officer may be puniſhed for ſo doing; and if Judgment be entered thereon, the ſame on Motion will be vacated and ſet aſide; and if Execution thereon be executed, the Party will have Reſtitution awarded him. For this *vide* Salk. 402. pl. 12. 6 Mod. 85. 163. Ld. Raym. 345, 598. Barnes 28, 37, 188. 2 Barnes 36, 51.

Stra. 526, 530, 639. 2 Stra. 718, 807. 2 Ld. Raym. 1532. 2 Stra. 884. Barnard. K. B. 357, 358, 404. 2 Stra. 902, 1243, 1247. 8 Mod. 144. Comb. 76, 224. Fitzgib. 191. 8 Mod. 77. See Andr. 54. 309.

In *Aſſumpſit* the Defendant pleaded *Non Aſſumpſit infra ſex annos*; the Plaintiff replied, and for Want of the Defendant's joining Iſſue in due Time, the Plaintiff's Attorney ſigned Judgment, but afterwards conſented to accept the Joinder in Iſſue; but upon Motion to the Court to compel him to accept it, it was oppoſed, becauſe the Plea was a hard Plea, and the Client had Notice of the Advantage, and ordered the Attorney to inſiſt upon it. The Court ſaid, That ſince it was a hard Plea, they would not have compelled him if he had not conſented to wave the Advantage, but now they would hold him to his Conſent; and for the Client, he was (*b*) bound by the Conſent of his Attorney, and they could take no Notice of him. Salk. 86. pl. 2.

(*b*) that the Attorney's Conſent to ſtand to an Arbitration will bind the Client, *vide* Carth. 412. Salk 70. pl. 3. Skin. 679. 2 Salk. 787. 12 Mod. 129. Comb. 439.

* In Debt the Plaintiff by Attorney cannot enter a *Retraxit*, becauſe that is a perpetual Bar, and in Nature of a Releaſe. *Page 89 8. Co. 58.

Cro. Jac. 211. Jenk. 283. In Treſpaſs in *C. B.* there was a Verdict for the Plaintiff, and his Attorney entered a *Remittit Damna* as to Part, and Judgment for the Reſt; and it was held, that the Attorney, by his being conſtituted Attorney, may remit Damages, and that a *Remittitur* need not be by the Plaintiff *in propria Perſona*, as a *Retraxit* muſt. Salk. 89. pl. 9. *Lamb* and *Williams*.

If

Jenk. 52. Where two brought a Writ of Error, and the Attorney for one of the Parties aſſigned Errors, to which the Defendant took Iſſue, and the other would plead in Abatement. *Vide* 6 Mod. 40. 2 Stra. 783. Barnard. K. B. 4. Fitzgib. 1. and Tit, *Error*.

If a Client deſires his Attorney to put in a Plea, which the Attorney knows to be falſe, in ſuch Caſe he may plead *quod non fuit veraciter Informatus*, and thereby he diſcharges his Duty.

(E) Of the Determination of his Power; and herein of diſmiſſing or changing him.

Vide Fareſt. 50. 12 Mod. 440. 8 Mod. 306, 3 Will. Rep. 104, 277.

BY an Order of the Courts it is provided, That no Perſon without Rule of Court, Order of the Judge or Secondary, and Notice to the adverſe Party or his Attorney, ſhall change or ſhift his Attorney; or if done by ſuch Order as aforeſaid, ſuch Attorney newly coming in, is to take Notice, at his Peril, of the Rules in the Cauſe, whereunto the former Attorney was liable to take Notice, and ſhall alſo pay ſuch firſt Attorney, upon Demand, all ſuch Fees as the Secondary ſhall tax to be due to him.

Vide Jenk. 179. Style's Pract. Reg. 13. Raym. 18.

That where the Attorney for the Plaintiff or Defendant dies pending the Suit, and the Party whoſe Attorney is dead, will not retain another Attorney to manage his Cauſe, the Attorney againſt him may proceed, and is not bound to hinder his Client's Cauſe.

If *A.* gives a Warrant of Attorney to one to confeſs Judgment in Debt to *B.* by *Non ſum Informatus* at eight in the Morning, and at ten the ſame Day *A.* dies before the Judgment is ſigned by the Secondary, yet the Judgment is regular.

Salk. 87. pl. 6. *Vide* Raym. 69. Latch. 8. Far. 2, 93. 2 Ld. Raym. 766, 849, 850. 2 Stra. 718, 882, 1081, 1121. Andr. 54, 309.

A Warrant of Attorney to confeſs a Judgment is not revocable, and the Court will give Leave to enter up the Judgment though the Party does revoke it, but it is determinable by the Party's Death; but if the Party dies in the Vacation, the Attorney may enter up the Judgment that Vacation, as of the precedent Term, and it is a Judgment at the Common Law, as of the precedent Term, though it be not ſo upon the Statute of *Frauds* in reſpect of Purchaſers, but from the Signing; alſo *the Attorney muſt bring in the Roll before the Eſſoin of the ſubſequent Term, otherwiſe the Court will not admit it to be filed.

Barnard. K. B. 357, 358, 404. *N. B.*

*Page 190 * (F) Of his Fees and Diſburſements, and the Remedy for the Recovery of them.

Vide Cro. Car. 159. and Title Maintenance. (*a*) If an Attorney alledges a ſpecial Promiſe to pay, the Statute cannot be pleaded. Salk. 86. pl. 1. Comb. 126. Al. 4. So if there be three Counts in the Declaration; The firſt for Work done in proſecuting, &c. 2d. Upon an executory Conſideration to proſecute and defend Suits, and alledging a Performance. 3d. Upon a general *Indebitatus Computaſſet.* Carth. 57.

BY the 3 *Jac.* 1. *cap.* 7. it is enacted, "That no Attorney, Solicitor, "or Servant to any, ſhall be allowed from his Client or Maſter, of or "for any Fee given to any Serjeant or Counſellor at Law; or of or for "any Sum or Sums of Money given for Copies, to (*a*) any Clerk or

"Clerks,

" Clerks, or Officers in any Court or Courts of Record at (*b*) *Weſtminſter*, " unleſs he have a Ticket ſubſcribed with the Hand and Name of the " ſame Serjeant or Counſellor, Clerk or Clerks, or Officers aforeſaid, teſti- " fying how much he hath received for his Fee, or given or paid for Co- " pies, and at what Time, and how often; and that all Attornies and Soli- " citors ſhall (*c*) give a true Bill unto their Maſters or Clients, or their Aſ- " ſigns, of all other Charges concerning the Suits which they have for them, " ſubſcribed with his own Hand and Name, before ſuch Time as they or " any of them ſhall charge their Clients with any the ſame Fee or Charges."

(*b*) Therefore does not extend to Matters tranſacted in, or where Part of the Buſineſs was done in an inferior Court, and Part in *Weſtminſter*. Carth. 147.

(*c*) *Vide* Raym. 245. and 3 Keb. 118, 514. Where this Clauſe of the Statute was pleaded, and held a good Plea; but where the Executor of an Attorney ſued for Fees, the Court held that it was not neceſſary to have the Bill ſigned. Comb. 348. Rep. and Caſ. of Pract. *C. P.* 58. Andr. 276. 3 Vin. Abr. 308. pl. 7. Nor to an Adminiſtrator. Barnard. *K. B.* 433. Nor to a ſpecial Agreement. 2 Barnard. *K. B.* 164. nor to conveyancing Buſineſs. Barnes 37. It may be given in Evidence upon *Non Aſſumpſit* pleaded to an Action brought for Fees. Show. Rep. 338. 12 Vin. Abr. 76. pl. 71.

The Executor of an Attorney brought an Action for Fees and Law Buſineſs done by his Teſtator; Defendant moved to refer the Plaintiff's Demand to the Maſter, but denied, becauſe all the Buſineſs was done in another Court; otherwiſe had the Buſineſs been done in this Court, or partly in this; and beſides, the Plaintiff was an Executor.

Salk. 89. pl. 2 Rep. and Caſ. Pract. *C. P.* 58. 2 Stra. 1056. Andr. 276. Barnes 91, 96.

By the 2 *Geo.* 2. *cap.* 23. *ſect.* (*d*) 23. made perpetual by 30 *Geo.* 2. *cap.* 19. *ſect.* 75. it is enacted, " That no Attorney or Solicitor ſhall commence " or maintain any Action or Suit for the Recovery of any Fees, Charges or " Diſburſements at Law or in Equity, until the Expiration of one Month " or more after ſuch Attorney or Solicitor reſpectively ſhall have delivered " unto the Party or Parties to be charged therewith, or left for him, her " or them, at his, her or their Dwelling-Houſe, or laſt Place of Abode, a " Bill (*e*) of ſuch Fees, Charges and Diſburſements, written in a common " legible Hand, and in the *Engliſh* Tongue, (except Law-Terms and Names " of Writs) and in Words at Length, (except Times and (*f*) Sums) which " Bill ſhall be ſubſcribed with the proper Hand of ſuch Attorney or Soli- " citor reſpectively; and upon Application of the Party or Parties charge- " able by ſuch Bill, or of any other Perſon in that Behalf authorized, un- " to the Lord High Chancellor, or the Maſter of the Rolls, or unto any " of the Courts, or unto a Judge or Baron of any of the ſaid Courts re- " ſpectively, in which the Buſineſs contained in ſuch Bill, or the greateſt (*g*) " Part thereof in Account or Value, ſhall have been tranſacted; and upon " the Submiſſion of the ſaid Party or Parties, or ſuch other Perſon autho- " rized as aforeſaid to pay the whole Sum, that upon Taxation of the ſaid " Bill ſhall appear to be due to the ſaid Attorney or Solicitor reſpectively, " it ſhall and may be lawful for the ſaid Lord High Chancellor, the ſaid " Maſter of the Rolls, or for any of the Courts, or for any Judge or Baron " * of any of the ſaid Courts reſpectively, and they are hereby required to " refer the ſaid Bill, and the ſaid Attorney or Solicitor's Demand there- " upon, (although no (*h*) Action or Suit ſhall then be depending in ſuch " Court touching the ſame) to be taxed and ſettled by the proper Officer

(*d*) This Act does not extend to any Bill of Fees and Diſburſements due from one Attorney and Solicitor to another. Stat. 12 G. 2. c. 13. ſ. 6.

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(*e*) That ſo the Client may have an Opportunity of looking into it before he is run to any further Expence. Str. 633. Pract. Reg. *C. P.* 36. Rep. and Caſ. Pract. C. P. 27. Barnes 28. Heretofore it was a common Thing for an Attorney to deliver in his Bill at any Time pending the Suit. Barnard. *K. B.* 316. Taxation cannot regularly be applied for before Bill delivered. Barnes 102. Rep. and Caſ. Pract. *C. P.* 60. (*f*) Every Attorney, *&c.* may write his Bill of Fees and Diſburſements with ſuch Abbreviations as are now commonly uſed in the *Engliſh* Language, any Thing in the above Act to the contrary notwithſtanding. Stat. 12 Geo. 2. c. 13. ſ. 5. See Barnes 94. Pract. Reg. C. P. 37. (*g*) See Barnes 95. Salk. 89. pl. 10. (*h*) See Barnes 95. Salk. 89. pl. 10.

" of

(a) Heretofore no Rule could be made for referring an Attorney's Bill delivered to his Client, unleſs there had been an Action pending thereon. Salk. 332. pl. 8. Previous to this Statute, *viz.* the very Year next before; the late Lord Chancellor *King* declared, that he firſt introduced the Practice of bringing in the Money into the Courts at Law, when he was *L. C. J. C. P.* and that the ſame Rule was afterwards obſerved in *K. B.* for the Party being ſtopped from ſuing at Law, he thought it reaſonable that the Attorney ſhould have Security for his Money, but refuſed to do it in Chancery. Moſ. 68. pl. 40. *Quere* therefore the *Reaſonableneſs* of this Part of the Act.

" of ſuch Court, without any Money being (a) brought into the ſaid " Court for that Purpoſe; and if the ſaid Attorney or Solicitor, or the " Party or Parties chargeable by ſuch Bill reſpectively, having due Notice, " ſhall refuſe or neglect to attend ſuch Taxation, the ſaid Officer may " proceed to tax the ſaid Bill *ex parte*, (pending which Reference and " Taxation, no Action ſhall be commenced or proſecuted touching the " ſaid Demand;) and upon the Taxation and Settlement of ſuch Bill and " Demand, the ſaid Party or Parties ſhall forthwith pay to the ſaid Attor- " ney or Silicitor reſpectively, or to any Perſon by him authorized to re- " ceive the ſame, that ſhall be preſent at the ſaid Taxation, or otherwiſe " unto ſuch other Perſon or Perſons, or in ſuch Manner as the reſpective " Court aforeſaid ſhall direct, the whole Sum that ſhall be found to be or " remain due thereon; which Payment ſhall be a full Diſcharge of the " ſaid Bill and Demand; and in Default thereof, the ſaid Party or Parties " ſhall be liable to an Attachment or Proceſs of Contempt, or to ſuch " other Proceedings at the Election of the ſaid Attorney or Solicitor, as " ſuch Party or Parties was or were before liable unto; and if upon the ſaid " Taxation and Settlement it ſhall be found that ſuch Attorney or Solicitor " ſhall happen to have been over-paid, then in ſuch Caſe the ſaid Attorney " or Solicitor reſpectively ſhall forthwith refund and pay unto the Party " or Parties intitled thereunto, or to any Perſon by him, her or them au- " thorized to receive the ſame, if preſent at the Settling thereof, or other- " wiſe unto ſuch other Perſon or Perſons, or in ſuch Manner as the re- " ſpective Court aforeſaid ſhall direct, all ſuch Money as the ſaid Officer " ſhall certify to have been ſo over-paid; and in Default thereof, the ſaid " Attorney or Solicitor reſpectively ſhall in like Manner be liable to an " Attachment or Proceſs of Contempt, or to ſuch other Proceedings at " the Election of the ſaid Party or Parties, as he would have been ſubject " unto if this Act had not been made; and the ſaid reſpective Courts " are hereby authorized to award the Coſts of ſuch Taxations to be " paid by the Parties, according to the Event of the Taxation of the " Bill, (that is to ſay) if the Bill taxed be leſs by a ſixth Part than the " Bill delivered, then the Attorney or Solicitor is to pay the Coſts of " the Taxation; but if it ſhall not be leſs, the Court in their Diſcre- " tion ſhall charge the Attorney or Client, in regard to the Reaſona- " bleneſs or Unreaſonableneſs of ſuch Bills."

(G) Of the Privileges which an Attorney has.

ATtornies have (b) Privilege not to be ſued in any other Courts except thoſe in which they are ſworn and admitted, becauſe of the Prejudice that may accrue to the Buſineſs of thoſe Courts in which their Attendance is required; neither are they to be held to ſpecial Bail, becauſe they are

2 Leo. 256. *Vide* Head of *Privilege* and Title *Abatement*. (b) But this Privilege an Attorney ſhall not have at the King's Suit. 2 Rol. Abr 274. Bro. *Superſedeas* 1. 9 H. 6. 44. Nor unleſs there be the ſame Remedy in his own Court; therefore ſhall not have it when Money is attached in his Hands by foreign Attachment in the Sheriffs Court in *London*. Sand. 67. *Vide* Comb. 427. Nor in an Action Real againſt an Attorney of the King's Bench. Sand. 67. Nor Appeal againſt an Attorney of the Common Pleas. Sand. 67. Nor when he ſues, or is ſued in *auter droit*, as Executor or Adminiſtrator. 12 Mod. 316. Ld. Raym. 533. Hob. 177. Salk. 2. pl. 4. Nor when one Attorney ſues another. 2 Mod. 298. 2 Rol. Abr. 274. Barnes 35. Nor when he joins or is joined in the ſame Action with others. Vent. 298. Dyer 277. Godb. 10. 2 Rol. Abr. 275.

obliged

obliged to attend, and therefore are presumed to be always amenable; also as Officers of the Court they are intitled to the Process of Attachment, and may sue by Attachment of Privilege.

* Also if an Attorney of any of the Courts of *Westminster-Hall* be chosen Constable, he may have a Writ of Privilege for his Discharge, for his Attendance being necessary in those Courts, it is apparent that he cannot execute any inferior Office in Person; and this Privilege he shall have, not only where there is no special Custom concerning the Election of Constables, but also where they are chosen by a particular Custom in respect of their Estates, or otherwise, for that no such Custom shall be intended to be more antient than the Usages of those Courts, and therefore shall give Way to them. *Page 192 Cro. Car. 283, 389. Vent. 16, 29. Noy 112. March 30. 2 Keb. 477, 508. Lev. 265. Mod. 13. Raym. 179.

11 Mod. 215. pl. 3. 227. pl. 1. 12 Mod. 88, 115, 180, 256. Ld. Raym. 94. Skin. 669. Fitzgib. 192. 2 Stra. 1050. Doug. 538. 2 Term Rep. 403.

(H) Of Offences and Misbehaviour for which he is punishable; and herein of the Form of the Proceedings against him.

Attornies are Officers of the Court, and liable to be punished in a summary Way, either by Attachment, or having their Names struck out of the Roll of Attornies, for any ill Practice attended with Fraud and Corruption, and committed against the obvious Rules of Justice and common Honesty: But the Court will not easily be prevailed on to proceed in this Manner; if it appears that the Matter complained of was rather owing to Neglect or Accident, than Design, or if the Party injured has other Remedy provided by Act of Parliament, or Action at Law. Stile 426. Cro. Car. 52, 74. 6 Mod. 16, 187. 8 Mod. 109. 10 Mod. 45. 12 Mod. 251, 318, 440, 583, 657, 666.

Fitzgib. 191. Barnes 159. 2 Barnes 39, 290. 4 Mod. 367. and the preceding Authorities. Cowp. 829. Doug. 114. 3 Term Rep. 275.

But if an (*b*) Attorney takes upon him to prosecute or defend a Suit for another, without any Manner of Directions from him, the Court will grant an Attachment against him. 38 E. 3. 8. b. Rastal. 582.

(*b*) Also a Person taking upon himself to prosecute or defend any Action, who is no Attorney, is liable to be punished in this Manner, whether he had any Directions or not. 2 Hawk. P. C. 144. In Strictness, he is liable to be punished unless he record his Authority or Warrant of Attorney in Time. 2 Hawk. P. C. 144.

Attornies are also punishable for base and unfair Dealings towards their Clients in the Way of Business, as for protracting Suits by little Shifts and Devices, and putting the Parties to unnecessary Expences in order to raise their Bills, or demanding Fees for Business that never was done, or for (*c*) refusing to deliver up to their Clients Writings with which they had been intrusted in the Way of Business, or (*d*) Money which has been recovered and received by them to their Client's Use, and for other such like gross and palpable Abuses. Rastal. 93. pl. 3. 2 Hawk. P. C. 144.

(*c*) But the Court will seldom grant an Attachment for the Detainer of such Writings or Money, without first making a Rule on the Attorney to deliver them to the Party; also it will justify an Attorney's detaining such Writings or Money for his Security, till he be paid all his just Fees; nor will it ever interpose in this Manner, as to any Writings or Money received by an Attorney on any other Account, except only in his Way of Business as an Attorney, but will leave the Party to his ordinary Remedy by Action. Salk. 87. pl. 5. See Stra. 547, 621. 8 Mod. 306. 12 Mod. 516, 554. 2 Barnard. K. B. 263. (*d*) Attornies imbezzilling their Client's Money except out of the Insolvent Debtors Act.

Attornies

Cro. Car. 74. Dyer 241. pl. 50. 244. pl. 58. Fitz. Attachment 3, 7. 16. E. 4. 5. Bro. Privilege 43.

Attornies are puniſhable for diſobeying the Rules of Court, of which they have Notice, either expreſsly or impliedly; alſo for forging a Writ, or any other Matter of Record, or but attempting to do it, or for taking out a *Capias* which has no Original to warrant it*, or for receiving Money of a Client for ſuing out an Original, and alſo for the Fine due thereon to the King, where in Truth no Original was ſued out, nor any Fine paid to the King, or for endeavouring to impoſe upon the Court, as by cauſing an Action to be brought againſt one in it, by Colluſion, without any juſt Ground, in order thereby to intitle the Party to the Privilege of the Court, * and afterwards, upon the Examination of the Matter in Court, giving a falſe Account of it, or for giving Directions to a Sheriff concerning what Perſon he ſhould return on a Panel†.

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Cowp. 829. 1 Com. Dig. 447, 448. Com. Dig. 475. Doug. 114. 3 Term. Rep. 275. Moor 882. 2 Hawk. Pl. Cr. 145. c. 22. ſ. 11. 1 20 H. 6. 37. a. 2 Init. 215. Lit. Rep. 46. 4 Inſt. 101. Hetl. 29.

* This muſt now be underſtood to relate to Suits by Original, in *B. R.*

† An Attorney ordered to pay Coſts, (as well as his Client) having joined in an Affidavit, to ſupport a frivolous Complaint, and made reſentful Declarations, which ſhewed him to be perſonally active in it. 2 Bur. 654.——Where Attornies act properly the Courts will take particular Care to protect and countenance them.

Audita Querela.

AN *Audita Querela* is a Writ to be relieved againſt an unjuſt Judgment or Execution, by ſetting them aſide for ſome Injuſtice of the Party that obtained them, which could not be pleaded in Bar to the Action; for if it could be pleaded it was the Party's own Fault, and therefore he ſhall not be relieved, that Proceedings may not be endleſs.

(A) **Who may be relieved by** Audita Querela, **and againſt whom.** 193.
(B) **In what Caſes an** Audita Querela **will lie.** 194.

(A) Who may be relieved by Audita Querela, and againſt whom.

2 Inſt. 673. Dyer 232. S. P. Moor 75. S. P. adjudged.

IF an Infant acknowledges a Recognizance, Statute-Merchant or Staple or Recognizance in Nature of a Statute-Staple, he cannot avoid this without an *Audita Querela* brought before his full Age, becauſe his Nonage ought to be tried by Inſpection.

10 Co. 43. S. P. adjudged. Noy 16. Yely. 88. Cro. Jac. 59. 2 Rol. Abr. 57. 2 Bulſt. 320. Vide Reg. 149. F. N. B. 105. That an Infant may bring an *Audita Querela* to avoid a Statute for his Nonage, although it be not certified or returned in any Court. Ander. 228. And there ſaid, that the common Practice was ſo, elſe the Conuzor might be of Age before the Conuzee would procure it to be certified. *Vide* 3 Bulſt. 307. *Vide* Title *Infant.*

If

If *A.* being within Age becomes Bail for *B.* and after two *Scire fa.* and *Nihil* returned, Judgment is given againſt *A.* &c. he may have an *Audita Querela* and avoid the Recognizance, and ſo the Judgment thereupon of Conſequence ſhall be avoided. Yelv. 155. Cro. Jac. 646. S. P. *Vide* Co. Ent. 87, 88.

Where an Infant was Bail and taken in Execution, and he brought an *Audita Querela*, and moved to be inſpected; and the Court, as a Matter diſcretionary, refuſed to admit him to Bail till he corroborated his Allegation by the Oaths of Witneſſes, and a Copy of the Regiſter where he was born was produced, and then he was diſcharged; but if he had brought his *Audita Querela* before he was taken in Execution, he muſt have had a *Superſedeas* of Courſe. Carth. 278, 279. Tidd's Practice, 130.

But if *A.* being within Age enters into a Bond to *B.* who procures *C.* without any Warrant, to appear for *A.* and confeſſes a Judgment thereupon, * yet *A.* ſhall not have an *Audita Querela*, but he muſt take his Remedy by Action of Diſceit againſt the Attorney*. *Page 194 Cro. Jac. 694. *Vide infra* Letter B.

* *Sed qu.* If the Court would not, on Motion, have ſet aſide the Judgment?

If Tenant in Tail acknowledges a Statute, and dies, the Conuzee ſues Execution againſt the Heir, he may avoid it by Aſſiſe, without being put to his *Audita Querela*. Rol. Abr. 305. Cro. Jac. 85. *Vide* Sid. 55.

But the Iſſue at his Election may have an *Audita Querela*, if he will. Rol. Abr. 305. Cro. Jac. 85. That this is only an equitable Action, and may be brought by a Reverſioner, or him that has but *Intereſſe Termini*, or might have been by *Ceſtui que Uſe* before the Statute. March 71.

So if a Diſſeiſor acknowledges a Statute, and the Diſſeiſee enters, the Conuzee extends the Land, the Diſſeiſee is not put to his *Audita Querela* to avoid the Extent, becauſe there is not the Appearance of Juſtice in this Extent, the Conuzor having only a tortious and unlawful Seiſin of the Land, and conſequently no Power to charge it. Rol. Abr. 304. Cro. Jac. 424.

But if *A.* be Tenant for Life, Remainder to *B.* his Son in Tail, *A.* enters into a Recognizance and dies, *C.* brings a *Scire facias*, and *B.* is returned Heir and Tertenant, and warned, but makes Default; he can have no *Audita Querela* to avoid this Execution, becauſe he had a Day given him in Court to ſet aſide the Recognizance, and it was his Folly not to appear when warned. Raym. 19. Sid. 54. Keb. 112, 141. Lev. 41, 42. S. C. between *Day* and *Guildford*. *Vide infra* Letter C.

If a Statute be acknowledged to two, of which one is an Infant, and they make a Defeazance, and after ſue Execution contrary to it, an *Audita Querela* ſhall be brought againſt both, for it does not appear within the Deed that he is an Infant; alſo the Deed of an Infant is only voidable, and peradventure he will affirm it. 48 E. 3. 12. b. Rol. Abr. 312.

If a Statute be made to Baron and Feme, and they make a Defeazance, and ſue Execution contrary to it, the *Audita Querela* ſhall be brought againſt both, although the Defeazance be void as to the Wife; for this Action is in Lieu of an Anſwer of the Execution, which is ſued by both; and this is all one as if the Baron alone had made the Defeazance, which would have been a ſufficient Diſcharge. 48 E. 3. 12. Rol. Abr. 312.

If a Statute be acknowledged to a Feme Sole and *J. S.* and after the Feme takes Huſband, and *J. S.* releaſes, and after Execution is ſued, the *Audita Querela* may be brought againſt the Baron and Feme and *J. S.* 11 E. 4. 8. b. Rol. Abr. 312.

If two Executors ſue Execution for Damages recovered by the Teſtator, where one hath releaſed, an *Audita Querela* lies againſt both. 21 E. 3. 13. b. Co. Ent. 89.

Rol. Abr. 312. That no *Audita Querela* lies againſt the King. Noy 26. 2 Bulſt. 325. Jenk. 129.

(B) In what Cases an Audita Querela will lie.

Cro.Eliz.40. And. 133. Rol. Abr. 318. Co.Lit.265, 291. 10 Co. 47.

IF a Conuzee of a Statute releaſes to the Tertenant all Right, Intereſt and Demands, together with all Suits and Executions, and afterwards ſues Execution, the Tertenant ſhall have an *Audita Querela* to ſet aſide this Execution.

But it may be demanded, How a Statute, which has the Force and Solemnity of a Judgment, can be avoided by an Act of leſs Notoriety than itſelf; as a Releaſe, which is an Act *in Pais*, muſt be confeſſed to be; which overthrows the eſtabliſhed Rule *unumquodque ſolvi eo Ligamine quo Ligatur*. The Anſwer to this is, that notwithſtanding the Releaſe, &c. from the Conuzee, the Statute ſtill continues in Force; but the Law with Reaſon conſtruing all Mens Deeds moſt ſtrongly againſt themſelves, by this Act precludes the Conuzee from Execution; but this muſt be by bringing an *Audita Querela*; for without this, nothing appears to the Court deſtructive of the Statute: The Words of the Releaſe muſt be comprehenſive enough. *Vide* Cro. Eliz. 552. and the Authorities *ſupra*.*

* See farther, Com. Dig. 1 V. 485, &c.

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Rol. Abr. 307. Noy 26. Cro. Jac. 646. Hob. 162. Yelv. 125.

* So in Treſpaſs or other Action, if it be found for the Plaintiff at *Niſi prius*, and after, before the Day in Bank, the Plaintiff releaſes to the Defendant, and after Judgment is given for the Plaintiff, the Defendant ſhall have an *Audita Querela* upon this Matter, becauſe he could not plead the Releaſe at the Day in Bank.

But if it had been in the Caſe of the King, the Defendant at the Day in Bank might have pleaded it, becauſe no *Audita Querela* lies againſt the King. Noy 26. If there be Judgment againſt the Defendant for Debt and Damages, and before Execution the Money is paid to the Plaintiff, who thereupon releaſes the Defendant, and afterwards takes him in Execution within the Year, yet he ſhall not have an Action for this Vexation, but muſt bring an *Audita Querela*. 4 Mod. 14. *

* *Sed. qu.* Would not a ſpecial Action on the Caſe lie?

Rol. Abr. 307. F.N.B.105, *vide* 1 Danv. Abr. 633.

If a Conuzee of a Statute gives a Deed of Defeaſance to the Conuzor, and afterwards ſues Execution, contrary to the Form of the Defeaſance, the Conuzor may have an *Audita Querela*, becauſe the Defeaſance precludes the Execution, if the Terms or Condition of it be performed by the Conuzor; and the Conuzor may have an *Audita Querela*, though the Condition be not performed according to the Defeaſance, if Execution was ſued before the Condition broken, becauſe the Conuzee extended before his Time; and therefore the Execution being unjuſtly ſued, muſt conſequently be an Injury to the Conuzor.

Moor, pl. 1097.

In *Audita Querela* the Caſe was this: The Conuzee gave a Defeaſance, that if he ſued Execution of the Lands the Conuzor had in *Kent*, the Statute ſhould be void; the Conuzee, contrary to his Defeaſance, extended the Land in that County; and it was adjudged this Writ well lay to avoid the Execution and vacate the Statute; for the Defeaſance was no way repugnant to the Statute, becauſe the Conuzee might ſtill extend the Lands of the Conuzor in any other County, and take his Body and Goods.

F.N.B.104.

If *A.* enters into a Statute to *B.* and pays the Money at the Day aſſigned, upon which the Statute is cancelled, and after *B.* forges a new Statute in the Name of *A.* in this Caſe *A.* may relieve himſelf by *Audita Querela*, for the forged Statute having all the Eſſentials of a true one, the Court was obliged to look on it as ſuch till the contrary appeared, which the Conuzor could not ſet forth before Execution, having no Day to appear judicially in Court, and therefore is put to this Writ to avoid the Execution founded on the Injuſtice of the pretended Conuzee.

If

If the Conuzee of a Statute, upon Agreement with the Conuzor, delivers up the Statute in Lieu of an Acquittance, and after ſues Execution, and the Conuzor prays a Re-extent, becauſe that the Land was extended too low, and has it granted him, he ſhall never avoid the Extent by *Audita Querela*, becauſe by his praying the Re-extent, he admits the Statute good and executory. Rol. Abr. 313.

If upon an *Elegit* the Sheriff takes an Inquiſition, and there are ſeveral Lands found ſubject to the Extent, and ſeveral Values found, and the Sheriff returns, that he has delivered ſome of the Lands in particular for the Moiety, where it appears according to the Values found, that an equal Moiety is not delivered to the Party who recovered, but more than a Moiety; yet this is not void, nor is it a Diſſeiſin by the Entry, but only voidable by *Audita Querela*. Rol. Abr. 305.

If a Man in Execution upon a Judgment for Debt or Damages, be delivered out of Execution by the Sheriff or Gaoler who hath him in Execution, with the Aſſent of him at whoſe Suit he is in Execution, and after, by Colour of this Judgment, he takes him again and puts him in Priſon, an *Audita Querela* lies upon this Matter, and thereupon he ſhall be delivered. Rol. Abr. 307. So if the Plaintiff conſents that one Defendant only ſhall be delivered out of Execution. Stile 387. So if one of the Bail be delivered out of Execution, he ſhall not take the other. 3 Leon. 260. Stile 117.*

* In all theſe Caſes however, the Court would probably on Motion, without putting the Party to the Expence and Trouble of an *Audita Querela*, ſet an Execution aſide, or direct the Sheriff to do what was proper, where he had levied or extended more than he ought.

* But if *A.* be in Execution at the Suit of *B.* and after *A.* eſcapes with the Conſent of the Sheriff, and after *A.* returns to the Priſon, and the Sheriff keeps him in Priſon upon the ſaid Execution, *A.* ſhall not be diſcharged by *Audita Querela*, for B. has it ſtill in his Election to have him in Execution at his Suit, and ſhall not be compelled to take his Remedy againſt the Sheriff for this voluntary Eſcape, who perhaps may be worth nothing. *Page 196

Vide Title Execution, and Rol. Abr. 307. Hob. 60. Cro. El. 555. Moor 57. 2 Leon. 118.

If the Principal be taken in Execution upon a Judgment, and after a *Scire facias* returned according to the Courſe of the Court, Judgment is given againſt the Bail, and thereupon he is taken in Execution, and after the Principal is delivered upon an *Audita Querela*, becauſe the Recoverer had acknowledged Satisfaction, *&c.* in this Caſe, though the Recognizance was forfeited by the Bail, by not bringing in the Principal at the Time appointed by Law; yet in as much as the Judgment and Execution againſt the Bail depends upon the Judgment againſt the Principal, and he was but a Security for the Payment of the Money, of which the Recoverer is ſatisfied, the Bail ſhall be diſcharged *. *Vide* Head of Bail in Civil Caſes, and Rol. Abr. 308.

* If the Principal is taken in Execution, the Bail may plead it in diſcharge of themſelves, and if by Accident, they omit to plead it, and Execution iſſues againſt them, I conceive on Motion the Court would ſet the Execution aſide, the Plaintiff being ſatisfied, by having the Body of the Principal in Execution.

If *A.* and *B.* are bound in an Obligation joinly and ſeverally, and Judgment given againſt each on ſeveral Actions brought, and both taken in Execution, and after *A.* eſcapes, yet *B.* ſhall not be delivered upon an *Audita Querela*; for though the Obligee may have an Action againſt the Sheriff 5 Co. 86. Bloomfields Caſe. Rol. Abr. 308. S. C.

Q. If there be a Diverſity where the Plaintiff recovers againſt the Sheriff in Debt, and where in Caſe. *Vide* Mod. 170. 12 Mod. 105, 598. Danv. Abr. 635.†

Sheriff for the Eſcape, yet till he is actually ſatisfied, the other ſhall not have an *Audita Querela*, for perhaps the Sheriff is worth nothing.

† I ſhould conceive there is not any Diverſity, but that Plaintiff being *ſatisfied* by the Sheriff (and not till then) the Court would diſcharge *B.* out of Cuſtody, on Motion.

Rol. Abr. 304. Cro. Jac. 424, 477. S. C. between *Harrington and Garraway.*

If *A.* leaſes *Black-acre* for Years to *B.* and then acknowledges a Statute to *C.* and afterwards another to *D.* then *C.* takes a Leaſe of the Reverſion, and the Rent from *A.* by which he has ſuſpended the Execution of the Statute during the Term, and conſequently laid the Land open to the Extent of *D.* the ſecond Conuzee, who ſues Execution; if therefore *C.* ſhould extend the Reverſion and Rent during his own Leaſe, *B.* the Leſſee is not obliged to pay him the Rent, but may avoid the Extent by Plea without *Audita Querela*, becauſe *C.* hath ſuſpended the Execution of his Statute, the firſt in Date, by the Acceptance of the Leaſe from the Conuzor.

Cro. El 233. 319, 810. Leon. 229. Owen 142. Dyer 35. pl. 27.

If a Statute is erroneouſly acknowledged, as before one that has no Authority; or if a Statute-Merchant hath but one Seal, an *Audita Querela* (*a*) lies, and not a Writ of Error, for this is no Record; but if a Statute is well acknowledged, and the Execution erroneous, a Writ of Error lies.

(*a*) That it lies where a Man ought not to be charged, and yet without any default in himſelf hath no other way of avoiding it. Kelw. 25. That it muſt be founded upon a Suggeſtion not contrary to, but admitting the Verdict. Sav. 69, 70. Where a Judgment in a Copyhold Court reverſed upon Petition to the Lord, and the Party reſtored to his Damages by *Audita Querela*. Hob. 54. Where after Judgment the Treſpaſs was diſcharged by an Act of Indemnity. 2 Mod. 37. Fitzgib. 88, 130. Raym. 89. Keb. 634. Where the Party muſt bring a *Scire facias*, and cannot be relieved by *Audita Querela*, *vide* Title *Scire facias*. And where a Writ of *Error*, *vide* Title *Error*, and Carth. 282. 4 Mod. 314. Ld. Raym. 27. Salk. 262. pl. 3. And where the Party may be relieved on Motion. Salk. 93. pl. 4.*

* I think there are very few Caſes where the Court would not relieve on Motion.—The Party moving ſtates the Grounds of his Application on Oath.—A Rule to ſhew Cauſe, being granted, the other Party, if he does not anſwer on Oath, admits the Facts. The only Queſtion then is, Are the Facts ſufficient for the Court to grant the Relief prayed, or not?—If the Adverſe Party anſwers on Oath, he admits, or he denies the Facts *in toto*, or in Part.—If all the Facts are not poſitively denied, the Court will act according to the Juſtice of the Caſe.—If the adverſe Party abſolutely denies all the Facts, the Party applying cannot of Courſe be relieved on Motion, but muſt bring his *Audita Querela*, or perhaps an Action; if the Merits are with him, and he would do right to indict the adverſe Party for Perjury, ſuppoſing his Denial of the Facts, contrary to the Truth of the Caſe.

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F.N.B. 104. Rol. Abr. 308. Q.

If a Statute be delivered to *B.* to be kept in an indifferent Hand, upon certain Conditions between the Conuzor and Conuzee; if *B.* before the * Conditions performed, delivers it to the Conuzee, and he ſues Execution, the Conuzor at his Election may either have an *Audita Querela* upon this Matter, or a Writ of *Diſceit* againſt *B.*‡

‡ Or perhaps a ſpecial Action upon the Caſe.

Cro. Jac. 218. So upon a Promiſe to diſcharge, &c.

If the Conuzor is taken in Execution upon a Statute, and the Conuzee covenants to diſcharge him from the Statute, the Conuzor ſhall not thereupon have an *Audita Querela*, but muſt take his Remedy by Action of Covenant.

an Action upon the Caſe only lies. Bulſt. 152.

Rol. Abr. 310.

If a Man makes a Feoffment upon Condition to re-infeoff him, and after the Feoffee, to the Intent to deceive him, falſely and by Covin between him and *B.* acknowledges a Recognizance to *B.* and after re-infeoffs him, the Feoffee may have an *Audita Querela* upon this Matter; for this is grounded upon the Matter of Record, as well as upon the Matter of Diſceit, which is Matter *in Pais.*

If

If a Man acknowledges a Statute, which is uſuriouſly entered into, and the Conuſee ſues Execution, the Conuzor ſhall have an *Audita Querela* upon this Matter. 1 Rol. Abr. 310. An *Audita Querela* lies upon a Suggeſtion that a Statute was made by *Dureſs* of Impriſonment. Rol. Abr. 310. Owen 142. Vidian Ent. 107. So upon a Suggeſtion that it is forged. F. N. B. 104.

If *A.* hath Lands in ſeveral Counties, and enters into a Recogniſance to *B.* and after acknowledges a Statute to *C.* upon which *C.* extends the Lands in one County, and after *B.* ſues Execution upon the Recogniſance, and hath the Moiety of the ſame Lands delivered to him, but ſued no Execution of the Moiety of the Lands in the other County; *A.* hath no Reaſon to complain, becauſe *B.* hath taken in Execution only a Moiety of his Lands, but *C.* may have an *Audita Querela* againſt *B.* becauſe it is prejudicial to him. 2 And. 170. Yelv. 12. Noy 47.

If the Conuzor infeoffs ſeveral Men of ſeveral Parts of the Land, and after the Conuzee ſues Execution of the Statute againſt one, he ſhall have an *Audita Querela* (*a*) upon this Matter. 1. Rol. Abr. 311. (*a*) But whether thereupon the Execution ſhall be avoided, or the Party only have Contribution, *vide* 3 Co. 14. b. 2 Inſt. 396. Mo. 537. Dyer 331. Bulſt. 15, 17. But now *vide* 16 & 17 Car. 2. cap. 5. made perpetual by 22 & 23 Car. 2. cap. 2. by which no extent upon any Statute, Judgment or Recogniſance ſhall be avoided or delayed, becauſe Part of the Lands extendable are omitted, ſaving to the Party, whoſe Lands are extended, his Remedy for Contribution. But note; No Statutes, unleſs conditioned for Payment of Money only, nor Extents, unleſs within twenty Years after Judgment, &c. had, are within this Act *.

* Nor is Extent or Contribution given by the Act, againſt any Heir within Age.

If *A.* brings an *Audita Querela* againſt *B.* and declares, that whereas *B.* had recovered againſt *A.* 200*l.* Debt, &c. and thereupon the ſaid *A.* was outlawed, and upon a *Capias Utlagatum* taken, and in Execution at the Suit of the ſaid *B.* and after from the ſaid Execution was delivered and ſuffered to go at large, &c. and yet *B.* hath taken out Execution upon the ſaid Judgment, and endeavours, &c. the Defendant may plead and ſhew, how that after the ſaid Enlargement, and before the Purchaſe of the *Audita Querela*, the Outlawry was ſet aſide and made void, and ſo conclude *Quod non habetur tale recordum.* 8 Co. 141. Dr. Drury's Caſe *vide* Mod. 111. 3 Keb. 291. Rob. Ent. 157. 12 Mod. 105, 240. Ld. Raym. 439. Vent. 34. Salk. 264. pl. 6.

If *A.* hath Judgment againſt *B.* for Coſts and Damages, and releaſes to *B.* all Executions, and after *B.* brings a Writ of *Error*, and thereupon the Judgment is affirmed, and further Coſts given for the Delay of Execution, and *A.* takes *B.* in Execution for the Whole, upon an *Audita Querela*, *B.* ſhall be diſcharged *quoad* the Damages and firſt Coſts, but not *quoad* the ſecond Coſts. Cro. Jac. 337. Rol. Rep. 11. S. C. *quod vide.*

*If *A.* as Adminiſtrator recovers Damages in Trover againſt *B.* and after his Adminiſtration is repealed, and granted to another, upon a Surmiſe that *A.* intends and endeavours to ſue Execution, *B.* may have an *Audita Querela*; for by the Repeal of the Adminiſtration the Power of *A.* is abſolutely determined. *Page 198 2 Sand. 148. *Turner* and *Davis* Mod. 62.

2 Keb. 668. Lutw. 343. For this *vide* Brownl. 29, 91. Yelv. 125. Noy 15. Stile 417. Dyer 203. Cro. Jac. 394. 6 Mod. 92. Fitzgib. 202, 257, 258. 10 Mod. 21, 22, 389. Comyns 150. pl. 102. 2 Will. Rep. 576. pl. 188. 3 Will. Rep. 88, 89. and *vide* Tit. *Executors and Adminiſtrators*, and 17 Car. 2. cap. 8. revived and made perpetual, by 1 Jac. 2. cap. 17. ſect. 5. whereby the Adminiſtrator *de bonis non* is enabled to take out Execution upon a Judgment obtained by the Executor or former Adminiſtrator; and note this *Audita Querela* was brought only againſt the firſt Adminiſtrator, and does not diſcharge the Judgment, but the Execution at his Suit only. *Vide* Co. Ent. 91. a. An Executor *durante minori ætate*, obtains Judgment, and the Infant comes of Age, &c. *Quære* if an *Audita Querela* lies. *Vide* 3 Leon. 278. Godb. 104.

AUTHORITY.

(A) Where an Authority shall be said to be given; and herein of the Construction of the Words that create it. 198.
(B) Who are capable of executing an Authority. 199.
(C) Where an Authority is well pursued and executed. 200.
(D) Where an Authority cannot be transferred. 203.
(E) When it shall be said to be determined and revoked. 204.

(A) Where an Authority shall be said to be given; and therein of the Construction of the Words that create it.

11 H. 4. 71. 2 Rol. Abr. 8. Co. Lit. 52. *Vide* Vol. 3. Tit. *Leases and Terms for Years*, p. 408. pl. 10.

THAT Power of acting which one Man has, being transferred to another, is called an Authority, and this the Law allows of; for as a Contract is no more than the Consent of a Man's Mind to a Thing, if such Consent or Concurrence appears it would be very unreasonable to oblige him to be present at the Execution of every Contract, since it may be as well performed by any other Person delegated for that Purpose.

Co. Lit. 48. b. 2 Rol. Abr. 8. Salk. 96. *Vide infra* Letter (C. 200.) Brownl. 94.

But such Delegation or Authority must be by Deed, that it may appear that the Attorney or Substitute had a Commission or Power to represent the Party; also that it may appear that the Authority was well pursued.

If *A.* by Letter of Attorney constitutes and appoints, and in his Stead and Place puts *B.* to surrender a certain Copyhold, this Authority is sufficient, and as full as if said for him and in his Name, *&c.*

* Page 199 Rol. Abr. 328. *Emery* and *Cook.*

* If a Man signs and seals a Lease of *Ejectment* indented, but does not deliver it, and at the same Time seals and delivers a Letter of Attorney, in which he recites, *Whereas by Indenture of Lease, bearing such a Date, &c. hath demised to* B. *such Land* Habendum: *Now these Presents witness, that he makes* J. S. *his lawful Attorney to deliver the said Indenture upon the Land as his Deed*; though according to the proper Signification of the Words, the Lease ought to be taken to be delivered by him, and so this Letter of Attorney void, to deliver it again; for this cannot be an Indenture if it was not delivered; yet all Parts of the Letter of Attorney being laid together, and the Intent of the Parties, and Proof being made that the Lease was not delivered, but only signed and sealed, it appears that this was only an improper Expression of his Intent, by calling it an Indenture and a Demise; for if he had intended that this was an Indenture sealed

and delivered, this Letter of Attorney to deliver it upon the Land, need not have been made.

If the Authority in a Letter of Attorney be *ad petend'*, *recipiend'* & *recuperand'* a certain Debt, it is sufficient to Arreſt, &c. becauſe neceſſary in order to recover. Rol. Rep. 390. Palm. 394. Godb. 359. Cro. Eliz. 48.

If a Steward makes a Deputy *hac vice* to take a Surrender of a Copy-hold, & *ulterius ad faciend' quantum in ſe eſt*; by Virtue of theſe laſt Words the Deputy may take a conditional Surrender. See 12 Mod. 468.

An Authority may be delegated by Deed indented, though the Attorney be not Party to the Deed, becauſe the Attorney takes nothing by the Deed, but has only a naked Authority delegated to him; and therefore ſince a Man may take an Eſtate in Remainder, though he is no Party to the Deed, *a fortiori* one not Party to the Deed may receive a naked Authority or Power by it. 2 Rol. Abr. 8, 9. Shep. Touchſtone 217.

(B) Who are capable of executing an Authority.

THERE are few if any Perſons excluded from exerciſing a naked Authority to which they are delegated; and therefore Monks, Infants, Feme Coverts, Perſons attained, outlawed, excommunicated, Villains, Aliens, &c. may be Attorneys; for the Execution of a naked Authority can be attended with no Manner of Prejudice to the Perſons under ſuch Incapacities or Diſabilities, or to any other Perſon, who by Law may claim any Intereſt of ſuch diſabled Perſons after their Death. Co. Lit. 52. a. Perk. f. 187.

A Feme Covert may be an Attorney to deliver Seiſin to her Huſband; and ſo may he in Remainder be an Attorney to make Livery to the Tenant for Life. Co. Lit. 52. a. Perk. Sect. 148, 199.

So if *Ceſtui que Uſe* had deviſed that his Wife ſhould ſell his Land, ſhe might ſell it to a ſecond Huſband; for ſhe did it *in Auter Droit*, and the Vendee was in by the Deviſor. Co. Lit. 112. *Vide* Lut. 9, 10, 39, 134. Jones 137. Noy 80.

*(C) Where an Authority is well purſued and executed. *Page 200

HERE it is neceſſary to take Notice of a Difference in the (*a*) old Books, between a naked Authority and an Authority coupled with an Intereſt; for if a Man deviſe that his Executors ſhall ſell his Lands, this gives but a naked Authority, and the Lands, till the Sale is made, deſcend to the Heir at Law; and in this Caſe all muſt join in the Sale; and if one die, it being a bare Authority, cannot ſurvive to the Reſt. Co. Lit. 112, 113, 181.

(*a*) But it has been held in Equity, that if a man deviſes that his Lands ſhall be ſold for the Payment of his Debts and Legacies, that though one of the Parties who was impowered die, the Survivor and Heir at Law muſt join in a Sale. Hard. 204. So if Lands are deviſed to be ſold, and no Perſon is named for that Purpoſe, the Heir muſt do it. Chan. Ca. 177. Chan. Rep. 283. S. P.

But if a Man by Will give Land to Executors to be ſold, and one of them die, the Survivors may ſell; for the Truſt being coupled with an Intereſt ſhall ſurvive together with it. Co. Lit. 113. b. 181. b. S. P. *Vide* Cro. El. 856.

Co. Lit. 112. b. Alſo if Lands be deviſed to *A.* for Life, and that after his Deceaſe his Lands ſhall be ſold by his Executors, and he makes three or four Executors, and during the Life of *A.* one of the Executors dies, and then *A.* dies, the ſurviving Executors may ſell, becauſe the Land could not be ſold before, and (*b*) the plural Number of Executors remains.

(*b*) So if there had been but one Executor living. Cro. Car. 382. Jones 352. *Vide* And. 145. Moor 61.

Co. Lit. 113. But it is ſaid, that if a Will had given ſuch Power to certain Perſons, naming them by their Names; as to *J. S. J. N. J. D.* and one of them died, the Survivors could not ſell, for the Words of the Will in that Caſe could not be ſatisfied *.

* *Sed qu.* and *vide* Cro. Car. 382. *cont.* 1 Leon. 106. c. 156. Moor 147. c. 291.

2 And. 59. *Townſend* and *Wales.* Owen 155. Moor 341. Cro. El. 524. S. C. If *A.* being ſeiſed in Fee of a Reverſion of twenty Acres expectant upon an Eſtate for Life, and of other twenty Acres in Poſſeſſion, and, for the Performance of his own and his Father's Will, deviſes all his Lands and Tenements to his Executors, and wills that they ſhould take the Profits thereof for ten Years, and that after the Expiration thereof, the ſame ſhould be ſold by his Executors, or by one of them, and dies, and after the Tenant for Life dies, and then one of the Executors dies, the other two may ſell the twenty Acres; for as they may perform his Will, ſo they may ſell in order thereto.

Co. Lit. 113, 181. At Common Law, if one of the Executors who was impowered to ſell Lands refuſed, the others could not ſell; but now, by 21 *H.* 8. *cap.* 4. notwithſtanding Part of thoſe to whom ſuch Power is deviſed refuſe, the reſt may ſell; and ſo may ſuch of thoſe to whom Land is deviſed to be ſold, who are willing, though the others refuſe, by a favourable Conſtruction of that Statute; but they cannot in either Caſe ſell it to the Executor that refuſed, for he is privy to the Will, and Executor ſtill.

Co. Lit. 113. My Lord *Coke* obſerves, that it is ſafeſt, in giving ſuch Power by Deviſe, to limit it to the Survivors or Survivor, or thoſe that prove the Will, *&c.* and when an Eſtate is deviſed to Executors to be ſold, it is adviſeable to appoint that the Profits taken by them before the Sale ſhall be Aſſets, for otherwiſe they ſhall (*c*) not.

(*c*) But *vide* Head of *Truſt*; that they are now conſidered only as Truſtees, and ſhall have no more than their Coſts and Charges.

* Page 201 * If a man deviſes Lands to his Executors to ſell, and dies, the Executors may ſell Part of the Land at one Time, and Part at another Time, as they

Co. Lit. 113. can find Purchaſers.

Cro. Jac. 153. Mo. pl. 876. Cro. El. 873. Lit. Rep. 144. 2 Wilſ. 167. Cowp. 717. Powell on Powers 459, 476. 483. *A.* by Indenture demiſed to *B. habend' a die datus* (which was the tenth of *June*) *Indenturæ prædict'* for his Life, with a Letter of Attorney to make Livery; the Attorney makes Livery the twenty-third of *July* following; and the Livery was held to be void, becauſe the Eſtate for Life being by the Indenture to commence the tenth of *June*, the Attorney had no Authority to change the Commencement of the Eſtate, and therefore having not purſued his Authority, by not giving Livery, to let the Freehold commence according to the Deed, what he did afterwards was without any Authority, and conſequently void; but in this Caſe, if the Deed had not been delivered till after the Day of the Date, and the Attorney had given Livery at the Time of the Delivery of the Deed, this had been a good Delivery, becauſe the Deed of Feoffment was to govern the Livery, but the Deed itſelf had no Effect till the Delivery; and therefore the Attorney making the Livery at the Time the Deed of Feoffment began to operate which was to govern it, ſeems to have well enough executed his Authority.

If

If a Letter of Attorney be to make Livery upon Condition, ſo as to make a conditional Feoffment, and the Attorney delivers ſeiſin abſolutely, the Livery is not good, becauſe the Attorney had no Authority to create an abſolute Fee-ſimple; and therefore ſuch abſolute Feoffment ſhall not bind the Feoffor, becauſe he gave no ſuch Authority. 11 H. 4. 3. 2. 2 Rol. Abr. 9. And hence the Attorney in ſome Books is called a Diſſeiſor, Co. Lit. 258. Perk. Sect. 188.

But if the Letter of Attorney had been to make Livery abſolutely, and the Attorney had made it upon Condition, this ſeems a good Execution of his Power, and the Feoffment good, becauſe when the Attorney had once delivered Seiſin, he has fully executed his Power; and the Condition annexed to it being without Authority is void; and therefore ſhall not deſtroy the Operation of the Livery. 26 Aſſ. 39. 2 Rol. Abr. 9. Co. Lit. 258. Shep. Touchſtone 218. Perk. f. 188.

If a Warrant of Attorney be given to make Livery to one, and the Attorney makes Livery to two; or if the Attorney had Authority to make Livery of *Black-acre*, and he makes Livery of *Black-acre* and *White-acre*, though the Attorney has in theſe Caſes done more, yet there is no Reaſon that ſhould vitiate what he has done purſuant to his Power, ſince what he did beyond it is a perfect Nullity and void. Perk. f. 189. But if the Attorney was to deliver Seiſin to two, and he had made Livery only to one that had been void, becauſe he had no Authority to deliver the whole Poſſeſſion to one excluſive of the other; and therefore it is void for the whole. Perk. f. 189. *Vide infra.*

If a Letter of Attorney be given to two jointly to take Livery, and the Feoffor makes Livery to one in the abſence of the other, in the Name of both, this is void, becauſe they being appointed jointly to receive Livery, are to be conſidered but as one. Co. Lit. 49. b. 2 Rol. Abr. 8.

But if a Feoffment be made to *A.* and *B.* and the Feoffor gives a Letter of Attorney to deliver Seiſin, and *J. S.* gives Livery to *A.* in the Abſence of *B.* in the name of both; this is a good Livery, for though the intire Poſſeſſion be delivered to one only, yet they being joint-tenants by the Deed of Feoffment, ſuch Livery to one makes no Alteration or Change in the Poſſeſſion, becauſe if the Livery had been made to both, each had been placed in the whole Poſſeſſion; beſides that, every Man being preſumed to accept a Gift for his Advantage, *A.* is looked upon as the Attorney of *B.* to receive the Poſſeſſion for him; and therefore the Livery of *A.* enures to the Benefit of *B.* till he diſagrees to it. Co. Lit. 49. 2 Rol. Abr. 8.

*But if a Letter of Attorney be made to three *conjunctim & diviſim*, and two only make Livery, this is not good, becauſe not purſuant to their Authority; for the Delegation was to them all three, or to each of them ſeparately; yet if the third was preſent at the Time of the Livery made by two, though he did not actually join with them in the Act of Livery, yet the Livery is good, becauſe when they all three are upon the Land for that Purpoſe, and two make Livery in the Preſence of the third, there is his Concurrence to the Act, though he did not join in it actually, ſince he did not diſſent from it. *Page 202. Dyer 62. Rol. Abr. 329. Co. Lit. 181. Rol. Rep. 299. Yelv. 26.

If *A.* be diſſeiſed of *Black-acre* and *White-acre*, and gives a Letter of Attorney to enter into both, and make Livery, if the Attorney enters into one Acre only, and makes Livery *ſecundum formam Chartæ*, this is not good, becauſe the Attorney has not purſued his Authority; for the Eſtate of the Diſſeiſor cannot be defeated without an Entry into both Acres; and till the Eſtate be defeated the Attorney cannot execute his Power in the Manner it was delegated, and therefore what he did in this Caſe was void. Co. Lit. 52. 2 Rol. Abr. 9. Co. Lit. 52.

If a Letter of Attorney be given to *A.* to make Livery of Lands already in Leaſe, the Attorney may enter upon the Leſſee in order to make Livery, becauſe whilſt the Leſſee continues in Poſſeſſion, the Attorney cannot deliver Seiſin of it; and therefore to execute the Power given him by the Lette Pop. 103. Dyer 131. a. 340. a. But *per Rol.*

it is the ſafer Way for the Feoffee to Letter of Attorney, it is neceſſary he ſhould have a Power to enter upon the Leſſee.

inſert a Clauſe in the Letter of Attorney for the Attorney to enter *& omnes alios inde expellend'*. 2 Rol. Abr. 8. that an Attorney cannot make Livery within View. *Vide* Co. Lit. 52. 2 Rol. Abr. 9.

11 Co. 92. Rol. Abr. 328, 329. If the King grants a Warrant to four Officers of the Exchequer, by which he authorizes them, or any of them, to pay out of the King's Treaſure the Coſts and Expences of any Man who ſhall be employed in the Service of the King; and two of the four give a Warrant for the Payment of a certain Sum to *J. S.* this is a good Warrant, though neither all four nor one only did it.

5 Co. 91. Rol. Abr. 328. So if a Judgment be aſſigned to the King in Satisfaction of a Debt due to the King with a Proviſo, that if the Barons of the Exchequer, or any two of them revoke it, that it ſhall be void; and after three of the Barons revoke it, (there being four in all) this is a good Revocation.

5 Co. 91. Rol. Abr. 328. But if the Words had been that if the Barons, or any two of them, jointly or ſeverally revoke it, *&c.* there three of them could not revoke it, for this is neither jointly nor ſeverally *.

* *Sed qu.* If an Act done by three ſhall not be conſidered in this Caſe as a proper Execution of the Power?

Co. Lit. 181. Palm. 52. 2 Rol. Rep. 137. Poph. 202. But if a Sheriff makes a Warrant to four or three, on a *Capias* jointly or ſeverally, to arreſt one, two of them may arreſt the Party, for the greater Expedition of Juſtice.

Cro. Eliz. 913. Noy 47. Yelv. 26. 3 Bulſt. 209. Rol. Rep. 406. Rol. Abr. 329. But a Commiſſion directed to ſix, four or two, cannot be executed by three, becauſe that is a judicial Act. Yelv. 26. Noy 47. 2 Inſt. 380.

Vide 9 Co. 76. b. Ld. Raym. 1418. Where a Perſon is authorized to do a Thing, it is moſt (*a*) regular to do it in the Name of him who gave the Authority.

Stra. 705. Godb. 389. Rol. Abr. 331. Moor 70. pl. 191, 818. pl. 1101. b. (*a*) But if Executors have Power to ſell Lands, they may do it in their own Names. Rol. Abr. 331. So if a Deputy Steward makes an Attorney, or appoints an Under-Deputy to take a Surrender of a Copyhold Eſtate, and he does it accordingly, without reciting his Power, this is good; for where a Man does ſuch an Act as he cannot do, ſo as to be effectual any other Way than by Virtue of his Authority, that ſhall be taken to be in Execution of his Authority. Salk. 95, 96. But where a Man has an Intereſt and Authority, and does an Act without reciting his Authority, it ſhall be taken to be done by Virtue of his Intereſt. Salk. 96. For this *vide* 6 Co. 18. a. Sir *Edward Cleer*'s Caſe. Cro. Eliz. 878. Cro. Jac. 31. Co. Lit. 111. b. Jenk. 201, 215. Cro. Car. 335. *Jones* 327. Noy 80. Latch, 9, 10, 39, 134. Jones 137. Rol. Abr. 330. Powell on Powers 111, 112. 4 Brown's P. Caſ. 523. 2 Term Rep. 241, 380, 781.

*Page 203 Rol. Abr. 330. * If the Lord gives Licence to a Copyholder for Life to leaſe the Copyhold for five Years, the Copyholder may leaſe it for three Years; for this is comprehended within the Leaſe, inaſmuch as he hath given him Licence to leaſe for more Years.

For Authorities that are to be ſtrictly purſued ſee Moor 43. Godb. 39. 2 Rol. Rep. 6. Owen 73. Bulſt. 104. 2 Mod. 318. Kelw. 43. Lit. Rep. 141. One who hath Power to make a Leaſe for ten Years, makes a Leaſe for twenty; decreed good in Chancery for ten Years. Chan. Ca. 23. *vide* Head of *Leaſes and Terms for Years*, Vol. 3. p. 418.

Rol. Abr. 330, 331. Cro. Ja. 436. S. C. Pop. 105. S. C. Cro. Eliz. 461. So if the Lord gives Licence to a Copyholder for Life to leaſe the Copyhold for five Years, if the Copyholder *tamdiu vixerit*, and he leaſes it for five Years generally without Limitation; this is a good Execution, and purſuant to the Licence, for the Leaſe is determinable by his Death, by a Limitation in Law, and therefore as much is implied by Law as if he had made an actual Limitation.

Owen 72. S. C. Powel on Powers 425. Doug. 565. 1 Term Rep. 705.

Where

Where the *Mayor* and *Commonalty* of *London* had conſtituted *J. S.* their Bailiff to receive their Rents, and to make Demand of them, and to make Entry, ſuch general Authority is not ſufficient to authorize a Bailiff to take Advantage, and demand a Rent accrued due after the Authority given; for it is a new Right attached, and there ought to be a ſpecial Authority for this Purpoſe. Skin. 413. pl. 10. Ruled by Holt, in Evidence in *Ejectment* at *Guildhall*.

(D) Where an Authority cannot be transferred.

ONE who has an Authority to do an Act for another muſt execute it himſelf, and cannot transfer it to another; for this being a Truſt and Confidence repoſed in the Party, cannot be aſſigned to a Stranger, whoſe Ability and Integrity were not ſo well thought of by him for whom the Act was to be done; therefore an (*a*) Executor having Authority to ſell, cannot ſell by Attorney. 9 Co. 77. b. Rol. Abr. 330. (*a*) *Quære*, and *vide* Head of *Executors and Adminiſtrators*.

So if Leſſee for Life hath Power to make Leaſes, rendering the ancient Rent, he cannot make them by Letter of Attorney. 9 Co. 76. 2 Rol. Rep. 303. Rol. Abr. 330.

If *A.* lends *B.* a Horſe to ride to *York*, *B.* cannot let his Man ride him; for the Licence is a Matter of Pleaſure annexed to the Perſon of *B.* and cannot be transferred; adjudged upon a demurrer, in an Action of Treſpaſs, for immoderately riding the Plaintiff's Mare; where the Defendant pleaded that the Plaintiff *licentiam eidem dedit equitare*; and that the Defendant and his Servant *alternatim* had rid upon the ſaid Mare. Mod. 210. *Bringſo* and *Morris*. But it is otherwiſe where a certain Time is limited for the Loan of the Horſe; for in that Caſe he hath an Intereſt in the Horſe, and may let his Servant ride him. So if *B.* for Money lets a Horſe to *A.* to ride to *York*. Mod. 210. Salk. 404. pl. 1. 6 Mod. 223. 11 Mod. 7. 2 Ld. Raym. 795, 913, 915, 916.

* (E) When it ſhall be ſaid to be determined and revoked. *Page 204

THE Authority given by Letter of Attorney, muſt be executed during the life of the Perſon that gives it; becauſe the Letter of Attorney is to conſtitute the Attorney my Repreſentative for ſuch a Purpoſe, and therefore can continue in Force only during the Life of me that am to be repreſented; and hence it is, that if *J. S.* make a Letter of Attorney to deliver Seiſin after my death, it is void, becauſe he cannot deliver Seiſin during my Life, for that were plainly without any Authority from me; nor can he do it after my death, for the former Reaſon. *Vide* 2 Rol. Abr. 9. Co. Lit. 52. Perk. ſ. 188.

But if any Corporation Aggregate, as a Mayor and Commonalty, or Dean and Chapter, make a Feoffment and Letter of Attorney to deliver Seiſin, this Authority does not determine by the Death of the Mayor or Dean; but the Attorney may well execute the Power after their Death, becauſe the Letter of Attorney is an Authority from the Body Aggregate, which 14 H. 8. 3. 11 H. 7, 19. Co. Lit. 52. 2 Rol. Abr. 12.

which ſubſiſts after the Death of the Mayor or Dean, and therefore may be repreſented by their Attorney; but if the Dean or Mayor be named by their own private Name, and die before Livery, or be removed, Livery after ſeems not good.

Co. Lit. 52. b. If the Leſſor by Deed licences his Leſſee for Years or Life to alien, who is reſtrained by Condition not to alien without Licence, and the Leſſor (*a*) dies before the Leſſee aliens; yet this is no Countermand of the Licence, for the Licence exempts the Leſſee out of the Penalty of the Condition, and it was executed on the Part of the Leſſor as much as could be.

(*a*) So if the Leſſor grants over his Eſtate, yet the Leſſee may alien.

Cro Jac 103. Co. Lit. 52. b. Sid. 6, 7. If the King gives Licence to alien in Mortmain, and dies, yet it may be executed after.

So if the King licences *J. S.* to ſell Wines, and dies.

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* Bail in Civil Cauſes.

2 Hawk. P. C. 88. (*b*) But in what they differ. *Vide* 4 Inſt. 180. Godb. 339. and 2 Hawk. P. C. 88.

BAIL and Mainprize are often uſed promiſcuouſly in our Law-Books, as ſignifying one and the ſame Thing, (*b*) agree in this Notion, that they ſave a Man from Impriſonment in the common Gaol, his Friends undertaking for him before certain Perſons, for that Purpoſe authorized, that he ſhall appear at a certain Day, and anſwer whatever ſhall be objected to him in a legal Way.

That the chief Difference is, that a Man's Mainpernors are barely his Sureties, and cannot impriſon him themſelves to ſecure his Appearance, as his Bail may, who are looked upon as his Gaolers, to whoſe Cuſtody he is committed, and therefore may take him up upon a *Sunday*, and confine him till the next Day, and then render him. 6 Mod. 231. *per Cur.* 7 Mod. 77, 85, 98. Ld. Raym. 706. 12 Mod. 275, 348, 606, 607, 667.—Againſt him that is mainprized *de die in diem*, no Bill can be filed; otherwiſe againſt him that is bailed. 4 Inſt. 180.—Alſo it ſeems that before the 23 H. 6. c. 10. the Sheriff was not upon an Arreſt obliged to take Bail, unleſs the Party ſued out a Writ of *Mainprize*; but for this *vide* 2 Rol. Abr. 112. Title *Mainprize*.

Vin. 839. Digeſt. *Lib.* 2. *Tit.* 8. Booth 9, 10. The putting in Bail in Perſonal Actions ſeems to be in Imitation of the Civil Law, which requires that Cautions ſhould be put in either by *Pignora* or *Fidejuſſores*, and the *Idoneus fidejuſſor* was *ex arbitrio judicis approbatus, vel litigantium conſenſu acceptus*; for formerly in theſe Actions, if the Defendant did not appear on the Summons, the Proceſs was an *Attachment*, and the Sheriff might attach him either by his Goods or by Pledges; and if he attached him by his Goods, by his Non-appearance his Goods were forfeited; if by Pledges, and the Party did not appear, they were amerced.

Under this Head I ſhall conſider,

(A) What Perſons are authoriſed to take Bail. 206.

(B) In what Caſes Special or Common Bail are required. 208.

And

And herein,

1. What the Debt must amount to for which there must be Special Bail. 208.
2. Where the Demand is uncertain, and sounds only in Damages. 209.
3. Whether Bail be required in Actions on Penal Statutes. 210.
4. Of Persons that are not required to put in Special Bail. 210.
5. Where Special Bail is required on removing a Cause out of an inferior Jurisdiction before Judgment. 211.
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7. Common Bail in what Cases necessary. 213.

(C) **Where Bail shall be said to be put in regularly.** 214.

And herein,

* 1. Of the Manner of putting in, excepting to, and justifying Bail. 214. *Page206
2. To what Time it shall have Relation. 214.
3. Where a different Action is prosecuted from that to which Bail was given. 215.
4. What Defect or Irregularity may be amended. 215.

(D) **Of the Proceedings against the Bail, and what they may plead in their Discharge.** 216.

(A) What Persons are authorized to take Bail.

WHEN the Sheriff arrests any one, he is not only authorized, but obliged to take Bail, otherwise an Action on the Case lies against him. 2 Sand. 59. Vent. 55, 85. Mod. 33. Salk. 99. pl. 6. Ld. Raym. 425. 6 Mod. 122.

This the Sheriff is obliged to do by the 23. *H.* 6. *cap.* 9. which enacts, 'That Sheriffs, Coroners, &c. shall let to Bail Persons by them arrested, 'or in their Custody, by force of any Writ, Bill or Warrant, in any Per- 'sonal Action, or because of any Indictment of Trespass, upon reason- 'able Sureties (having sufficient within the County) to keep their Days in 'such Place, &c. as the Writ, &c. require, (such as are in Ward by Con- 'demnation, Execution, *Capias Utlagatum* or Excommunication, Surety 'of Peace, or committed by Command of the Justices; and Vagabonds 'refusing to serve according to the Statute of Labourers, only excepted.)

But though the Sheriff is obliged to take Bail, yet if the Plaintiff dislike the Security, and does not take an Assignment of the Bail-Bond, he may have

(a) 1 Vent. 85. Mod. 33, 57, 244. have him brought up; for the Sheriff having arrested the Party, (a) must return a *Cepi Corpus*, on which Return it is a Breach of Duty in him not to bring him up, for which the Court amerces him as one of their Officers.

12 Mod. 311, 485, 494, 516, 527, 557, 579. Ld. Raym. 399. 2 Ld. Raym. 849, 886, 904. 2 Salk. 625. Comyns 132, Stra. 423.

Vide Tit. *Sheriff.* But if the Writ be not returned, and the Court makes an Order that the Sheriff shall return his Writ in four Days, as is usual, there the Disobedience is to the pronounced Order of the Court, and consequently a Contempt of the Court, for which an Attachment lies.

Rol. Abr. 807, 808. Cro. Eliz. 824, 852. Noy 39. If the Sheriff returns *Cepi* on a mesne Process, & *paratum habeo*, he shall be only (b) amerced if he does not bring in the Body, though he shall be attached if he does not return his Writ; and the Reason is, because the Sheriff is bound to bail the Party; and therefore if the Sheriff is mistaken in his Sureties, he is not to suffer in his Liberty; and the returning his Writ is in his own Power; but it may not be in his Power to bring in the Body which he was obliged to bail.

(b) That it is usual at this Day to serve the Sheriff with a Rule to bring in the Body before you move to amerce him. Salk. 99.——If the Sheriff returns a *Cepi Corpus* and *Paratum habeo*, or *Languidus*, where the Defendant is at large, without any Bail taken, he is not aided by the Statute, but an Action for a false Return lies against him. Noy 39. Rol. Abr. 807.*

* After the Sheriff has returned a *Cepi Corpus*, Plaintiff may sue out a Rule to bring in the Body: The Intent of which is, to compel the Sheriff to put in good Bail above, which if not done in due Time, the Court, on Motion, will grant an Attachment against the Sheriff, the Consequence of which is, generally, Payment, by the Sheriff, of the Debt and Costs, who seeks his Remedy over against the Officer, who arrested the Defendant, or his Sureties; or, in *London* against that Secondary, or Officer who took the Bail-Bond, if any, or his Sureties.

And if the Plaintiff takes an Assignment of the Bail-Bond, the Sheriff is not amerciable; for by accepting of the Bond, the Plaintiff has waved the * Benefit of the Amercement, and he may now sue it in his own Name, though formerly he could only sue in the Sheriff's Name; and if the Sheriff released the Action, his Remedy was in a Court of Equity.

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Salk. 99. pl. 6. 6 Mod. 122.

Ld. Raym. 425, 722, 1564. 10 Mod. 289, &c. 11 Mod. 170. pl. 7. 12 Mod. 447. Ld. Raym. 723. Barnes 63, 66.

But now by 4 *Ann. cap.* 16, *sect.* 20, for Amendment of the Law, it is enacted, "That if any Person shall be arrested by any Writ, Bill or Process, out of any of her Majesty's Courts of Record at *Westminster*, at the Suit of any common Person, and the Sheriff or other Officer takes Bail from such Person against whom such Process is, the Sheriff or Officer, at the Request and Costs of the Plaintiff in such Action or Suit, or his lawful Attorney, shall assign to the Plaintiff in such Action the Bail-Bond or other Security taken from such Bail, by indorsing the same, and attesting it under his Hand and Seal, in the Presence of two or more credible Witnesses, which may be done without any Stamp, provided the Assignment so endorsed be duly stamped before any Action be brought thereon; and if the said Bail-Bond, or other Security taken for Bail, be forfeited, the Plaintiff in such Action, after such Assignment made, may bring an Action and Suit thereupon, in his own Name; and the Court where the Action is brought, may, by Rule or Rules of the same Court, give such Relief to the Plaintiff and Defendant in the original Action, and to the Bail upon the said Bond or other Security taken from such Bail, as is agreeable to Justice and Reason; and that such Rule or Rules of the said Court shall have the Nature and Effect of a Defeasance to such Bail-Bond or other Security for Bail."

If

If the Plaintiff accepts of an Aſſignment of the Bail-Bond, the Defendant may put in the ſame Bail to the Action that were Bail to the Writ, and the Plaintiff cannot except againſt them*. *Vide* Salk. 97. pl. 1. 99. pl. 6 Fareſ. 62. 117.

* This adjudged in *B. R.* In *C. P.* it is ſaid in all Caſes wherein Bail-Bonds are taken, and the ſame Bail is put in above, the Plaintiff may except againſt it, *M.* 6 *Geo.* 2.——By a Rule of the King's Bench, no Bail-Bond ſhall be put in Suit till four Days after the Return of the Writ, if the Arreſt be in *London* or *Middleſex*, *Rule of Trin. Term* 6 *Geo.* 3. and not till ſix Days after the Return of the Writ, if the Arreſt be in the Country. 11 Mod. 2.——See farther as to Bail, *Harriſon B. R.* 70, 73.

By the 4 *W. & M. cap.* 4. "The Judges in each Court, or any two of "them, whereof the Chief to be one, may, by Commiſſions under the Seals "of their reſpective Courts, appoint Commiſſioners to take Recogniſances "of Bail in Suits depending before them, and upon Affidavit of the true "taking of them, ſuch Recogniſances ſhall be as effectual as if they were "taken before themſelves; the Cognizors, unleſs they live in *London* or "*Weſtminſter*, or within ten Miles, may juſtify before the Commiſſioners "in the Country."

Before this Statute, Bail was always taken *de bene eſſe* before a Judge, as it may, and muſt be ſtill, if the Cognizors live within ten Miles of *London* or *Weſtminſter*; the Commiſſioners are obliged by Rule of Court to keep a Book wherein are the Names of the Plaintiff and Defendant, and Bail, and the Perſon who tranſmits the ſame, and who makes Affidavit that the Recogniſance was duly acknowledged in his Preſence; on ſuch Affidavit the Judges make a conditional *Allocatur*, and the Bail are to ſtand abſolute, unleſs the Plaintiff except againſt them within twenty Days; and if he except, the Bail may juſtify by Affidavit taken before the Commiſſioners in the Country.

* If one is arreſted in *London* by a Serjeant of the Mace, upon a Plaint of Debt entered in any of the Counters, the Serjeant cannot take Bail, (*a*) but the Judge in Court muſt *. *Page 208

Cro. Car. 196. Rol. Abr. 561. S. C. Jones 226. S. C.

(*a*) Cro. Eliz. 77. S. P. agreed, and like Point agreed, where an Arreſt was upon a Plaint in the Court of *Nottingham*, and the Defendant in Gaol under Cuſtody of the Mayor, and not of the Serjeant, and Cro. Eliz. 168. it is ſaid, that in all Corporation Courts the Mayor, who is Judge, is Gaoler alſo.——Bail being a Matter of Record cannot be taken before any but the Judge of the Court, and not before the Serjeant, though alledged *ſecundum conſuetudinem villæ*; but Bail for Appearance only, may be taken by the Serjeant. Cro. Jac. 94.

* *Qu.* If the Secondaries, in *London*, and their Deputies are not the proper Officers for this purpoſe.

(B) In what Caſes Special or Common Bail is required.

HERE it muſt be firſt obſerved that regularly, after Judgment, no Bail is to be taken; for the Plaintiff having aſcertained his Right, and proved his Demand, the Defendant muſt pay the Condemnation Money; for which purpoſe a Writ of Execution iſſues, to which the Sheriff can take no Bail. *Vide* Head of *Sheriff*, *vide poſt*, where upon bringing a Writ of *Error*, and where upon reverſing an Outlawry, Title *Outlawry* and Carth. 459.

But one in Execution brings an Attaint, (*b*) he may have (*c*) a Writ to the (*d*) Juſtices, commanding them to let him to Mainprize. F. N. B. 106. 2 Rol. Abr. 112.

(*b*) Cro. Eliz. 5. *per Wray*, the Court doth not uſually bail, for the Verdict is intended true till reverſed; but in ſome Caſes upon good Conſideration they will bail. (*c*) Reg. 123, a. (*d*) Dyer 193. pl. 29. though at firſt it was doubted whether it lay to the Juſtices *de B.* and a Caſe cited *cont.* where it was commanded to the Warden of the *Fleet* to have the Body in Court *quolibet die*, &c.

If

Dyer 365. pl. 31. Rol. Rep. 132. If an *Audita Querela* is founded upon a Releaſe or Record, the Plaintiff may be bailed.

ſaid *per Coke*, S. C. but ſuch Bail muſt be taken in open Court. Bulſt. 140. Latch 113.

Rol. Rep. 132. *per Coke* But if upon (*e*) a Surmiſe of a Matter of Fact only, it is otherwiſe.

Chief Juſt. Rol. Rep. 384. S. P. *per Coke*, who ſaid that in the Time of *Dyer* and *Wray*, and all his Time, the Practice had been never to bail, where grounded on a Matter of Fact only; but where upon a Matter of Writing in Diſcharge the Plaintiff had uſed to be bailed, the Defendant being called to know whether he could deny it. *Vide Sid.* 286. Dyer 285. pl. 41, 339. pl. 46. and *vide* 11 H. 6. c. 10. 2 Rol. Abr. 113. (*e*) Yet *vide* in ſuch Caſes where the Plaintiff was bailed, Cro. Jac. 29. 67.

Raym. 475. *Vide* 3 Mod. 121. Sid. 210. If in an *Homine Replegiando* an *Elongatus* is returned, and the Defendant taken upon a *Withernam*; though this is no Execution, yet the Defendant ſhall not be bailed unleſs he will confeſs the taking and having the Party in Cuſtody.

Raym. 475. But if in an Action for a falſe Return of an *Elongatus* againſt the Sheriff, it is found for the Plaintiff, he may be bailed.

As to the Caſes in which Special or Common Bail are required, I ſhall conſider,

1. What the Debt muſt amount to for which there muſt be Special Bail.

Comp. Attor. printed 1667. fol. 45. The old Rule in the *Compleat Attorney* is, that if the Defendant be arreſted by meſne Proceſs, as *Capias*, *Alias* or *Pluries*, and the Plaintiff holdeth him not ſufficient to anſwer to Debt or Damages contained in the Writ, the ſame amounting to 20*l.* or upwards, that in this Caſe
*Page 209 * the Plaintiff, upon the Return of the Writ, by entering a (*a*) *Ne recipiatur* with the Filazer, out of whoſe Office the *Capias* did iſſue, may have Special Bail to be put in to this Action, which the Defendant muſt put in before ſome Judge of the Court where the Cauſe depends, who will accept of ſuch Bail as the Validity or Weight of the Cauſe doth require, or in his Diſcretion ſhall be thought fit.

(*a*) The *Ne recipiatur* is entered by the Attornies as Officers of the Court, after which no Appearance is to be received till Bail is filed with the Judge.

This was the Rule that both the Courts of *King's Bench* and *Common Pleas* went by, but was afterwards ſunk to 10*l.* which has been long the ſtanding Rule of the Courts.

Vide the Statute, and 21 Geo. 2. c. 3. whereby it is made perpetual, and 5 Geo. 2. c. 27. whereby it is explained and amended, and 6 Geo. 2. c. 14. whereby it is extended to *Wales*. For Caſes of holding to Bail on this Statute, ſee 2 Str. 1157, 1209, 1219, 1226, 1270. 2 Bur. Rep. 655, 1032.

And now by the 12 *Geo.* 1. *cap.* 29. it is enacted, "That where the Cauſe "of Action ſhall not amount to the Sum of 10*l.* in a ſuperior Court, or "40*s.* in an inferior Court, the Plaintiff ſhall only ſerve the Defendant "with a Copy of the Proceſs, and ſhall not arreſt his Perſon; and that in "all Caſes where the Plaintiff's Cauſe of Action ſhall amount to the above "Sums or upwards, Affidavit ſhall be made and filed of ſuch Cauſe of Action, and the Sum or Sums ſpecified in ſuch Affidavit, ſhall be indorſed "on the Back of ſuch Writ or Proceſs; for which Sum or Sums ſo indorſed, the Sheriff or other Officer ſhall take Bail, and for no more."

However the above Stat. 12 Geo. 1. c. 29. ſeems to have ſuper-

In an Attachment of Privilege, which is a *Capias* in the firſt Proceſs, the Defendant is held to Bail for any Sum though never ſo ſmall; for this being a *Capias* in the firſt Proceſs without Summons, does not ariſe from a Suppoſition of a *Nihil* returned, but ariſes from a Debt due to the Officers of

of the Court, by the Acts of the Court; and therefore another Officer ought not to appear without ſeeing a Security given for ſuch Debt.

ſeded this Doctrine, and that at

this Day an Attorney cannot, any more than any other Perſon, hold Defendant to Bail, unleſs the Demand be 10*l.* or upwards.

2. Where the Demand is uncertain, and ſounds only in Damages.

Where the Action is only for Damages, there regularly the Party is not to be held to ſpecial Bail; for there is no certain Sum for which Bail can be aſcertained.

Vide 13 Car. 2. c. 2. c. 2.

But in Actions of *Aſſault* and *Battery*, *Scandalum Magnatum*, and for other perſonal Wrongs, in which it is apparent the Damages will exceed the Sum of 10*l.* the Court, or any Judge of the Court, may and do, on good Cauſe ſhewn, give Leave to the Plaintiff to ſue out a Writ with the Clauſe of *Acetiam billæ*, to hold the Defendant to ſpecial Bail *.

Sid. 307. Rol. Abr. 335. Lev. 39. Brownl. 90. Sid. 183. Raym. 74.

* But this muſt be on Affidavit of the Facts.

So upon an Affidavit of a great *Mayhem*, and that he intended to declare in *Treſpaſs*, the Court ordered a Special *Latitat*, with an *Acetiam*, and that ſo there ſhould be Special Bail.

Sid. 276. Special Bail ordered *per Curr'*, in Caſe

of a notorious Battery. Sid. 307.—So in Caſe of a foul Battery againſt a Man and his Servants. Comb. 57.—But this ſeems to be diſcretionary in the Court; therefore *vide* Mod. 2. 2 Ld. Raym. 767. Salk. 101. pl. 15. 7 Mod. 9. 2 Barnes 47, 55, 58. Special Bail denied for putting an Arm out of Joint; and *vide* Rol. Abr. 335. pl. 14.

In Debt upon a (*a*) Bond for Performance of Covenants, the Court will order Bail according to the (*b*) Breaches aſſigned †.

Sid. 63. (*a*) So Special Bail in

Account, *ſecus* in Debt upon an Account. 2 Rol. Rep. 53. (*b*) Noy. 88. Lev. 300.——And the Meaſure of that ſhall be taken from the Plaintiff's Oath. Salk. 100. pl. 11.

† This muſt mean according to Breaches ſtated in Plaintiff's Affidavit.

In an Action of Debt on a Bond, though the Defendant ſays it was by *Dureſs*, or on an uſurious Contract, yet there ſhall be Special Bail, for the Merits of the Cauſe ſhall not be determined on Motion; neither will the * Court put a Slur upon the Plaintiff's Cauſe, which ought to come down fairly to Trial, without Prejudice.

Salk. 100. * Page 210

So in an Action for Money won at Play, if the Contract be lawful, as being under 100*l.* the Defendant muſt put in ſpecial Bail ‡.

Salk. 100. pl. 10. 12 Mod. 295. Andr. 70. 2 Stra. 1079. *Vide* Head of *Gaming*.

‡ There are few Caſes now where ſuch an Action will lie, and query if for any Sum amounting to 10l. on Games mentioned in the Stat. 9 An. c. 14? See that Stat. and the ſeveral Acts of 2 Geo. 2, c. 28. 12 Geo. 2. c. 28. 13 Geo. 2. c. 19. and 18 Geo. 2. c. 34.

3. Whether Bail be required in Actions on Penal Statutes.

On a Penal Statute the Defendant is not held to Bail, becauſe the Penalty on a Statute is in the Nature of a *Fine* or *Amercement* ſet on the Party for an Offence committed; and therefore no Perſon ought to ſuffer any Inconvenience by Reaſon of ſuch Law, till he is convicted of the Offence.

Yelv. 53. 2 Brownl. 293. Comyns 75. Caſ. 48. 12 Mod. 231. See Andr. 71. Gilb. Hiſt. C. P. 37.

4. Of

4. Of Perſons who are not required to put in Special Bail.

2 Brownl. 293. 3 Bulſt. 316.

An Heir, Executor or Adminiſtrator, (*a*) ſhall not be held to Special Bail; for the Demand is not on the Perſons, but on the Aſſets of the Deceaſed; and it would be unreaſonable to ſubject their Perſons to an Execution for the Debt of another.

(*a*) So though an Attorney was Plaintiff, and it was pretended he was intitled to have Special Bail by his Privilege. Sid. 62. S. P. *per Cur'*.

Cro. Jac. 352. Cro. Car. 39. Lit. Rep. 2, 3.

So if there be a Judgment againſt an Executor for the Debt *de bonis Teſtatoris*, and for the Damages only *de bonis propriis*, he may bring *Error*, and have a *Superſedeas*, without giving Sureties according to 3 *Jac.* 1. *cap.* 8. For though the Words of the Statute are general, yet it muſt be intended where Judgment is againſt the Defendant himſelf, upon his own Bond, or where the Judgment is general againſt the Executors; for it would be unreaſonable they ſhould find Sureties to pay the whole out of their own Eſtate.

2 Lev. 204. Sid. 418. Lev. 245. 368. 2 Jones 82.

Neither is an Executor, Adminiſtrator or Heir, upon the Removal of a Cauſe out of an inferior Court, obliged to put in Bail.

Salk. 98. pl. 4. S. P. *cont.* Lit. Rep. 81.

Lev. 145. Sid. 63. Salk. 98. pl. 4.

But if there be a *Devaſtavit* ſuggeſted, which can only be on an Action of Debt on a Judgment, they muſt find Special Bail.

Vide Head of *Executors and Adminiſtrators*.

Mod. 10. But for this *Vide* Title *Attorney*, and 535, 536. *

An Attorney or other Officer, whoſe Attendance is required in the Court to which he belongs, ſhall not be held to Special Bail.

2 Ld. Raym. 1567. 2 Stra. 864. Barnard. K. B. 300. 12 Mod. 112, 113, 163, 164.

* *Secus*, If an Attorney of another Court be Plaintiff.

Vide Title *Baron* and *Feme*, and Goldſ. 127. Cro. Eliz. 370. Cro. Jac. 445. Stile 475. Mod. 8. 6 Mod. 17, 105. 10 Mod. 163. Ld. Raym. 73. Salk. 115. pl. 4. 5 Mod. 69. 12 Mod. 19, 89, 246, 444, 445. 2 Stra. 1167, 1237, 1272. Barnes 59. 2 Barnes 72, 74, 80. Fareſt. 10.

If Baron and Feme are ſued, the Huſband muſt put in Bail for both; but if the Huſband does not appear upon the Arreſt, the Wife muſt file Common Bail before ſhe can be diſcharged; for otherwiſe the Plaintiff could not proceed to obtain Judgment.

——And where one Partner muſt put in Bail for another. Mod. 45.

*Page 211 * 5. Where Special Bail is required on removing a Cauſe out of an inferior Juriſdiction before Judgment.

Salk. 98. pl. 4. *Vide* Title *Courts and their Juriſdiction in general.*

Upon the Removal of a Cauſe by *Habeas Corpus* out of any inferior Court into the Courts above, though the Sum be under 10*l.* the Party (*b*) muſt file Special Bail, ſo that the Plaintiff may not be in a worſe Condition than he was in the Court below; and the Reaſon hereof is, that thoſe inferior Juriſdictions being confined, they cannot follow the Debt out of their own Juriſdiction; and therefore it is requiſite that they ſhould be Bail who live within their Precincts †.

(*b*) But if the Cauſe appears to be vexatious, the Court above will conſider the *Quantum* of the Sum in which Bail ought to be taken. Salk. 101. pl. 15. 102. 2 Ld. Raym. 767. 7 Mod. 9. Salk. 105. pl. 8. 134, 294, pl. 3. 12 Mod. 562. Holt 494. 6 Mod. 242. S. P. Ld. Raym. 603, 696.

† If Bail is not in within due time, a *procedendo* iſſues, and carries the Cauſe back to the inferior Court.

If a Cauſe be removed by *Habeas Corpus* out of the *Marſhalſea*, or any other inferior Court, and the Bail there offer to be Bail to the Action in the Court above, the Plaintiff is compellable to take them, becauſe he might, but did not except to them below. Salk. 97. pl. 1. *per Holt* Ch. J. 6 Mod. 242. 2 Show. Rep. 421, 485.

But it is otherwiſe where the Cauſe comes out of *London*, for the Sufficiency of the Bail there is at the Peril of the Clerk, and he is reſponſible to the Plaintiff; ſo that the Plaintiff had not the Liberty of excepting againſt them, and the Clerk is not reſponſible for their Deficiency in the Court above, though he was in *London*. Comb. 1. Skin. 244. pl. 9. Salk. 97. pl. 1. *per Holt* Ch. J.

If a Cauſe is removed out of an inferior Court by *Habeas Corpus*, and new Bail found, and after in the ſame Term it is remanded by *Procedendo*, the old Bail ſhall ſtand; for when a Cauſe is remanded the ſame Term in which it was removed, no record is made thereof. Cro. Jac. 363. *Beſton* and *Buller* adjudged, and there ſaid, that *Brook*, *Mainprize* 96. and *Procedendo* 16 is ſo to be underſtood. Moor 836. S. C. adjudged. 2 Bulſt. 286, 287. S. C. adjudged. Rol. Rep. 64. S. C. adjudged, notwithſtanding the old Bail was diſcharged, and new put in; the new Bail being taken off the File and made void the ſame Term, while the Record was in the Breaſt and Power of the Court. *Vide* Cro. Jac. 203. S. P. *cont.* and Yelv. 120. S. P. adjudged *cont.* But *per Curiam* it is there ſaid, If the *Procedendo* was delivered, &c. before Bail given to the ſuperior Court, it ſhould have been a *Superſedeas* to the *Habeas Corpus*, and the old Bail ſhould have ſtood.

Otherwiſe where it is remanded in another Term. Cro. Jac. 363. Moor 836. pl. 1128. Rol. Rep. 64. 2 Bulſt. 286. S. C. and S. P. *per Cur'*, and Skin. 244. pl. 9. S. P. Where it ſeems agreed generally, that upon ſuch removal the Bail below are diſcharged, for they declare *de novo*. 1 Wilſ. 277. 3 Burr. 1462.

But where a Replevin by Plaint was ſued in the Sheriffs Court of *London*, and Pledges were found *de retorno habend' ſi, &c.* and this Plaint was removed according to their Cuſtom into the Mayor's Court, and after into the *King's Bench* by *Certiorari*; and there *Oyer* of the *Certiorari* being demanded, the Party declared in *B. R.* and upon this a return awarded; and upon an *Elongat'* returned a *Scire Facias* went againſt the Pledges in the Sheriffs Court of *London*: the Queſtion was, Whether this Cauſe being removed by *Certiorari*, the Pledges in the inferior Court were diſcharged; and it was held that they were not. Skin. 244. pl. 9. *Dorrington* and *Edwin* adjudged. 2 Show. 421, 485. S. C. adjudged.

6. Of putting in Bail on bringing a Writ of Error.

By the (*a*) 3 *Jac.* 1. *cap.* 8. it is enacted, "That no Execution ſhall be "ſtayed or delayed, upon or by any Writ of Error, or *Superſedeas* there "* upon, to be ſued for the Reverſion of any Judgment given, or to be "given, in (*b*) any Action or Bill of Debt, upon any ſingle Bond for "Debt, or upon any Obligation with Condition for the Payment of Mo-"ney only, or upon any Action or Bill of Debt for Rent, or upon any (*c*) "Contract ſued in any of the Courts of *Weſtminſter*, Counties Palatine, or "Great Seſſions in *Wales*; unleſs ſuch Perſon or Perſons in whoſe Name

*Page 212

(*a*) Made perpetual by 3 Car. 1. c. 4. ſ. 4. and ſee 4 Mod. 245. Barnes 70. 12 Mod. 511. 2 Burr. Rep. 746, 747.

(*b*) The 13 Car. 2. ſt. 2. c. 2. par. 9. enacts in like Manner, That no Execution ſhall be ſtaid after Verdict and Judgment in Actions for not ſetting out Tithes, Actions on the Caſe or any Promiſe for Payment of Money, Trover, Covenant, Detinue and Treſpaſs. See 4 Mod. 7. Cro. Car. 59, 410. Hob. 127. 8 Mod. 79, 237. * The 16 and 17 Car. 2. c. 8. par. 3. extends to Writs of Error on Judgments after Verdict in Dower and Ejectment. Carth. 121. 3 Lev. 275. (*c*) On this Statute it hath been adjudged, that Judgment on an *Inſimul computaſſet* was not an Action founded on ſuch a Contract as comes within the Statute. 2 Bulſt. 53. Yelv. 227. So of a Debt due by Arbitration. *Ibid per Cur'*. Judgment on a Demurrer, on a Bottomree Bond, for Payment of Money, and Performance of Covenants, not within any of the Statutes. Show. 14. Comb. 105.

* This Statute does not extend to Judgment by *Default*, in any of the Actions ſpecified, nor do either of the others.

"or

" or Names such Writ shall be brought, with two sufficient Sureties, such " as the Court (wherein such Judgment is or shall be given) shall allow of, " shall first, before such Stay made, or *Superſedeas* awarded, be bound un- " to the Party for whom any such Judgment is or shall be given, by Re- " cognizance, to be acknowledged in the same Court, in double the Sum " adjudged to be recovered by the said former Judgment, to prosecute " the said Writ of Error with Effect; and also to satisfy and pay (if the " said Judgment be affirmed) all and singular the Debts, Damages and " Costs adjudged, or to be adjudged upon the former Judgment; and all " Costs and Damages to be also awarded for the same delaying of Execu- " tion."

Cro. Jac. 94. *per Cur'*. (*c*) *A.* became Bail for *B.* in the *Portmote* Court of the City of *Cheſter*, and Judgment was there given for *B.* and upon a Writ of Error before the Justices of the Great Seſſions of the County of *Cheſter*, that Judgment was reverſed; and after upon a Writ of Error in *B. R.* both Judgments were reverſed; and it was adjudged, that the Plaintiff ſhould recover 50*l.* Damages, *&c.* and it was urged, that *A.* was not liable; for by the Reverſal there is no Judgment in the inferior Court againſt *B.* and took a Difference where the Judgment of the inferior Court is affirmed, and were reverſed. 2 Jones 96. *adjornatur.*

If *A.* becomes Bail for *B.* in an (*c*) inferior Court, and there Judgment is given for *B.* and thereupon the Plaintiff brings a Writ of Error, and that Judgment is reverſed, and Judgment given for the Plaintiff againſt *B.* the Bail is liable; for when the firſt Judgment is reverſed, it is as if that Judgment had never been, and as if at the firſt the Principal had been condemned in the inferior Court.

Cro. Jac. 402. *Auſten* and *Mopk*, adjudged without Argument. Moor 853. pl. 1165. S. C. and S. P. adjudged *per totam Curiam.** Stra. 419, 717, 781, 877. 1 Term Rep. 624.

If *A.* brings a Writ of Error upon a Judgment obtained againſt him, according to the 3 *Jac.* 1. *c.* 8. *B.* enters into a Recognizance, conditioned that *A.* ſhall proſecute his Writ of Error with Effect, and if Judgment ſhall be affirmed, that he ſhall pay the Condemnation, *&c.* and after the Judgment is affirmed, *B.* cannot render *A.* the Principal, for this Manucaption is not to render the Body, but to pay the Debt.

* It is now the known and eſtabliſhed Doctrine.

Rol. Abr. 335. Cro. Jac. 636. S. P. adjudged. Noy 18. Cro. El. 587. 2 Term Rep. 57, 58.

If Judgment be affirmed upon a Writ of Error in the Exchequer-Chamber, (*d*) no Execution ſhall go againſt the Bail in the Original Action for the Coſts *occaſione Dilationis Executionis*, and the Party might have compelled the Defendant in Error to put in Bail, purſuant to the Statute 3 *Jac.* 1. *c.* 8.

(*d*) In a *Scire facias* upon a Recognizance againſt Bail, the Defendant pleaded a Writ of Error brought by the Principal; and *per Cur'*, This is no Plea, for the Writ of Error upon the principal Judgment doth not affect the Recognizance: But *per Holt* Ch. Juſt. I have known an Attachment againſt a Town-Clerk for proceeding in an inferior Court after a Writ of Error here; but I never took it to be right. Comb. 295. ‖

‖ Where Error is brought, the Court, on Motion, will ſtay Proceedings againſt the Bail, on Terms, according to the Nature of the Caſe; *i. e.* if they are in Time to ſurrender the Principal, on engaging to pay Debt and Coſts, or ſurrender, within a ſpecific Time, after Affirmance. If too late to ſurrender, then on engaging to pay Debt and Coſts, within a limited Time, after Affirmance, if the Judgment ſhall be affirmed.

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Salk. 97. pl. 2. *Tully* and *Richardſon*. 2 Ld. Raym. 840. 7 Mod. 120. 8 Mod. 79.

In Debt on a Bond in *C. B.* and Judgment for the Plaintiff, Error was brought in *B. R.* and Bail put in according to the Statute, and Judgment affirmed thereupon, Error was brought in (*e*) Parliament, and the Clerk of the Errors refuſed to allow the Writ, unleſs the Party would give

(*e*) *Vide* 2 Bulſt. 162. That one in Execution is not to be bailed on bringing a Writ of Error in Parliament, becauſe of the Uncertainty how long the Parliament may continue.

a new

a new Recognizance. It was objected, that it was not required by 3 *Jac.* 1. *c.* 8. But *per Cur'*, the firſt Recognizance does not include Payment of Coſts to be aſſeſſed in the Houſe of Lords, and theſe Coſts ought to be paid, and therefore a new Recognizance ought to be given within the Intent of the Statute; and it is not the Buſineſs of this Court to examine whether Bail was put in upon the firſt Writ, for the Want of that does not hinder the Proceſs of the Writ of Error, but only makes it no *Superſedeas*.

If there is a Judgment in *B. R.* and the Defendant is taken in Execution, and after brings Error in the Exchequer Chamber, and the Record is removed, he (*b*) cannot be bailed in *B. R.* becauſe there is no Record there, nor can he be bailed in the Exchequer-Chamber, for they have Authority only to affirm or reverſe the Judgment. Cro. Jac. 108. Cro. Eliz. 731. Impey Inſtr. Cleri. 412, 532. 2 Cromp. Prac. 353. 1 Term Rep. 624. 2 Term Rep. 44.

(*b*) By a Rule of *B. R.* every Attorney who ſhall ſue out any Writ of Error on any Judgment of this Court, returnable in the Exchequer-Chamber, ſhall forthwith allow ſuch Writ of Error with the Clerk of the Errors of this Court for the Time being, and in Caſe where Special Bail ſhall be required, if the Plaintiff upon ſuch Writ of Error do not within four Days after Allowance thereof put in Special Bail thereon, the Plaintiff in the Action may proceed to take out Execution notwithſtanding ſuch Writ of Error; and where Special Bail is put in, the Plaintiff or his Attorney muſt forthwith give Notice thereof to the Defendant in Error, or his Attorney; and if the Defendant in Error do not except againſt ſuch Bail within twenty Days after ſuch Notice given, ſuch Bail ſhall be allowed.——By a Rule in *C. B. Mich.* 6 *Geo.* 2. in all Caſes where Bail ſhall be filed on Writs of Error, ſuch Bail ſhall be perfected within four Days after Exception taken thereto; or in Default thereof, the Clerk of the Errors of this Court ſhall *Nonpros* ſuch Writ of Error.*

* The Allowance of a Writ of Error, before Execution, is, of itſelf, a *Superſedeas* to Execution; and I conceive the Court would ſet aſide the Execution, if executed after Allowance of a Writ of Error, though there was not any Notice given: The Intent of Notice is, to ſubject the Attorney for the Defendant in Error, to an Attachment, if he ſhould dare, after Notice, to levy an Execution.

Upon a Writ of Error of a Judgment in *Ireland*, the Record being removed in *B. R.* the Court took Bail here, and ſent Directions to have the Defendant ſet at Liberty there. Palm. 286.

7. Common Bail, in what Caſes neceſſary.

The filing of common Bail is neceſſary, that it may appear that the Court had Conuzance of the Cauſe. But where the Want of it is Error, *vide* Title *Error*, and Hob. 264.

If a Priſoner be diſcharged for Want of being declared againſt within two Terms, or upon Nonproſſing the Plaintiff, or if he ſurrender himſelf in Diſcharge of his Bail, and is not charged within two Terms; in all theſe Caſes he muſt file common Bail, that it may appear by the Acts of the Court that he was actually in Court when diſcharged. (*c*) *Vide* Salk. 98. pl. 5. and the Stat. 4 and 5 W. and M. c. 21.

(*c*) Formerly three Terms. Cro. Jac. 620.

By the Rules of *B. R.* no Attorney ſhall be compelled to appear or file common Bail for any Defendant, unleſs ſuch Attorney hath by a Note in Writing under his Hand † undertaken ſo to do, and ſuch Note produced by the Plaintiff's Attorney; but if any Attorney hath accepted a Warrant to appear for the Defendant, (which Warrant be in no wiſe revoked) or hath ſubſcribed the ſame, and do not cauſe Bail to be filed accordingly, ſuch Attorney

† *Sed. qu.* If the Court, on Motion, will not compel an Appearance on a Parol Undertaking, unleſs in particular Caſes?

(*d*) By the 5 W. and M. c. 21. ſ. 3. the Defendant ſhall cauſe an Appearance or common Bail to be entered or filed within eight Days after the Return of the Proceſs, on Penalty of 5*l.* to be paid to the Plaintiff, for which the Court ſhall immediately award Judgment, and the Plaintiff may take out Execution. *Vide* 5 Mod. 392. †

torney ſhall be compelled to file common Bail of the (*d*) proper Term, and take a Declaration and plead to the ſame, or in Default of pleading, Judgment may be entered by Default, if Rules for Pleading have been given; for that the Default of the Defendant or his Attorney ſhall not tend to the Plaintiff's Prejudice.

† But this being before the Statute requiring an Oath of the Debt, and ſpeaking of an *Arreſt*. *Qu.* If that Part of the Clauſe is not virtually repealed, and whether, now, we are not to be governed by 5 Geo. 2. c. 27. ? and *vide* alſo 12 Geo. 1. c. 29. If Defendant does not appear, Plaintiff may enter a common Appearance.

*Page 214 * In an Action upon a Replevin Bond, common Bail ſhall be filed.

Salk. 99. pl. 8. Carth. 519. Holt. 127. pl. 1. 12 Mod. 320, 380.

2 Show. 249. pl. 253. and ſuch a Judgment actually ſet aſide. A Judgment in Ejectment againſt the caſual Ejector is erroneous, unleſs a *Latitat* was ſued out, and common Bail filed for him*.

* This is not, now, Law. If Judgment goes againſt the caſual Ejector, there is not any Defendant in Court, to bring Error. If the Tenant, or Landlord, appears, he enters into the common Rule to confeſs Leaſe, Entry and Ouſter, and inſtantly pleads the general Iſſue. The Declaration in Ejectment is in the Nature of Proceſs only.

(C) Where Bail ſhall be ſaid to be put in regularly: And herein,

1. Of the Manner of putting in, excepting to, and juſtifying Bail.

Salk. 98. 6 Mod. 24, 25. (*a*) At the Expiration of the twenty Days without any Exception, the Bail is filed in Court; but if the Defendant except and give Notice thereof, the Defendant's Attorney muſt

BY the printed Rules of the Courts, every Attorney who ſhall appear for any Defendant in any Action in which Special Bail is not required, ſhall duly file common Bail for ſuch Defendant, of the Term of which he appears (*a*) and give Notice thereof to the Plaintiff or his Attorney; and where Special Bail is required and put in (*b*) *de bene eſſe*, before any Judge or Commiſſioner on a *Cepi Corpus*, the Defendant's Attorney ſhall forthwith give Notice thereof in Writing to the Plaintiff or his Attorney, and of the Names of ſuch Bail, with their Additions and Places of Habitation; and if no Exception be taken to ſuch Bail, and entered in the Judge's Book within (*c*) twenty Days after ſuch Notice, then upon Oath thereof made, for which no Fee is to be taken, ſuch Bail ſhall be filed; and if Special Bail ſhall be put in before any Judge *de bene eſſe*, on any Writ of *Habeas Corpus* or *Certiorari*, and no Rule for better Bail, or Exception taken, or entered in the Judge's Book, againſt the Bail ſo put in, within twenty-eight Days after putting in ſuch Bail, then ſuch Bail ſhall be filed by the Defendant's Attorney after the End of the ſaid twenty-eight Days.

bring up the Bail-piece, and the Bail muſt juſtify in Court; and *note*, That in the Common Pleas the Bail-piece remains with the Filazer till the twenty Days are expired; but in the King's Bench it is left with the Judge, becauſe Judges of that Court determine all Matters relating to their Priſoners. And for the Difference of the Manner of taking Bail, and the Form of the Recognizance in each Court, *vide* Cro. Jac. 449, 645. Cro. Car. 481. 2 Bulſt. 232. Rol. Rep. 387. 2 Show. 335. pl. 345. 2 Salk. 564. pl. 4. (*b*) The like Time to except where the Plaintiff puts in Bail upon bringing a Writ of Error. Salk. 98. (*c*) No Notice neceſſary by the modern Practice, but Plaintiff's Attorney is obliged to ſearch the Clerk of the Bail's Office.

It

It is ſaid, That after Exception to Bail there is no ſet Time to juſtify or exchange them for better, but it muſt be in convenient Time*. 6 Mod. 24, 25. See Salk. 97, 98. 11 Mod. 2, 253. Barnes 82. 2 Barnes 60, 83. *Vide* a Rule 3 and 4 *Geo.* 2. in C. *B.* If ſpecial Bail put in by Defendant be excepted to, the Defendant ſhall perfect his Bail within four Days after ſuch Exception taken, in Default whereof the Plaintiff may proceed upon the Bail-Bond: And if inſufficient Bail be put in ſeveral Times, the Court will order Execution. Fareſt. 50. †

* In *B. R.* If Notice of Exception is in Term, Bail muſt juſtify in four Days, or add others that will juſtify. If Exception and Notice be in Vacation, Juſtification to be the firſt Day of next Term. *E.* 5 *Geo.* 2.

† If Notice of Exception in Vacation, Juſtification to be on firſt Day of Term, as in *B. R.*

If the Plaintiff accepts the Bail, he may take away the Bail-piece from the Judge's Chamber, and file it for his own Expedition; but after twenty Days then it becomes abſolute, and the Defendant takes it away and files it.

2. To what Time it ſhall have Relation.

In *B. R.* though the Bail of the Defendant be taken and entered the laſt Day of the Term, and the Bill be put in at any Time the ſame Term, this is well enough by the Courſe of the *King's Bench*; though in Strictneſs of Law the Defendant is anſwerable but from the Time of putting in Bail as *in Cuſtodia Mareſchalli*, and not before ||. Rol. Abr. 333. Hob. 70. S. C. adjudged. Cro. Jac. 384.

S. C. adjudged; becauſe the Bill, whenſoever filed, hath Relation to the firſt Day of the Term. Cowp. 454. Doug. 62. Tidd's Practice 187.

|| A Bill is ſeldom filed, unleſs where Judgment goes by Default, and a Writ of Error is brought, unleſs filed for the Purpoſe of amending by it in either Caſe, if the Cauſe of Action accrues in Term, the Bill ſhould be of a particular Day, ſubſequent to the Cauſe, and it would be the beſt Way, where Bail is put in on the laſt Day of the Term, to make the Bill of that Day.

* If in Trover commenced in *Hilary* Term, the Converſion is alledged to be the 3d of *February* in the ſame Term, and Bail is filed the laſt Day of the Term, yet this is well enough, for the Action ſhall not be ſaid to be depending until the Bill is filed*. Vent. 135. adjudged. *Page 215

*But the Bill ſhould be of a particular Day ſubſequent to the 3d of *February*.

Bail is put in one Term, and new Bail is added the next Term after; and the Queſtion was, If this ſhould be Bail of the firſt Term, or only of the Term when added; about which the Clerks differed; but the Court was of Opinion, that it was only Bail of that Term when the additional Bail was put in, for they ſaid it was not Bail till (*b*) compleated and accepted, and making the additional Bail to be Bail of the firſt Term, might do a (*c*) Wrong to a third Perſon, who might be a Purchaſer after the firſt, and before the additional Bail was put in. Salk. 100. pl. 12.

(*b*) It ſeems now to be the eſtabliſhed Practice, that every Bail taken before or upon the Continuance Day ſhall be a Bail, and filed of the precedent Term, and every Bail taken after the Continuance Day ſhall be a Bail, and filed of the ſubſequent Term, and not otherwiſe: But where any new Bail is added to any other, but ſo as aforeſaid taken on or before the Continuance Day, the ſame ſhall be taken and filed as of that Term in which the Bail was firſt put in. (*c*) For this *vide* Cro. Jac. 449. 2 Salk. 564.

2. Where a different Action is proſecuted from that to which the Bail was given.

If there be an Original and *Capias* in one County, and Bail thereupon filed, and the Plaintiff after declares in another County, and thereupon obtains 3 Lev. 235. *Yates* and *Plaintain* ad-

judged, and agreed by the Prothonotaries, though obtains Judgment, by this Variation the Bail are discharged, and not liable to the Damages upon this Declaration.

by the Course of the Court the Plaintiff might declare in another County, and the Judgment would be good. *

* This relates to Proceedings in *C. P.* or *B. R.* by Original, but if the Proceeding was in *B. R.* by Bill of *Middlesex* or *Latitat*, the Bail would not be discharged for such Variation.

2 Show. 335. pl. 345. Resolved on Motion; but

If *A.* arrests *B.* in an Action of 20*l.* and Bail is put in thereto, and afterwards *A.* delivers two Declarations, one for 200*l.* and another for 500*l.* the Bail shall be only liable for the 200*l.* †

how far the Bill have been held liable in other Actions at the Suit of the same or other Persons, *vide* Cro. Jac. 449, 451. Style 464. 2 Sid. 163. 2 Jones 188. Mod. 16. 8 Mod. 188. Comyns 75. pl. 48. 556. pl. 235. 10 Mod. 24, 44, 153, 270, 280. 2 Stra. 922. 2 Barnard. *K. B.* 44.

† By Rule of *E.* 5 *G.* 2. *B. R.* the Bail are only liable for the Sum sworn to and indorsed on the Writ and Costs, though the Plaintiff by his Judgment recovers much more. See Stra. 922. a Case in *Hil.* 5 *G.* 2. which probably induced the Court to make the Rule of *E.* 5 *G.* 2.

Salk. 102. pl. 16.

A. brings a Bill of *Middlesex*, with an *Acetiam* for 40*l.* and recovered 100*l.* and the Court held, that the Bail should not be liable for more than the *Acetiam*, which was the Measure of his Undertaking: And *per Holt* Ch. Just. He is not liable at all, for his Recognizance is to answer the Condemnation, and since that cannot be, he is bound to nothing; and *Clerk*, Secondary, affirmed, That there was a Rule of Court, that where the Plaintiff recovers a greater Sum than is laid in the Action, the Bail shall not be chargeable in *Ista actione* ‡.

‡ That Doctrine is now over-ruled. Bail are liable for any lesser Sum than marked on the Process, but not for more than the Sum sworn to and Costs. Stra. 922.

4. What Defect or Irregularity may be amended.

If Bail in Debt is entered in this Manner, *viz. sub pœna executionis in adjudicatione executionis*, where it ought to have been *sub pœna condemnationis*, (*e*) yet it * shall stand as well for the Judgment, as for the Execution; adjudged upon a Writ of Error, and it was ordered to be amended, and made *sub pœna executionis Judicii*, as well as for the Execution.

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Cro. Jac. 272.

(*e*) For Bail cannot be taken for Part, *viz.* the Execution, and not the Judgment, no more than for Part of the Debt. Bulst. 107. Doug. 114.

Latch. 182. So ruled on Motion. *Vide* Cro. Eliz. 459.

If two are arrested on a *Latitat*, and one puts in Bail in *Michaelmas* Term, and the other of the Term subsequent, the Court will allow the Bail put in on the *Michaelmas* Term to be filed as put in of the subsequent Term; for otherwise it would be Error to proceed in a joint Action on Bail put in at different Terms.

6 Mod. 309. *per Cur'*, *Bernardiston* and *Vic. Middlesex*, *vide* Title *Amendment.*

If a Writ be taken out in the Name of *A.* and the Officer takes a Bail-Bond to appear at the Suit of *B.* and after there is a *Reddidit se*, by the same Name; though this be *vitium Scriptoris* in not making the Bail-Bond according to the Writ, yet it cannot be amended, for the Bail must be according to the Bail-Bond, and not according to the Writ.

(D) Of the Proceedings againſt the Bail, and what Matters they may plead in their Diſcharge.

THE Act of the Court in delivering the Defendant to Bail being of Record, intitles the Plaintiff to a *Scire facias*, when it appears that the Defendant has not ſatisfied the Judgment; hence it appears, that there muſt be a (*a*) *Capias* returned againſt the Principal before the *Scire facias* is to iſſue againſt the Bail. 1 Wilſ. 269. Doug. 45. 2 Term Rep. 576. 3 Term Rep. 390.

(*a*) Rol. Abr. 308, 333. Moor 432. Cro. Eliz. 597. Goldſb. 174. But this is reſolved and admitted in ſo many Books, that it ſeems needleſs to cite them. *Vide* 1 Lev. 225. That it muſt iſſue and be returned, but may be filed at any Time after;—and that it muſt be awarded within the Year, elſe not till a *Scire facias* againſt the Principal. 2 Jones 96.——And *Note*, That every *Capias ad Satisfaciendum* to warrant a *Scire facias* againſt Bail, muſt have ſeven Days at the leaſt excluſive betwixt the *Teſte* and the Return thereof; and every ſuch *Capias* is to be delivered and left with the Sheriff, to whom it is directed, four Days excluſive at leaſt before the Return. *Vide* 2 Salk. 602. pl. 12. 2 Ld. Raym. 1176. That there ought to be eight Days between the *Teſte* and Return.

But though on the Return of the *Capias* the Plaintiff is intitled to a *Scire facias*, and the Recognizance in Strictneſs is forfeited, yet if the Defendant render himſelf at any Time before, or on the Day of the Return of the ſecond *Scire facias* againſt the Bail, where two *Nihils* are returned, or on or before the Day of the Return of the firſt (*b*) *Scire facias*, where a *Scire feci* is returned *ſedente Curia*, and Notice of ſuch Render is given to the Plaintiff or his Attorney, the Bail ſhall be diſcharged *. Salk. 101. pl. 13. And for the general Underſtanding at what Time the Bail may bring in the Principal,

vide Rol. Abr. 333, 334. Cro. Jac. 109, 165. 2 Brownl. 76. Cro. Eliz. 738. 3 Bulſt. 182. Moor 850. pl. 1156. 2 Rol. Rep. 367, 382. Leon. 58. Godb. 339. Lit. Rep. 194. Stile 134, 324, 425. Jones 139. 6 Mod. 238, 239. ‡ (*b*) How it is to be returned, and how many Days there muſt be between the *Teſte* and Return, *vide* Cro. Eliz. 738. 2 Salk. 599, pl. 7. and Title *Scire facias*.

* This is, *ex gratia*, not *ex debito Juſtit*.

‡ The common Books of Practice contain almoſt every poſſible Caſe on this Subject and full Inſtructions, without referring to ſuch a Multitude of Caſes.

If an Action of Debt be brought on the Recognizance, if the Defendant renders himſelf in Cuſtody within eight Days in full Term after the Day of the Return of the Proceſs againſt the Bail, they ſhall be diſcharged. 2 Rol. Abr. 600, 897. Jones 29. Winch. 61, 62. Godb. 354. Raym. 14. 2 Show. 77. Salk. 101. pl. 13. 2 Salk. 600. pl. 10. Carth. 515. 6 Mod. 132. 8 Mod. 340. 11 Mod. 2, 253. 12 Mod. 650. Ld. Raym. 156, 157, 721. 3 Salk. 56. pl. 8.

* If the Defendant dies (*c*) before the (*d*) Return of a *Capias ad Satisfaciendum* againſt him, his Bail pleading the ſame may be diſcharged. *Page 217 Rol. Abr. 336. Jones 20. Cro. Jac. 97. Moor 432. *Vide* pl. 607. 775. pl. 1073. Poph. 186. * Hut. 47. Stile 324. 2 Mod. 28. S. P.

(*c*) They may plead that the Principal died before any Judgment againſt him, becauſe they cannot have a Writ of Error to reverſe that Judgment. Cro. Eliz. 199. adjudged. But 2 Leon. 101. the whole Court, except *Wray*, inclined otherwiſe. And *vide* Godb. 377. Rol. Abr. 742. 2 Mod. 308. (*d*) But if he dies after the Return of the *Capias*, this will not excuſe the Bail. Rol. Abr. 336.——And where the Defendant pleaded that the Principal died before the *Scire facias* brought, and without more, it was adjudged no good Plea. Cro. Jac. 163. Hutt. 47.

* *Vide* Cro. Eliz. 597. Cro. Jac. 165.

If *A*.

Cro. Jac. 45. and Yelv. 52. S. C. by three Judges againſt two in both Books, and the Plaintiff accordingly diſcontinued his Action.

If *A.* as Bail, enters into a Recognizance that *B.* upon eight Days Warning *comparebit* to any Action that ſhall be brought by *C. necnon* that if *B.* ſhall be condemned in the ſaid Action, and does not pay, &c. that then he will anſwer the Condemnation, and *C.* does bring an Action againſt *B.* and he is condemned, and does not pay, &c. in Debt upon this Recognizance, it muſt be averred that he gave *B.* eight Days Warning to appear, &c. for *A.* is bound only to anſwer the Condemnation in ſuch Action upon which eight Days Warning was given, for that is the Foundation of the Whole; and there is no Reaſon that *B.* by his voluntary Appearance without Warning, ſhould prejudice his Bail.

If a Defendant gives Judgment with a Stay of Execution until a certain Day, the Plaintiff may, notwithſtanding ſuch Stay of Execution, ſue forth a *Capias ad Satisfaciendum* to the Sheriff of the County where the Action is laid, and returnable before the Day, to make out a *Teſtatum* againſt the Defendant; but no ſuch *Capias ad Satisfaciendum* ſhall be ſued forth to warrant a *Scire facias* againſt the Bail, (*a*) becauſe it is to the Prejudice of a third Perſon.

(*a*) Where there was a Contrivance between the Plaintiff and the Principal to free and diſcharge the Principal, and to charge the Bail, *vide* Bulſt. 43.

Cro. Jac. 620. Salk. 98. pl. 5. 99. Comb. 295. 3 Mod. 274. adjudged between *Doe* and *Dawſon*. 8 Mod. 315, 316. 3 Will. Rep. 36. Barnes 158.

If the Plaintiff does not declare againſt the Principal within two Terms after Bail put in, the Bail will be diſcharged, as likewiſe the Principal on filing common Bail.

But if after Bail put in, and before the Plaintiff hath declared, the Defendant obtains an Injunction, and this is continued for ſeveral Terms, and after diſſolved, and the Plaintiff ſoon after declares and gets Judgment, and brings a *Scire facias* againſt the Bail, they cannot plead that no Declaration was delivered or filed againſt the Principal within two Terms after the Action commenced and Bail entered, for there was no Default in the Plaintiff that he did not declare ſooner.

Salk. 89. pl. 11. 402. pl. 10. 7 Mod. 3. 3 Salk. 369. pl. 6. Ld. Raym. 328, 553. *Bur.* and *Atwood* adjudged, and ſaid by the Chief Juſtice, that upon this Writ of Error the Record of the Judgment againſt the Principal ought not to have been certified. Carth. 447. S. C. and only ſaid, That the Writ of Error was quaſhed *quoad* all that related to the principal Judgment. 5 Mod. 397. S. C. ſaid in general that it was quaſhed. And *vide* Stile 174. Cro. Car. 481. Jones 396. Rol. Abr. 749.

J. S. acted as Attorney for the Plaintiff in the original Action, and after Judgment in that Action took out a *Scire facias*, and proceeded to Judgment againſt the Bail without any new or ſecond Warrant; on a Writ of Error, as well of the principal Judgment, as upon that againſt the Bail, the Court held, That any Body might have taken out the *Scire facias*; but as to the further Proceedings they were irregular, the Attorney's Authority determining with the firſt Judgment, and therefore reverſed the Judgment.

Cro. Car. 300. Jones 325. Godb. 440. S.C. adjudged between *Lancaſter* and *Keyleigh*. Hob. 72. Cro. Jac. 384. Rol. Rep. 294. Cro. Car. 408, 574. Jones 360. Bulſt. 125. Lit. Rep. 93. Lev. 137. Com. 108. S. P. 5 Com. Dig. 288, 291. 2 Wilſ. 414.

If Judgment be given againſt the Principal, and after, upon a *Scire facias* againſt the Bail, Judgment be alſo given againſt them, theſe Judgments are ſeveral, and they ſhall not join in a Writ of Error no more than Tenant for Life, and he in Reverſion, or the Tenant and Vouchee, may join.

*Page 218 Skin. 100. pl. 16. ad.

* If the Condition of a Recognizance be, that the Principal ſhall ſurrender himſelf, or pay the Money; and the Breach aſſigned is, That he hath

hath not ſurrendered himſelf; this is naught, for he might have (*a*) paid the Money, and then the Condition is not broken. judged.

(*a*) Where the Bail may plead Payment by the Principal, and how ſuch Plea is to be pleaded, *vide* Rol. Abr. 335, 336. 2 Lev. 212 Cro. Eliz. 233. Stile 324. 2 Leon. 213. Cro. Eliz. 132.* Where a Releaſe to the Principal diſcharges the Bail. Rol. Abr. 336.

* The Bail pleaded in *Scire facias* upon the Recognizance, Payment by the Principal, before the Return of the ſecond *Scire facias*; and the Plea held bad; for in Strictneſs of Law the Recognizance was forfeited, by ſuing out the firſt *Scire facias*. 1 Ld. Raym. 157. In ſuch Caſe, if the Payment had been really made, the Bail ſhould have moved to ſtay Proceedings, on Payment of Coſts incurred againſt them before the Payment.

But if in a joint Action againſt two, *J. S.* is Bail for one of them, and there is Judgment againſt the Principals, in a *Scire facias* againſt *J. S.* the Bail, it is ſufficient to alledge, that the Defendant, for whom he was bound, did not pay the Money, and if the other had paid it, he ſhould have pleaded it. 2 Show. 147. pl. 128. *Creſley* and *Darling* adjudged *Niſi*.

A. and *B.* are Bail to an Action in *B. R.* where Judgment is given againſt the Principal, who brings a Writ of Error in the *Exchequer-Chamber*, pending which the Bail bring in the Principal, or the Principal renders himſelf to Priſon; though the Recoveror cannot pray him in Execution, nor can the Court put him in Execution, becauſe the Writ of Error is a *Superſedeas* to it; yet this is a good Diſcharge of the Bail, for the Marſhal ought to keep him in Priſon as a Pledge till the Judgment be affirmed or diſaffirmed, as he does upon meſne Proceſs for Want of Bail. Rol. Abr. 334, 335. Moor 853 pl. 1165. Cro. Jac. 402. 3 Bulſt. 19. Rol. Rep. 392. Raym. 100.

3 Mod. 87. Ld. Raym. 156, 157, 721. 2 Ld. Raym. 1097, 1177, 1259, 1452, 1467. 8 Mod. 31, 79, 129, 130, 194, 196, 240, 280, 281, 282, 290, 340. 10 Mod. 44, 153, 267, 303, 306, 444. 11 Mod. 2, 33. pl. 3. 12 Mod. 99, 112, 236, 319, 351, 423, 525, 559, 583, 601, 650. Will. Rep. 685. pl. 198. Com. Rep. 554. pl. 232, 556. pl. 235, 573 Caſ. 247. Barnes 46, 47, 52, 56, 60, 62, 72, 83. 2 Barnes 57, 62, 66, 79, 91, 93. Stra. 419, 443, 526. 2 Stra. 717, 781, 872, 877 Barnard. K. B. 373. Fareſt. 77, 97, 98. S. P. Latch. 149. 3 Bulſt. 331, 332. Noy 82. Poph. 186. S. C. See 3 Salk. 56. Carth. 515. 6 Mod. 231. 2 Term Rep. 576.

If the Principal ſurrenders himſelf, or the Bail render him up, this will diſcharge the Bail, and may be (*b*) pleaded to the *Scire facias*; but ſuch Surrender or Render are not ſufficient, unleſs the Plaintiff or his Attorney have (*c*) Notice of it; and this is required, that the Plaintiff may, if he pleaſes, charge him in Execution; alſo, that he may not be at any further Trouble or Charge in proceeding againſt the Bail. Rol. Abr. 337. Moor 888. Leon. 58. 2 Bulſt. 260.

(*b*) Where the Principal was in actual Execution, and a *Committitur* entered, yet after two *Scire facias*'s returned, and Judgment thereupon, the Court would not ſet it aſide on Motion, for the Bail ought to have pleaded it. Skin. 120.—So where the Principal ſurrendered himſelf before the Return of the *Capias*, yet the Plaintiff having had no Notice, and there being no Diſcharge of the Bail-piece, or *Exoneratur* entered; and the Plaintiff having proceeded to Judgment againſt the Bail, the Court would not relieve them on Motion, but put them to their *Audita Querela*. Salk. 101. pl. 14. (*c*) But if through want of Notice he is at further Charge againſt the Bail, that ſhall not vitiate the Surrender; but yet the Bail ſhall not be delivered till they pay ſuch Charges. 6 Mod. 238.

If *A.* ſues *B.* in three Actions, and *B.* puts in three ſeveral Bails, the Plaintiff recovers in all, and the Defendant renders himſelf, on which one of the Bail only enters an *Exoneratur*; though the rendering is a Diſcharge *in Poſſe* as to all, yet it is not (*d*) compleat and actual as to all, till an *Exoneratur* entered upon all. Salk. 98. pl. 3. *per Cur'*.

(*d*) Where after a Surrender at a Judge's Chamber the Principal eſcaped from the Tipſtaff. 6 Mod. 238, 239. Fareſt. 77.

If

Latch. 149. Noy 82. Poph. 185. S. C. Hob. 210. Moor 888. pl. 1249. Keb. 761, 815. S. P. adjudged. Sid. 216. *dubitatur*, and ſaid there were Precedents both ways; but *vide* Lev. 211. 2 Keb. 189, 206. Like Point adjudged.

If the Bail plead a Render of the Principal, they (*a*) muſt conclude their Plea *prout patet per recordum*; for this is not to be tried *per Pais*, but by the Record.

(*a*) So if in a *Scire facias* againſt Bail upon a Writ of Error, according to the Statute of 3 Jac. 1. c. 8. they plead the Plaintiff proſecuted the Writ of Error with Effect, and thereupon the Judgment was reverſed, they muſt conclude *prout patet per recordum*. Raym. 50.

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3 Bulſt. 192. Poph. 186. Rol. Rep. 392, 393.

* Alſo in pleading a Render of the Principal, the Bail muſt ſay *quod venit hic in* (*b*) *Curia & in* (*c*) *eadem Curia reddidit ſe & per eandem Curiam commiſſus fuit*; but it being here laid to be done the 2d of *February*, (being *Candlemas-Day*, and ſo *dies non Juridicus*) it judicially appears there could be no Court that Day, and ſo the Render and Commitment void.

S. C. and S. P. admitted *per Cur'*, tho' it is ſaid *quod adhuc remanet in Cuſtod'*, &c. for if in Priſon without Render or Commitment, it is not material. (*b*) *Vide* Stile 330, 331. (*c*) The Render muſt be made in that Court where the Record is at the Time. Cro. Jac. 98. Rol. Abr. 334.

Moor 400. pl. 524. adjudged.

In a *Scire facias* againſt Bail, they cannot plead that the Plaintiff hath arreſted the Principal in the *Stannery Court*, *per quod* they could not have his Body, for they might have removed him by *Habeas Corpus*.

2 Jones 75. 2 Mod. 312. 2 Lev. 195. Cro. Jac. 320. Rol. Rep. 897. 2 Will. Rep. 542.

So in a *Scire facias* againſt Bail, they cannot plead that before the Return of the ſecond *Scire facias* the Plaintiff proſecuted a *Teſtatum Capias* againſt the Principal, directed to the Sheriff of, &c. who took the Principal in Execution upon the ſaid Judgment, & *adhuc habet & detinet*, for the Recognizance was forfeited before.*

Caſ. 175. Comyns 554. pl. 232. Ld. Raym. 156. 3 Salk. 56. Carth. 515. 2 Stra. 717. 6 Mod. 231. 2 Ld. Raym. 1097, 1117, 1452, 1467. 8 Mod. 31. and the Authorities in the preceding Page to pl. 3. Vent. 314, 315. S. C. *Vide* 1 *Ann.* c. 6. *Vide* Title *Audita Querela*, Letter (B). Bankrupt's Bill (who obtains his Certificate pending the Action) diſcharged, if obtained before they are fixed; liable if not till after. Bur. Rep. 244, 245. How a Soldier's Bail may ſurrender him in their own Diſcharge. *Id.* 339. Bail ſhall have Time to ſurrender their Principal, after a Writ of Error brought by him: But upon different Terms, according to different Circumſtances. *Id.* 340. Where the *Scire facias* is irregular, for Want of an *Exoneretur* being actually entered. *Id.* 4090.

* This is Strictneſs of Law, yet the Court, *ex gratia*, would have permitted the Bail to have ſurrendered the Principal, before the Return of the *Scire facias*. See *ante*.

Bail in Criminal Cauſes.

2 Inſt. 189. 2 Hawk. P. C. 93.

BAIL in Criminal Cauſes is regularly to be allowed in all ſuch Caſes wherein it ſeems doubtful, whether the Perſon accuſed be guilty of the Offence or not; in which Caſe, according to another general Rule, it may be allowed and taken by that Perſon who has Cognizance of the Crime, and therefore being Judge of the Offence, may, if he thinks fit, bail the Offender.

(A) In what Cases it is grantable by a Sheriff. 220.
(B) Where by a Justice of the Peace. 221.
(C) Where by Justices of Gaol Delivery. 223.
(D) Where by the Court of King's Bench. 223.
(E) Where by the other Courts of Westminster. 226.
(F) What shall be said to be sufficient Bail. 226.
(G) The Offence of taking insufficient Bail. 227.
(H) The Offence of granting it where it ought to be denied. 227.
(I) The Offence of denying, delaying or obstructing it, where it ought to be granted. 228.
(K) In what Form it is to be taken. 230.
(L) What shall forfeit the Recognizance. 231.

(A) In what Cases it is grantable by a Sheriff.

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BY the Common Law, according to some Opinions, the Sheriff without any Writ might *ex Officio*, as (*a*) principal Conservator of the Peace, bail any Person arrested on Suspicion of Felony; and it is certain, that by the Common Law, he (*b*) might bail any Person who was indicted before him at his Torn for Felony, or any other Crime that is bailable. *Vide* 2 Hawk. P. C. 93.

(*a*) That a Constable had the like Power, *vide* 2 Hawk. P. C. 93. And how far this Power is taken away by those Statutes which impower Justices of the Peace to admit Persons to Bail on an Accusation of Felony, and particularly prescribe in what Manner they shall do it, *vide Ibidem* 93. (*b*) But this Power is now taken away by 1 *E.* 4. c. 2. by which it is enacted, That the Sheriff shall not proceed on such Indictment, but shall remove it to the next Sessions of the Peace. H. P. C. 106. 2 Hawk. P. C. 93.

Also Bail is grantable by a Sheriff by Virtue of the following Writs. 1. By that of *Odio & Atia*, by which a Person committed for the Death of a Man, might on an Inquest taken by the Sheriff, if he were found to have done the Fact by Misadventure, or *se Defendendo*, be Mainprized by twelve Men, upon the Writ *de Ponendo in Ballium*; but this Writ seems obsolete at this Day. Co. Bail and Mainprize, c. 10. 2 Hawk. P. C. 93. Hawk. P. C. 76.

2dly, By Writ of Mainprize, which of late has been disused, but seems still in Force, and may be brought by Persons bailable, as those who are imprisoned for a slight Suspicion of Felony, or indicted of Larceny, before the Steward of a Leet, or of a Trespass before Justices of the Peace, *&c.* Register 26 c. H. P. C. 103, 104. 2 Hawk. P. C. 93.

3dly, That of *Homine Replegiando*, whereon if he return that the Plaintiff is esloigned, he may by *Capias* of *Withernam* imprison the Defendant, whether he be a Peer or Commoner, till the Plaintiff shall be replevied. F. N. B. 66. Register 78, 79. *Vide* Head of *Writs*.

By

By *Weſtm.* 1. *cap.* 15. it is enacted as followeth; "For as much as "(*c*) Sheriffs and others, who have taken and kept in Priſon Perſons de- "tected, of Felony, and incontinent, have let out by Replevin ſuch as "were not repleviſable, and have kept in Priſon ſuch as were replevi- "ſable, becauſe they would gain of one Party and grieve the other; and "for as much as before this Time it was not determined which Perſons "were repleviſable and which not, but only thoſe that were taken for "the (*d*) Death of a Man, or by (*e*) Commandment of the King, or of "the (*f*) Juſtices, or for the (*g*) Foreſt: It is provided, and by the "King commanded, That ſuch Priſoners as before were (*h*) outlawed, *Page 221 "* and they which have abjured the Realm, (*i*) Provers, and ſuch as be "taken with the (*k*) Manner, and thoſe which have broken the (*l*) King's "Priſon, Thieves (*m*) openly defamed and known, and ſuch as be appealed "by Provers, ſo long as the Provers be living (if they be not of good Name) "and (*n*) ſuch as be taken for Houſe-burning feloniouſly done, or for falſe "Money, or for counterfeiting the King's Seal, or Perſons (*o*) excommu- "nicate, taken at the Requeſt of the Biſhop, or for (*p*) manifeſt Offences, "or for Treaſon touching the King himſelf, ſhall be no wiſe repleviſable "by the common Writ, nor without Writ; but (*q*) ſuch as be indicted of "Larceny by Inqueſts taken before Sheriffs or Bailiffs by their Office, or "of light Suſpicion, or of Petit Larceny, that amounteth not above the Va- "lue of Twelve Pence, if they were not accuſed of ſome other Larceny "afore-time, or accuſed of (*r*) Receipt of Thieves or Felons, or of Com- "mandment, or Force, or of Aid in Felony done, or accuſed of ſome other "Treſpaſs, for which one ought not to loſe Life or Member, and a Man "approved

(*c*) This Statute beginning with inferior officers, extends not to Judges of ſuperior Courts. 2 Inſt. 185, 186. But though the ſuperior Courts are not ſtrictly within the Purview of the Statute, yet they will always in their Diſcretion pay a due Regard to the Rules preſcribed by it, and not admit a Perſon to Bail who is expreſsly declared by it to be irrepleviſable, without ſome particular Circumſtances in his Favour. 2 Hawk. P. C. 113, 114.——And by the 1 & 2 *Ph. & M.* c. 13. Juſtices of the Peace ſhall not bail any Perſon for Offences declared irrepleviſable by this Statute, *vide infra*. (*d*) For this *vide* 2 Hawk. P. C. 95. and the Statutes of Glouc. c. 9. 3 H. 7. 1. (*e*) This Exception is not to be applied generally to every Command of the King, but only to ſuch as proceed from him in Perſon, or from his Privy Council. 2 Hawk. P. C. 95.* (*f*) This is not to be underſtood of ordinary Commitments by ſuch Juſtices for ſafe Cuſtody, but of Impriſonments by their abſolute Command, by Way of Puniſhment, as for Contempts, and ſuch like Matters, which lie rather in their Diſcretion than in their ordinary Power. 2 Hawk. P. C. 96. S. P. C. 73. Dalt. c. 14. F. N. B. 251 24 E. 3. 33. pl. 25. Rol. Rep. 131. (*g*) They muſt be Foreſts, ſtrictly ſuch, and not Parks or Chaſes; but it is not material whether the Foreſt be the King's, or a Subject's. Regiſter 77. 4 Inſt. 314. Co. Lit. 2. a. 233. a. F. N. B. 67. Plowd. 124. *Vide* the 1 E. 3. c. 8. and 7 R. 2. c. 4. *That no Man ſhall be impriſoned by any Officer of the Foreſt without due Indictment, or being taken with the Manner, or Treſpaſſing in the Foreſt:* For the Explanation of which *vide* 2 Hawk. P. C. 97. And for what ſhall be ſaid a Taking with the Manner, *vide* Carth. 77, 78. (*h*) Yet the King's Bench may in Diſcretion bail a Man upon an Outlawry of Felony; as where an Error is alledged in the Proceedings, *&c.* 19 H. 6. 2. a. 2 Hawk. P. C. 98. *Vide* Title *Outlawry*. (*i*) For this *vide* 2 Hawk. P. C. 204. Head of *Approver*. (*k*) Or rather *Mainer*, that is, with the Thing ſtolen as it were in their Hands. H. P. C. 101. 2 Hawk. P. C. 98. (*l*) Alſo they who have broken any other Priſon. 2 Inſt. 188. 2 Hawk. P. C. 98. (*m*) The Judgment whereof muſt be left to the Diſcretion of the Perſon who hath Power to bail them. 2 Hawk. P. C. 98. (*n*) Perſons taken for Arſon, or for falſe Money, or for falſifying the King's Seal, or for Treaſon which touches the King himſelf, are, in reſpect of the Heinouſneſs of their Offence, excluded from Replevin, eſpecially if they be in actual Cuſtody; but yet ſuch, according to the Circumſtances of their Caſes, may be bailed in the King's Bench. 2 Hawk. P. C. 99. (*o*) But if a Perſon appear to be impriſoned for an Excommunication, in a Cauſe whereof the Spiritual Court hath no Cognizance, he may be delivered either by *Habeas Corpus*, or by Quaſhing, or ſuperſeding the Writ of *Excommunicato capiendo*. 2 Hawk. P. C. 98. (*p*) Muſt be intended of inferior Crimes of an enormous Nature, under the Degree of Felony; the Judgment whereof ſeems to be left to Diſcretion. *Vide* 2 Hawk. P. C. 99. (*q*) But how far it muſt appear that thoſe excepted out of the Statute are of good Reputation, and innocent of the Fact, *vide* 2 Hawk. P. C. 101. And that it muſt be left to the Diſcretion of the Perſon who has the Power of bailing them. (*r*) This is to be under-

* With reſpect to the Command of the King, or his Council, the Power of *Secretary of State* to commit, *&c.* The Editor would refer the Student to the Caſes of *Entick Clerk, v. Carrington and others*, 2 Wilſ. 275, *&c.* and the Caſe of *Money et al' v. Leach* in *Error*, in *B. R.* 3 Burr. 1742, *&c.* Alſo *vide* the *King* and *Wilkes*, 2 Wilſ. 151, *&c.* The Caſe of *Croſby* Eſq; Mayor of *London*, 3 Wilſ. 188, *&c.* As to a Commitment by the Commons, *vide Poſt*. 224.

" approved by a Prover after the Death of the Prover (if he be no common " Thief nor defamed) ſhall be henceforth let out by ſufficient Surety, " whereof the Sheriff will be anſwerable, and that without giving Ought " of his Goods."

(B) Where by a Juſtice of the Peace.

IT ſeems clear, that wherever Juſtices of Peace have Power to hear and determine any Offence which is bailable within the Statute *Weſtm.* 1. any one of ſuch Juſtices ſeems conſequently to have Power to bail any Perſon indicted at the Seſſions for ſuch Offence, becauſe every ſuch Juſtice is a Judge of the Court which is to determine it. H.P.C.105. Coke, Bail and Mainprize, c. 6. Lamb. 347. 2 Hawk. P. C. 103.

Alſo every Juſtice of the Peace has a Diſcretionary Power of admitting Perſons to Bail who have given a dangerous Wound.

But the Power of Juſtices admitting to Bail, is chiefly regulated by Acts of Parliament; to which Purpoſe it is recited by 1 *R.* 3. *cap.* 3. " That " divers Perſons had been daily arreſted and impriſoned for Suſpicion of " Felony, ſometime of Malice, and ſometime of a light Suſpicion, and ſo " kept in Priſon without Bail or Mainprize, to their great Vexation and " Trouble; and thereupon it is enacted, That every Juſtice of the Peace " in every Shire, City or Town, may, by his or their Diſcretion, let ſuch " Priſoners and Perſons ſo arreſted to Bail or Mainprize, in like Form " as though the ſame Priſoners or Perſons were indicted thereof, of Record, " before the ſame Juſtices at their Seſſions." 2 Hawk. P. C. 103.

But this Statute, ſo far as it gives ſuch Power to a ſingle Juſtice, is repealed by 3 *H.* 7. *cap.* 3. which enacteth, " That Juſtices of the Peace, or " two of them at the leaſt, whereof one to be of the *Quorum*, have Power " * to bail any Perſon mainpernable by Law, to their next General Seſſions, " or to the next General Gaol-Delivery, as well within Franchiſe as with- " out; and that the ſame Juſtices, or one of them, ſhall certify the ſame " to ſuch Seſſions or Gaol-Delivery, on Pain of 10*l.*" *Page 222

But theſe Statutes having been often abuſed by Juſtices of the Peace, bailing Perſons in the Name of two Juſtices, where one only was preſent, and for Offences not bailable;

It is enacted by 1 & 2 *Ph.* & *Mar. cap.* 13. " That no Juſtice ſhall bail " any Perſon for Offences declared to be irrepleviſable by *Weſtm.* 1. and " that no Perſon arreſted for Manſlaughter or Felony, or Suſpicion thereof, " ſhall be let to Bail or Mainprize by any Juſtices of the Peace, if it be not " in open Seſſions, except it be by two Juſtices at the leaſt, and one to be of " the *Quorum*, and the ſame Juſtices to be preſent together at the Time; " which Bailment or Mainprize they ſhall certify in Writing, ſubſcribed or " ſigned by them at the next General Gaol-Delivery; and ſuch Juſtices, be- " fore ſuch Bailment for Felony, ſhall take the Examination of the Priſoner,

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underſtood of Acceſſaries before and after to Capital Offences, with theſe Reſtraints, that the Perſons ſo accuſed are of good Reputation, and under no violent Preſumptions of Guilt. 2 Hawk. P. C. 102. and 31 Car. 2. *c.* 2. par. 21.*

* I conceive the Court of King's Bench will bail, in every Caſe not capital; in every capital Caſe, where there is any favourable Circumſtance, to induce the Court to ſuppoſe the Priſoner may be innocent; and in every Caſe where the Charge is not alledged with ſufficient Certainty. See page (D. 223.)

" and

" and the Information of them that bring him, of the Fact and Circum-
" ſtances thereof; and ſhall put in Writing ſo much thereof as ſhall be
" material; before they make the Bailment; and ſhall certify ſuch Exami-
" nation and Bailment to the next General Gaol-Delivery; and ſhall have
" Authority to bind all ſuch by Recognizance or Obligation, as do declare
" any Thing material to prove the ſaid Offences, to appear at the next
" General Gaol-Delivery, and to give Evidence, *&c.* and ſhall certify the
" ſaid Evidence and Bonds, *&c.* before the Time of the Trial; and if any
" Juſtice of *Quorum* ſhall offend againſt this Act, he ſhall be fined in Diſ-
" cretion by the Juſtices of Gaol Delivery, on Proof by Examination be-
" fore them, *&c.*" *But it is provided,* " That Juſtices in *Middleſex*, and
" in Cities, Boroughs, and Towns Corporate, ſhall have Authority to bail
" Priſoners in ſuch Manner as was before accuſtomed; and alſo ſhall take
" Examinations and Bonds as aforeſaid, upon every Bailment, and certify
" the Bailment-Bond and Examination at the next General Gaol-
" Delivery."

2. Hawk. P. C. 105. The Authority given to one Juſtice of the Peace by 1 *R.* 3. to admit Perſons to Bail for Felony, being repealed by 3 *H.* 7. *c.* 3. and 1 & 2 *Ph. & Ma. c.* 13. one Juſtice of the Peace cannot admit Perſons to Bail, unleſs it be for an Offence directly tending to a Breach of the Peace, the Reſtraint whereof is the chief End of his Office; or for an Offence by Statute put under the Cognizance of one Juſtice; or for an Offence indictable at the Seſſions.

2 Hawk. P. C. 105. But though the Statute of 1 & 2 *Ph. & Ma. c.* 13. has preſcribed the Statute of *Weſtm.* 1. *c.* 15. as a Pattern for Juſtices to follow in relation to Bail, and it therefore follows, that a Perſon under an actual Arreſt for any Crime, declared to be irrepleviſable by that Act, cannot be bailed by any Juſtice; yet if a Perſon at large be only accuſed of any ſuch Crime on a ſlight Suſpicion, before a Juſtice of the Peace, it ſeems that the Juſtice ought not to commit him, but ought to take Surety from him to appear before a proper Court.

2 Hawk. P. C. 105. Rol. Rep. 268. H. P. C. 99. Dalt. c. 114. Lamb. 346. 2 Inſt. 314. Alſo the Statute of 1 & 2 *Ph. & Ma. c.* 13. expreſsly mentioning the Bailing of Perſons for Manſlaughter, as well as for other Felonies, it is clear that Juſtices of the Peace may, by Force thereof, ſafely bail any Perſon impriſoned on a ſlight Suſpicion of a Fact, appearing to be no higher an Offence than Manſlaughter; and much more if it appear to amount to no more than Homicide by Miſadventure, or in Self-defence; but the Juſtices ought to be cautious, the Offence does not amount to Murder; alſo that there be no violent Preſumptions that the Party did the Fact; for if any ſuch appear, the Party ought not to be bailed; though the Offence amount to no more than Homicide by Miſadventure or Self-defence.

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* (C) Where by Juſtices of Gaol-Delivery.

*Page 223

Crompt. 154. a. H. P. C. 101. F. N. B. 246. S. P. C. 15. 2 Hawk. P. C. 106. JUSTICES of Gaol-Delivery, not being within the Reſtraint of the Statute *Weſtm.* 1. *c.* 15. may bail Perſons convicted before them of Homicide by Miſadventure or Self-defence, the better to enable them to purchaſe their Pardon.

Alſo

Alſo it ſeems, that in Diſcretion they may bail a Perſon convicted before them of Manſlaughter, upon ſpecial Circumſtances; as, if the Evidence againſt him were ſlight; or if he had purchaſed his Pardon. H.P.C. 101. Crompt. 153. 2 Hawk. P. C. 106.

Alſo if an Appellee plead an Excommunication in Diſability of the Plaintiff, it ſeems they may bail him till the Plaintiff ſhall be abſolved; for otherwiſe the Appellee might lie in Priſon for ever, without having an Opportunity of coming to his Trial. Salk. 61. S. P. C. 72. 2 Hawk. P. C. 106.

And where ſuch Juſtices have Power to admit Perſons to Bail, it ſeems that they may do it after their Seſſions is over, as well as during their Seſſions. 2 Hawk. P. C. 106.

(D) Where by the Court of King's Bench.

THIS Court, by the Plenitude of its Power, may in Diſcretion admit Perſons to Bail, though committed by other Courts, for Crimes not bailable by thoſe Courts, on Conſideration of the Nature and Circumſtances of the Caſe. Vaugh. 157. 6 Mod. 73. 3 Salk. 91. pl. 1. 284. pl. 12.

Holt. 590. 2 Ld. Raym. 978. 12 Mod. 102, 155, 156. 2 H. P. C. 112. Raym. 381.

But here it muſt be obſerved, that with reſpect to the Nature of the Offence, although this Court is not tied down by the Rules preſcribed by the Statute of *Weſtm.* 1. *cap.* 13. yet it will in Diſcretion pay a due Regard to the Rules preſcribed by it, and not admit a Perſon to Bail who is expreſsly declared to be irrepleviſable, without ſome particular Circumſtances in his Favour. 2 Inſt. 185, 186, 189. H.P.C. 104. Salk. 61. 3 Bulſt. 113. 2 Hawk. P.C 113, 114. 5 Mod. 454.

And therefore if a Perſon be attainted of Felony, or convicted thereof by Verdict General or Special, or notoriouſly guilty of Treaſon or Manſlaughter, *&c.* by his own Confeſſion, or otherwiſe, he is not to be admitted to Bail, without ſome ſpecial Motive to induce the Court to grant it. Kelynge 90. Dyer 79. Bulſt. 87. 2 Hawk. P. C. 114.

As where a Perſon taken by a *Capias Utlegatum* on an Appeal of Felony, by the Name of *J. S.* Gentleman, pleads that his Name is *J. S.* Yeoman, and not Gentleman, and ſo he is not the ſame Perſon that was outlawed; in which Caſe, the Court in Diſcretion may bail him; for until the Plea be determined, it appears not whether he were the Perſon intended or not. 2 Hawk. P. C. 114. So for any other Error in the Outlawry, eſpecially if it be an apparent one. *Vide* 5 H. 7, 16. pl. 7. 8 Inſt. 188. H. P. C. 101. Sid. 316.

So if a Man is convinced of Felony upon Evidence, by which it plainly appears to the Court that he is not guilty of it; in which Caſe even the Juſtices of Gaol-Delivery may bail him. Cromp. Juſtice 154. 2 Hawk. P. C. 114.

Or where a Proſecution is unreaſonably delayed; or where the Priſoner may be in Danger of loſing his Life, either by Famine, or dangerous Diſtemper, *&c.* unleſs he be bailed. 5 Mod. 455. Sid. 78. Bulſt. 85. Palm. 558.

Keb. 305. Latch. 12. Cro. Jac. 356. Co. Lit. 289.

* The Court of *King's Bench* hath always admitted Perſons to Bail impriſoned by the King's Special Command, or by Order of the Privy Council, where the Commitments expreſſed the Crime or Cauſe for which the Party was *Page 224 5 Mod. 78. Sid. 143. Palm. 559.

was committed, on the like Circumſtances, on which, in Diſcretion, it will grant Bail on other Commitments.

Alſo where it hath appeared that

Perſons have been committed by Colour of an Authority claimed under an illegal Patent, this Court hath always diſcharged the Perſons ſo committed without Bail. Leon. 70. And. 297. 2 Hawk. P. C. 107.

But it was formerly (*a*) holden by many, and at length adjudged in (*b*) Sir *John Corbet's* Caſe, that Perſons committed by the Special Command of the King, ſignified by Warrant from the Lords of the Privy Council, were not bailable without the King's Conſent, unleſs there appeared ſome extraordinary Circumſtances in the Caſe; it being to be preſumed that the King would not exert his Prerogative in ſuch a Manner, without ſome good Reaſon for the Safety of the State, not fit to be divulged; but this being thought to be a great Strain of the Prerogative, and to make the Liberty of the Subject precarious, and contrary to the Purport of *Magna Charta*, and many other Statutes, which declared, That no Man ſhall be impriſoned but by due Proceſs of Law, *&c.* occaſioned the Petition of Right, 13 *Car.* 1. and the 16 *Car.* 1. *cap.* 10. By which it ſeems now eſtabliſhed, That where Commitments by the Privy Council do not with convenient Certainty expreſs the Crime alledged againſt the Party, he ought to be bailed *.

(*a*) 33 H. 6, 28. b. And. 298. Rol. Rep. 134, 192, 219. Con. Moor 839. And. 158. F. N. B. 66. S. P. C. 72.

(*b*) See the Arguments on the *Habeas Corpus*, concerning Loans, and *Ruſhworth's Collections*, 1 Part, fol. 458. *Vide* Cro. Car. 507, 579, 593. 2 Wilſ. 195. 2 Bl. Rep. 756. * See *ante* 820. n.

2 Hawk. P. C. 110.

The great Regard which is ſo juſtly due, and which has always been paid to the Proceedings of either Houſe of Parliament, who are the Guardians of the Liberty of the Subject, makes it ſomewhat doubtful in what Caſes the Court of *King's Bench* will Diſcharge or Bail a Perſon committed by either of thoſe Houſes.

2 Hawk. P. C. 110.

Hence no Precedent can be found, where the Court of *King's Bench* has bailed a Priſoner, ſitting the Parliament, on a Commitment, which, on the Return of it, ſtands indifferent whether it be ſtrictly legal, or not.

Mod. 144, 145, *&c.* 3 Keb. 792. See 2 Show. 336, 337.

And therefore in the Lord *Shafteſbury's* Caſe, who, upon his *Habeas Corpus* in the *King's Bench*, was returned to have been committed by the Houſe of Lords, for a high Contempt committed againſt the Houſe; the Court would not take Notice of any Exceptions againſt the Form of the Commitment; as that it was too general, and did not expreſs the Nature of the Contempt or in what Place it was committed, *&c.* for that it ſhall be preſumed that it was ſuch, for which the Lords might lawfully make ſuch an Order, and no other Court ſhall preſcribe to them in what Form they ought to make it.

2 Hawk. P. C. 111. Keb. 871, 887, 889. Sid. 245. Lev. 165. Mod. 155, 157.

But a Perſon committed for a Contempt by the Order of either Houſe of Parliament, may be diſcharged by the Court of *King's Bench*, after a Diſſolution or Prorogation of the Parliament, whether he were committed during the Seſſions, or afterwards; for that all the Orders of Parliament are (*c*) determined by a Diſſolution or Prorogation; and all Matters, before either Houſe, muſt be commenced a-new at the next Parliament, except only in the Caſe of a Writ of Error; and if the Subject ſhould be deprived of his Liberty till the next Parliament, which perhaps may not meet again in many Years, no one could ſay when his Impriſonment would end.

(*c*) But Q. For though the Prorogation of the

Parliament was the chief Reaſon why the Earl of *Danby* was bailed; yet the binding him to appear at the next Seſſions of Parliament, was an Affirmance of the Commitment, and a plain Proof of the Opinion of the Court at that Time, that the Commitment was not avoided or diſcharged by the Prorogation of the Parliament. Carth. 132, 133. *Vide* Skin. 56. that the Earl of *Danby* was not bailed.*

* In Skin. 162, 3. there are further Arguments in his Favour, but in Carth. 132, it is ſaid he was bailed, when Ch. Juſt. *Jefferies* came in. See Ch. Juſt. *Holt's* Opinion in Salk. 503.

And

And though the Court of *King's Bench* may in their Diſcretion bail a Lord upon an Impeachment of High Treaſon, after a Diſſolution or Prorogation of the Parliament, yet may they refuſe it, not as a Matter out of their Power, but as a Thing which they are not bound to do, and improper on Conſideration of the whole Circumſtances of the Affair. Raym. 381. Lord *Staſford*'s Caſe. *Page 225

The Earl of *Saliſbury* was impeached for being reconciled to the Church of *Rome*, by the Convention that was turned into a Parliament 1 *W. & M.* and lay in the *Tower* till the next Parliament, which being adjourned for two Months, he moved to be diſcharged on the Act of Oblivion, wherein neither his Crime nor his Perſon were excepted, but clearly within the Act of Pardon, or that he might be bailed; but as to the Act of Pardon, the Court held, that it ſhould be (*a*) pleaded with proper Averments, which could not be done here, becauſe there was nothing before the (*b*) Court upon which to ground ſuch Plea; and that as to the Bailing him, this being a ſhort Adjournment, the Application for that Purpoſe ſhould be to the Parliament. Carth. 131, 132. Show. 100. S. C. Earl of *Saliſbury*'s Caſe.

(*a*) For which are cited Plow. 484, 401. 8 Co. 68. 4 *H.* 7. 8. Raſt. Ent. 665.

(*b*) But the Reporter makes a *Quære*, Whether he might not plead it in Diſcharge of the Matter returned by the *Habeas Corpus*, and enter it on the ſame Roll. Carth. 132.

In former Days, and particularly at the Time when Sir *Edward Coke* was Chief Juſtice, ſeveral Perſons committed to the *Fleet* by the Lord Chancellor, were bailed by the Court of King's Bench, upon Exceptions to the (*c*) Generality of the Form of the Commitments.

(*c*) As not ſhewing the Time of the Commitment. Rol. Rep. 192 ——Or ſetting forth only the Command of the Lord Chancellor as the Ground of the Impriſonment, without mentioning any Crime at all. Moor 839. Rol. Rep. 219.—Or mentioning the Crime in general Terms; as for a Contempt to the Court of Chancery, without mentioning what the Contempt was. Rol. Rep. 192, 218.

Alſo one *Glanvil*, who was generally committed by the Command of the Lord Chancellor, without ſetting forth any Cauſe of ſuch Command, ſeems to have been bailed upon Examination of the Merits of the Decree, for diſobeying whereof he was in Truth committed; whereby it appeared that the Decree related to a Matter before adjudged at the Common Law; which was thought contrary to the Purport of 27 *E.* 3. *cap.* 1. and 4 *H.* 4. *cap.* 23. But this Proceeding being reſented by the Lord Chancellor, the ſaid *Glanvil* was afterwards recommitted by him for the ſame Matter, and yet was afterwards on another *Habeas Corpus* bailed the ſecond Time by the Court of *King's Bench*. Rol. Rep. 111, 219. Moor 838. 2 Bulſt. 301. Cro. Jac. 343. 3 Bulſt. 115. Rol. Rep. 277. *Vide* Daliſon 81. 3 Leon. 18.

But as there have been no ſuch Proceedings of late Days, the Diſuſe of them has certainly leſſened, if not wholly removed, the Force of theſe Reſolutions, eſpecially as it is now eſtabliſhed, that a Court of Equity can give Relief after a Judgment at Law; for otherwiſe it would have no Power of moderating the Rigour of the Law, it being in many Caſes very doubtful what the Law is before it be determined; the ſuperior Courts therefore will put the (*d*) moſt favourable Conſtruction on one another's Proceedings, and not intend that they acted beyond their Juriſdiction. 2 Hawk. P. C. 111, 112. Abr. Eq. 130.

(*d*) A Commitment from Chancery for Diſobedience to a Decree, is good without ſhewing what the Decree was. Mod. 155. adjudged. Moor 840. S. P.

The Court of King's Bench, having the ſupreme Controul of all inferior Courts, may in Diſcretion admit Perſons to Bail committed by ſuch Courts, upon Conſideration of the whole Circumſtances of the Caſe, as the (*e*) Length of the Impriſonment, the (*f*) Enormity, or dangerous Tendency or Notoriety, or ſmall Conſequence of the Offence, or Obſtinacy of the Offender, or the (*g*) Dignity of the Court by which he was Vaugh. 157. 6 Mod. 73. 3 Salk. 92 pl. 1. 284. pl. 12. Holt. 590. 2 Ld. Raym. 978. 12 Mod. 102, 155, 156.

2 Hawk. P. C. 112. (*e*) Rol. Rep. 218, 337. 2 Bulſt. 140. Latch. 12. (*f*) Bulſt. 48 to 54. (*g*) For this *vide* 2 Hawk. P. C. 112. Vaugh. 139. 2 Bulſt. 139. Cro. Jac. 219. Cro. Car. 579. Sid. 144, 286, 320. Salk. 348. pl. 2. 5 Mod. 19. March, 52.

committed,

committed, and other ſuch like Circumſtances; of which the Court will
*Page 226 * receive Information by Suggeſtion or Affidavit, being (*a*) conſiſtent with the Return of the *Habeas Corpus*.

(*a*) That no one can in any Caſe controvert the Truth of the Return to a *Habeas Corpus*, or plead or ſuggeſt any Matter repugnant to it; yet a Man may confeſs and avoid ſuch Return, by admitting the Truth of the Matters contained in it, and ſuggeſting others not repugnant, which take off the Effect of them. Sid. 287. 5 Mod. 323, 454. 2 Jones 222. 2 Hawk. P. C. 113.*

* *B. R.* cannot bail one, committed for a Contempt of the Houſe of Commons, (*Alexander Murray's* Caſe, P. 24. *G.* 2.) nor for Contempt of any other Court in *Weſtminſter-Hall*. 1 Wilſ. 299. See farther, *Contin. of Com. Dig.* 6 *V.* 54, 55.

(E) Where by the other Courts of Weſtminſter.

2 Inſt. 53, 55, 615. 4 Inſt. 290. Vaugh. 154. 2 And. 297. Daliſon 81. 3 Leon. 18. 2 Jones 13, 14. 2 Mod. 198.

THE Courts of Common Pleas and Exchequer, at any Time during Term, and the Chancery, either in Term or Vacation, may by the Common Law award a *Habeas Corpus* for any Perſon committed for a Crime under the (*b*) Degree of Felony or Treaſon; and thereupon diſcharge him, if it ſhall plainly appear by the Return that the Commitment was illegal, or bail him if it ſhall appear doubtful.

(*b*) That in ſome Caſes the Chancery may by the Common Law bail Perſons for Felony. 2 Hawk. P. C. 115.

Vide infra Letter (I. 228.)

And by the *Habeas Corpus* Act, any of the ſaid Courts in Term-time, and any Judge of the ſaid Courts, being of the Degree of the Coif, in the Vacation, may award a *Habeas Corpus* for any Perſon bailable within the Intent of that Act, for any Crime under the Degree of Felony.

(F) What ſhall be ſaid to be ſufficient Bail.

2 Hawk. P. C. 88. H. P. C. 97. Dalt. c. 14. That formerly none under the Degree of Subſidy Men were admitted to be Bail for any Perſon. Dalt. c. 70. and 114.

NO Perſon ſhall be bailed for Felony by leſs than two, and it is ſaid not to be uſual for the *King's Bench* to bail a Man on a *Habeas Corpus*, on a Commitment for Treaſon or Felony, without four Sureties; the Sum in which the Sureties are to be bound, ought to be never leſs than 40*l.* for a capital Crime; but it may be higher in Diſcretion, on Conſideration of the Ability and Quality of the Priſoner, and the Nature of the Offence; and the Sureties may be examined on Oath concerning their Sufficiency, by him that takes the Bail; and if a Perſon be bailed by inſufficient Sureties, he may be required either by him who took the Bail, or by any other who hath Power to bail him, to find better Sureties, and on his Refuſal may be committed; for inſufficient Sureties are as none.

2 Hawk. P. C. 89.

But Juſtices muſt take care, that under Pretence of demanding ſufficient Surety, they do not make ſo exceſſive a Demand, as in Effect amounts to a Denial of Bail; for this is looked upon as a great Grievance, and is complained of as ſuch by 1 *W. & M. Seſſ.* 2. by which it is declared, that exceſſive Bail ought not to be required.

(G) The

* (G) The Offence of taking inſufficient Bail.

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IF the Party bailed by inſufficient Sureties do not appear according to the Condition of the Recognizance, the Juſtice, &c. who bailed him is fineable by the Juſtices of Aſſiſe; but if he appear, it ſeems that the Perſon who bailed him is excuſed. S. P. C. 333. H. P. C. 97. 2 Hawk. P. C. 89. *Vide infra* Letter (H)

And that if a Juſtice admits a Perſon to Bail by inſufficient Sureties, whom he knows not to be bailable by Law, corruptly for Lucre or Reward, the Court of King's Bench will grant an Information againſt him, *vide* Title *Informations*; or it is ſuch an Offence for which he may be indicted, *vide* Title *Indictments*.

(H) The Offence of granting it where it ought to be denied.

THE Bailing a Perſon not bailable by Law, is puniſhable at Common Law, as a negligent Eſcape, or as an Offence againſt the ſeveral following Statutes. 2 Hawk. P. C. 89. S. P. C. 33. *Vide* Title *Eſcape*.

By the Statute of *Weſtm.* 1. *cap.* 15. it is enacted, "That if the Sheriff "or any other let any go at large by Surety that is not repleviſable, if he "be Sheriff or Conſtable, or any other Bailiff of Fee, which hath keeping "of Priſons, and be thereof attainted, he ſhall loſe his Fee and Office for "ever; and if the Under-Sheriff, Conſtable or Bailiff of ſuch as have Fee "for keeping of Priſons, do it contrary to the Will of his Lord, or any "other Bailiff, being not of Fee, they ſhall have three Years Impriſon-"ment, and make Fine at the King's Pleaſure."

And it is enacted by 27 *E.* 1. commonly called the Statute *de Finibus levatis, cap.* 3. "That the Juſtices aſſigned to take Aſſizes, &c. when "they delivered the Gaols, &c. ſhall inquire if Sheriffs, or any other, have "let out by Replevin Priſoners not repleviſable, or have offended in any "Thing contrary to the Form of the ſaid Statute of *Weſtm.* 1. and whom "they ſhall find guilty they ſhall chaſten and puniſh in all Things according "to the Form of the ſaid Statute."

And it is further enacted by 4 *E.* 3. *cap.* 2. "That at the Time of the "Aſſignment of Keepers of the Peace, Mention ſhall be made, that ſuch "as ſhall be indicted or taken by them, ſhall not be let to Mainprize by "the Sheriffs, nor by none other Miniſters, if they be not mainpernable "by Law, nor that none who are indicted ſhall be delivered but by the "Common Law; and that the Juſtices aſſigned to deliver Gaols ſhall have "Power to enquire of Sheriffs, Gaolers and others, in whoſe Ward ſuch "Perſons indicted ſhall be, if they make Deliverance, or let to Mainprize "any ſo indicted which be not mainpernable, and to puniſh the ſaid She-"riffs, Gaolers and others, if they do any Thing againſt the ſaid Act."

And it is enacted by 1 & 2 *Ph. & M. cap.* 13. "That no Juſtice or "Juſtices of the Peace ſhall let to Bail or Mainprize any Perſon or Per-"ſons, which for any Offence or Offences by them or any of them com-"mitted, be declared not to be repleviſed or bailed, or be forbidden to be

A Juſtice of *Surry* committed a Man on Suſpicion of ſtealing a Mare, and bound over the Owner to proſecute; afterwards, upon examining two other Perſons, he admitted the Party to Bail. The Proſecutor appeared at the Aſſiſes, and found a Bill, but the Party accuſed did not appear, and the Court granted an Information againſt the Juſtice, declaring they ſhould not have bailed the Man themſelves. 2 Stra. 1216.

" repleviſed or bailed by the above-mentioned Statute of *Weſtm.* 1. *cap.* 15.
" And then the Juſtices of Gaol-Delivery of the Place where ſuch Juſtices
" of the Peace ſhall be guilty of ſuch Offence, upon due Proof thereof, by
*Page 228 " * Examination before them, ſhall for every ſuch Offence ſet ſuch Fine on
" every ſuch Juſtice, as the ſame Juſtices of Gaol-Delivery ſhall think
" meet."

Poph. 96. Dalt. c. 114. 2 Hawk. P. C. 90.

Juſtices of the Peace, before they bail a Man under Commitment, muſt at their Peril inform themſelves of the Cauſe for which he was committed; for if he were in Truth committed for a Cauſe not bailable by Law, it is no Excuſe that they did not know that he was committed for ſuch Cauſe.

(I) The Offence of denying, delaying or obſtructing it where it ought to be granted.

14 H. 7. 7. pl. 19. H. P. C. 97. Dalt. 114. 2 Hawk. P. C. 90.

IT is clearly agreed to be an Offence by the Common Law as well as by Statute, and puniſhable by Indictment as well as by Action, to deny or delay, or obſtruct Bail where it ought to be granted.

But it ſeems alſo clear, that he who has Power to bail another, is not bound to demand of him to find Sureties, and to forbear Committing him till he ſhall refuſe to find them, but may well juſtify his Commitment, unleſs the Party himſelf ſhall offer his Sureties.

H. P. C. 97. 2 Hawk. P. C. 90.

The principal Statutes relating to this Offence, are the above-mentioned Statute of *Weſtm.* 1. *cap.* 15. and the Statute *de Finibus*, *cap.* 3. and 31 *Car.* 2. *cap.* 2. commonly called the *Habeas Corpus* Act; by the firſt whereof it is enacted, " That if any with-hold Priſoners repleviſable after that they
" have offered ſufficient Surety, he ſhall pay a grievous Amercement to the
" King; and if he take any Reward for the Deliverance of ſuch, he ſhall
" pay double to the Priſoner, and alſo ſhall be in the great Mercy of the
" King." And by the latter of the ſaid Statutes it is enacted, " That
" Juſtices of Aſſiſe ſhall inquire if ſheriffs, or any other have offended in
" any Thing contrary to the ſaid Statute of *Weſtm.* and whom they ſhall
" find guilty, they ſhall puniſh in all Things according to the Form of the
" ſaid Statute."

Habeas Corpus Act.

Upon this Statute Mr. *Burn* obſerves two Things: 1. That although the Conſtable by his own Authority without any Warrant of Commitment, may carry an Offender to Gaol, and this was the Method of ſecuring Priſoners, before there were any juſtices of the Peace; yet ſince the Inſtitution of that Magiſtrate, it is better that they be carried before him, to be ſent by him to Gaol by Warrant of Commitment; otherwiſe they have a Right to be bailed upon this Act, whatever the Offence may be. 2. That the Warrant of Commitment ought to ſet forth the Cauſe ſpecially, that is to ſay, not for Treaſon or Felony in general, but Treaſon *for counterfeiting the King's Coin*, or Felony, *for ſtealing the Goods of ſuch an one to ſuch a Value*, and the like; that ſo the Court may judge thereupon, whether or no the Offence is ſuch, for which a Priſoner ought to be admitted to Bail. Burn 64.

" Alſo it is recited by the above-mentioned Statute of 31 *Car.* 2. *cap.* 2.
" *That great Delays had been uſed by Sheriffs, Gaolers, and other Officers, to*
" *whoſe Cuſtody the King's Subjects had been committed for Criminal, or*
" *ſuppoſed Criminal Matters, in making Return of Writs of* Habeas Cor-
" pus, *by ſtanding out an* Alias *and* Pluries, *and ſometimes more; and by*
" *other Shifts to avoid their yielding Obedience to ſuch Writs, contrary to*
" *their Duty and the known Laws of the Land, whereby many Subjects*
" *had been detained in Priſon in ſuch Caſes, where by Law they were bail-*
" *able*, &c. *And thereupon it is enacted*, That whereſoever any Perſon ſhall
" bring any *Habeas Corpus* directed to any Perſon whatſoever, for any Per-
" ſon in his Cuſtody, and the ſaid Writ ſhall be ſerved upon the ſaid
" Officer, or left at the Gaol or Priſon with any of the Under-Officers
" Under-Keepers or Deputy of the ſaid Officers, the ſaid Officers or Keep-

" ers

" ers or Deputies, ſhall within three Days after ſuch Service thereof, (unle s the Commitment were for Treaſon or Felony, plainly and ſpecially expreſſed in the Warrant of Commitment) upon Payment or Tender of the Charges of bringing the ſaid Priſoner, to be aſcertained by the Judge or Court that awarded the ſame, and endorſed on the ſaid Writ, not exceeding 12*d. per* Mile; and on Security given by his own Bond to pay the Charges of carrying back the Priſoner, if he ſhould be remanded; and that he will not make any Eſcape by the Way, make Return of ſuch Writ, and bring or cauſe to be brought the Body of the Party ſo committed or reſtrained, unto or before the Lord Chancellor, or Lord Keeper, or the * Judges or Barons of the Court from which the ſaid *Page 229 Writ ſhall iſſue, or ſuch other Perſons before whom the ſaid Writ is made returnable, according to the Command thereof; and ſhall then likewiſe certify the true Cauſes of his Detainer or Impriſonment, unleſs the Commitment be in a Place beyond twenty Miles Diſtance, *&c.* and if beyond the Diſtance of twenty, and not above one hundred Miles, then within the Space of ten Days; and if beyond the Diſtance of one hundred Miles, then within the Space of twenty Days."

And it is further enacted, *par.* 3. " That all ſuch Writs ſhall be marked in this Manner, *per Statutum triceſimo primo Caroli ſecundi Regis*, and ſhall be ſigned by the Perſon that awards the ſame; and if any Perſon ſhall be, or ſtand committed or detained as aforeſaid for any Crime, unleſs for Treaſon or Felony, plainly expreſſed in the Warrant of Commitment, in the Vacation Time, it ſhall be lawful for ſuch Perſons ſo committed or detained, (other than Perſons convict or in Execution by legal Proceſs) or any one on his Behalf, to complain to the Lord Chancellor or Lord Keeper, or any Juſtice of either Bench or Baron of the Exchequer of the Degree of the Coif; and the ſaid Lord Chancellor, *&c.* Juſtice or Baron, on View of the Copy of the Warrant of the Commitment, or otherwiſe on Oath, that it was denied, are authoriſed and required, on Requeſt in Writing by ſuch Perſon, or any on his Behalf, atteſted and ſubſcribed by two Witneſſes who were preſent at the Delivery of the ſame, to grant an *Habeas Corpus* under the Seal of the Court, whereof he ſhall be one of the Judges, to be directed to the Officer in whoſe Cuſtody the Party ſhall be, returnable *immediate* before the ſaid Lord Chancellor, *&c.* Juſtice or Baron, and on Service thereof as aforeſaid, the Officer, *&c.* in whoſe Cuſtody the Party is, ſhall, within the Times reſpectively before limited, bring him before the ſaid Lord Chancellor, Juſtice or Baron before whom the Writ is returnable; and in Caſe of his Abſence, before any other of them, with the Return of ſuch Writ, and the true Cauſe of the Commitment and Detainer; and thereupon within two Days after the Party ſhall be brought before them, the ſaid Lord Chancellor, Juſtice or Baron before whom the Priſoner ſhall be brought as aforeſaid, ſhall diſcharge the ſaid Priſoner from his Impriſonment, taking his Recogniſance with one or more Sureties, in any Sum according to their Diſcretions, having Regard to the Quality of the Priſoner and Nature of the Offence, for his Appearance in the *King's Bench* the Term following, or in ſuch other Court wherein the Offence is properly cogniſable, as the Caſe ſhall require, and then ſhall certify the ſaid Writ, with the Return thereof, and the Recogniſance into ſuch Court, unleſs it be made to appear to the ſaid Lord Chancellor, *&c.* that the Party ſo committed is detained upon a legal Proceſs, or Order or Warrant, out of ſome Court that hath Juriſdiction of Criminal Matters, or by ſome Warrant ſigned and ſealed with the Hand and Seal of any of the ſaid Juſtices or Barons, or ſome Juſtice or Juſtices of the Peace, for ſuch Matters or Offences for which by Law the Priſoner is not bailable."

But it is provided, *par.* 4. " That if any Perſon ſhall have wilfully neglected, by the Space of two whole Terms after his Impriſonment, to " pray an *Habeas Corpus* for his Enlargement, he ſhall not have an *Habeas* " *Corpus* to be granted in Vacation Time, in Purſuance of this Act."

And it is further enacted, *par.* 5. " That if any Officer, *&c.* ſhall neglect or refuſe to make the Returns aforeſaid, or to bring the Body of " the Priſoner, according to the Command of the Writ, within the reſpective Times aforeſaid, or ſhall not, within ſix Hours after Demand, " deliver a true Copy of the Commitment, *&c.* he ſhall forfeit for the " firſt Offence 100*l.* for the ſecond 200*l.* and be made incapable to hold " his Office."

*Page 230 * And it is further enacted, *par.* 6. " That no Perſon who ſhall be ſet at " large upon any *Habeas Corpus*, ſhall be again impriſoned for the ſame " Offence, by any Perſon whatſoever, other than by the legal Order and " Proceſs of ſuch Court wherein he ſhall be bound by Recognizance to appear, or other Court having Juriſdiction of the Cauſe, on Pain of 500*l.*"

And it is further enacted, *par.* 7. " That if any Perſon, who ſhall be " committed for Treaſon or Felony, plainly and ſpecially expreſſed in the " Warrant of Commitment, upon his Prayer or Petition in open Court, " the firſt Week of the Term, or the firſt Day of the Seſſions of *Oyer* and " *Terminer* or general Gaol-Delivery, to be brought to his Trial, ſhall not " be indicted ſometime in the next Term, Seſſions of *Oyer* and *Terminer* " or general Gaol-Delivery, after ſuch Commitment, the Juſtices of the " ſaid Courts ſhall, upon Motion in open Court, the laſt Day of the Term " or Seſſions, ſet at Liberty the Priſoner upon Bail, unleſs it appear upon " Oath, that the Witneſſes for the King could not be produced the ſaid " Term, *&c.* and if ſuch Priſoner upon his Prayer, *&c.* ſhall not be indicted and tried the ſecond Term or Seſſions, he ſhall be diſcharged from " his Impriſonment."

And it is further enacted, *par.* 10. " That it ſhall be lawful for any " Priſoner, as aforeſaid, to move and obtain his *Habeas Corpus*, as well " out of the Chancery or Exchequer, as the *King's Bench* or *Common* " *Pleas*; and if the ſaid Lord Chancellor or Lord Keeper, or any Judge " or Judges, Baron or Barons, for the Time being, of the Degree of the " Coif, of any of the Courts aforeſaid, in the Vacation Time, upon View " of the Coppy of a Warrant of Commitment or Detainer, or on Oath " made that ſuch Copy was denied, ſhall deny any Writ of *Habeas Corpus* " by this Act required to be granted, being moved for as aforeſaid, they " ſhall ſeverally forfeit to the Party grieved the Sum of 500*l.*"

But it is provided, *par.* 18. " That after the Aſſiſes proclaimed for that " County where the Priſoner is detained, no Perſon ſhall be removed from " the common Gaol upon any *Habeas Corpus* granted in Purſuance of this " Act; but upon ſuch *Habeas Corpus* ſhall be brought before the Judge of " Aſſiſe in open Court, who thereupon ſhall do what to Juſtice ſhall appertain; but it is provided nevertheleſs, *par.* 19. that after the Aſſiſes are " ended, any Perſon detained may have his *Habeas Corpus* according to " the Direction of this Act."

(K) In what Form it is to be taken.

2 Jones 210 Lev. 106. Sid. 211. WHERE a Perſon actually preſent in Court is bailed for a Crime puniſhable with Loſs of Life or Member, it ſeems to be in the Diſcretion of the Court to take a Recogniſance from each of the Bail either

either in a certain Sum, or Body for Body, or both Ways; however such Recognizance of Body for Body doth not make the Bail liable to the same Punishment with the Prisoner, but only to be fined, &c. 4 Inst. 178. 2 Stra. 911. 1242. 2 H. H. P. C. 125.

H. P. C. 97. Cromp. Just. 157. a. and *per* 2 Hawk. P. C. 115. Justices of the Peace may take the Recognizance in such Form.

But for a Crime of an inferior Nature it seems that the Recognisance ought to be only in a certain Sum of Money, and not Body for Body. 2 Hawk. P. C. 115.

Where the Court on Motion may dispense with the Principal's joining in the Recognizance. Salk. 3. Pl. 7.

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* (L) What shall forfeit the Recognisance.

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IF the Recognisance be in the usual form, *ad standum recto de felonia prædicta & ad respondendum Domino Regi*, and at the Trial the Party stands mute, though it may be reasonably argued from the Import of these Words, that in Strictness the Recognisance is forfeited, yet the later Opinions hold otherwise; for if a Man's Bail, who are his Gaolers of his own choosing, do as effectually secure his Appearance, and put him as much under the Power of the Court, as if he had been in the Custody of the proper Officer, they seem to have answered the End of the Law, and to have done all that can be reasonably required of them. 2 Inst. 150. 4 Inst. 178. S. P. C. 178. Dalt. c. 127. 2 Hawk. P. C. 115.

If *A.* enters into a Recognisance that *B.* shall appear in the *King's Bench* such a Term, to answer such an Information, and not to depart till he shall be discharged by the Court, and afterwards a *Nolle prosequi* is entered on that Information, and another exhibited, whereto he refuses to appear, &c. the Recognisance is forfeited. 2 Hawk. P. C. 116.

BAILIFF.

BAILY or *Bailiff*, saith my Lord *Coke*, is an old *Saxon* Word, which signifies a Keeper or Protector; and though there be several Officers called Bailiffs, whose Offices and Employments seem quite different from each other, yet doth something of Keeping or Protection belong to them all. Hence the Sheriff is considered as Bailiff to the Crown; and his County, of which he hath the Care, and in which he is to execute the King's Writs, is called his Bailiwick; also his Officers, who by his Precept execute Writs, are called Bailiffs; there are likewise Bailiffs of Liberties, who are Officers under Lords who have Franchises exempt from the Jurisdiction of the Sheriff; there are likewise Bailiffs of Lords of Manors, who collect their Rents, and levy their Fines and Amerce- Co. Lit. 61. b. By some Opinions a Bailiff in *Magna Charta*, c. 28. signifies any Judge. *Vide* Co. Lit. 168. b. *Vide* 10 H. 4. 4. Mirror c. 5. s. 2. Bract. 409.

Fleta lib. 2. c. 63. Glanv. lib. 1. c. 9. Kitch. Retorn. Brev. 285. 2 Inſt. 453. Co. Lit. 172. Manwood, part 1. p. 113.

Amercements; alſo he is called a Bailiff who hath the Adminiſtration or Charge of Lands, Goods or Chattels to make the beſt Benefit for the Owner, againſt whom an Action of *Account* doth lie for the Profits which he hath raiſed or made, or might by his Induſtry and Care reaſonably have made, his reaſonable Charges and Expences deducted; there are likewiſe thoſe termed Bailiffs, to whom the King's Caſtles are committed, as the Bailiff of *Dover-Caſtle*, &c. The Chief Magiſtrates in divers antient Corporations are called Bailiffs, as in *Ipſwich*, *Yarmouth*, *Colcheſter*, &c. There are likewiſe Officers of the Foreſt which are termed Bailiffs; but as there is but little ſaid of ſome of theſe in our Books, and as what relates to others will more properly fall under other Heads, we ſhall in this Place only conſider what we find relating to

(A) Sheriffs Bailiffs. 232.
(B) Bailiffs of Liberties or Franchiſes. 234.
(C) Bailiffs to Lords of Manors. 235.

* (A) Of Sheriffs Bailiffs.

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6 Co. 54. A Bailiff is to take the ſame Oath which the Under-Sheriff takes, preſcribed by the Statute 27 Eliz. c. 12.

A Sheriff's Bailiff is an Officer appointed in every Hundred to execute all Writs within the Hundred, directed to the Sheriff; he is likewiſe to collect the (*a*) Poſt-Fines, Fee-Farms of the King, &c. for the Sheriff, and to attend the Juſtices of Aſſiſe and Gaol-Delivery, and Juſtices of Peace in their Courts.

But a ſpecial Bailiff, or one employed by the Sheriff for a particular Time only, as to execute one Writ, &c. is not obliged to take the Oath. Jones 249. 2 Lev. 151. But what he doth is conſidered as done by the Sheriff himſelf; and therefore a Reſcue from him ſhall be judged a Reſcue from the Sheriff, and his Eſcape the Eſcape of the Sheriff, for which the Sheriff ſhall anſwer. (*a*) See 32 Geo. 2. c. 14. whereby he is not to collect them.

Stile 18. *Stoughton* and *Day*.

If an Under-Sheriff takes Bond from a Bailiff, conditioned to ſave him harmleſs in executing all Proceſſes, &c. and on Action brought on this Bond, the Sheriff aſſigns for Breach that the Bailiff had not executed a certain Warrant ſent to him upon a Proceſs directed to him out of the Exchequer, to levy Iſſues upon certain Lands in *D.* and it is not alledged that *D.* is within his Hundred; this is no Breach of the Condition, for the Bailiff (*b*) cannot execute a Precept out of the Hundred where he is Bailiff.

(*b*) Unleſs it be directed to him particularly, and he made ſpecial Bailiff for that Purpoſe. *Salk.* 176.

8 E. 4. 14. a. 14 H. 7. 9. b. 6 Co. 54. 9 Co. 69. Stile 405. Cro. Jac. 485, 486.

A ſworn Bailiff, commonly known to be an Officer, acting within his own Precinct, need not ſhew his Writ to the Perſon he arreſts; but when he has made his Arreſt, he is to inform him of the Subſtance of his Writ, at whoſe Suit the Action is, and out of what Court the Proceſs iſſues; but a ſpecial Bailiff is obliged to ſhew his Warrant.

8 E. 4. 14. a. Dalt. c. 117. (*c*) But an Arreſt by a Bailiff's Follower is not good; *Quære* if good by the Follower in the Bailiff's Preſence. 6 Mod. 211. A Contempt to the Court to hinder a Bailiff from arreſting; but no Reſcue unleſs the Arreſt be made 6 Mod. 210.

A Bailiff

A Bailiff caught one by the Hand (whom he had a Warrant to arreſt) as he held it out of a Window, and the Court ſaid that it was ſuch a Taking of him that the Bailiff might juſtify the Breaking open of the Houſe to carry him away. Vent. 306. 6 Mod. 173. S. P.

In what Caſes a Bailiff may juſtify breaking open a Houſe. *Vide* Cro. Jac. 280. Palm. 53. 6 Mod. 105. and the Authorities there cited; and Title *Sheriff.* †

† In General *Gaſſell's* Caſe, *B. R.* it was determined, the Street Door being open, the Officers might legally break open the Defendant's Inner or Chamber Door, he being a Lodger.

One who is arreſted by a Sheriff's Bailiff, is in the Sheriff's Cuſtody, and if reſcued, the Sheriff may alledge that he was reſcued out of his Cuſtody. 2 Jones 197. Lev. 214. 2 Lev. 26.

But where the Sheriff returned *virtute brevis mihi direct' faci warrant'* A. and B. *ballivis meis qui virtute inde ceperant* the Defendant, *& in Cuſtodia mea habuerunt quouſque* ſuch and ſuch *recuſſerunt* him *ex Cuſtodia ballivorum meorum*; it was held ill, for when the Bailiffs have arreſted the Party, he is in Fact and in Truth in their Cuſtody, but in Law he is in the Cuſtody of the Sheriff, and an anſwer either Way is good; but to ſay that it was in the Cuſtody of the Sheriff, and yet reſcued out of the Cuſtody of the Bailiffs, is repugnant. 2 Salk. 586. pl. 2.

A Bailiff having a Warrant againſt *A.* went to him in his Yard, and being at ſome Diſtance told him he had a Warrant, and ſaid he arreſted him; *A.* having a Fork in his Hand, keeps off the Bailiff from touching him, and retreats into his Houſe; and on Motion for an Attachment * for a Contempt, the Court held that bare Words will not make an Arreſt; but if the Bailiff had touched him, that had been an Arreſt, and the Retreat a Reſcous, and the Bailiff might have purſued and broke open the Houſe, or might have an Attachment or Reſcous againſt him; but as this Caſe is, the Bailiff has no Remedy but an Action for the Aſſault; for the holding up of the Fork at him, when he was within Reach, is good Evidence of that. *Page 233 Salk. 79. pl. 2. *Genner* and *Sparks.* 6 Mod. 173. S. C.

By the 29 *Car.* 2. *cap.* 7. it is enacted, "That no Perſon or Perſons "upon the Lord's Day ſhall ſerve or execute, or cauſe to be ſerved or executed, any Writ, Proceſs, Warrant, Order, Judgment or Decree, (except "in Caſes of Treaſon, Felony or Breach of the Peace) but that the Service "of every ſuch Writ, Proceſs, Warrant, Order, Judgment or Decree, "ſhall be void to all Intents and Purpoſes whatſoever; and the Perſon or "Perſons ſo ſerving or executing the ſame, ſhall be as liable to the Suit of "the Party grieved, and to anſwer Damages to him for doing thereof, "as if he or they had done the ſame without any Writ, Proceſs, Warrant, "Order, Judgment or Decree at all." An Arreſt on *Sunday* is void, and the Party may have an Action for falſe Impriſonment, Salk. 78. pl. 1. *A.* was taken on a *Sunday* without any Warrant, and locked up all that Day, and then on *Monday* Morning a Writ was got againſt him; and on a Motion to diſcharge him, the Court held that the Party might have an *Attachment* or an Action of *Falſe Impriſonment* againſt thoſe who took him on the *Sunday.** 6 Mod. 96. *vide* Mod. 56. 8 Mod. 80. 10 Mod. 4, 111, 346. Barnes 17, 137, 138, 228, 278. where an *Attachment* was granted for arreſting one on *Chriſtmas Day.* Hetley 19. But Bail may take their Principal on *Sunday*, and confine him till *Monday*, and then ſurrender him. 6 Mod. 231. 12 Mod 275, 348, 606, 607, 667. Ld. Raym. 706. *Vide* Stat. 5 Ann. c. 9. ſ. 3. by which one may be taken on an Eſcape Warrant on a *Sunday*. That a Bailiff may arreſt in the Night, *vide* 9 Co. 65. b. Cro. Jac. 486. Where he may juſtify entering the Houſe of a Stranger to make an Arreſt, *vide* Lutw. 1432. If a Sheriff makes out a Precept to his Bailiff to arreſt one before any Writ directed to him, and the Bailiff arreſt the Party accordingly, and afterwards a Writ iſſues to the Sheriff, the Party arreſted may have an Action of *Falſe Impriſonment.* Sand. 298. 2 Keb. 173, 838.

* But the Arreſt was held good, being on the *Monday*, by Virtue of the Writ.

A ſpecial Verdict found that a *Fieri facias* bore *Teſte* 4 *June*, but was really ſued forth 11 *June*, and executed 12 *June*; and that the Party, againſt whom it went, became a Bankrupt 6 *June*, and a Commiſſion was taken Sid. 271. Lev. 173. Keb. 930, 932. S. C.

taken out 17 *June*, and *Trover* and *Converſion* was brought againſt the Bailiff who executed the Writ; and the Court held, that though the Property was ſo bound that the Execution ſhould not have Effect againſt the Aſſignment of the Commiſſioners, yet it was hard to puniſh the Officer in *Trover*, and make him a Treſpaſſer for doing what he was obliged to do, and from which he could not plead to excuſe himſelf, and therefore gave Judgment for the Defendant *.

* I conceive the Law is now ſettled *contra*——If a Man commits an Act of Bankruptcy 4th *December*, has Judgment againſt him, Execution thereon, and his Goods ſeized on the 5th, is declared a Bankrupt on the 8th, and the Sheriff ſells the Goods on the 28th, *Trover* lies for the Aſſignees againſt the Sheriff. *Cooper* v. *Chitty*. M. 30. Geo. 2. 1 Burr. 20. Where a Plaintiff ſhall refund Money received under an Execution, where Defendant becomes Bankrupt, by relation prior to the Execution. Se *Copendale* v. *Bridgen*, T. 32 & 33 Geo. 2. 2 Burr. 814. In the Caſe in the Text, the Officer ſhould have taken an Indemnity from the Plaintiff, but the Nature and Effect of the Bankrupt Laws were then little underſtood.

Vide 5 Mod. 225. An Action brought againſt a Bailiff on this Statute for taking 5s. 4d. for an Arreſt.

The Statute 23 *H.* 6. *cap.* 10. enacts, "That for an Arreſt or Attachment the Sheriff ſhall have 20*d.* and the Bailiff who makes the Arreſt 4*d.* and that the Sheriff or Bailiff who doth contrary ſhall pay treble Damages to the Party grieved, and forfeit the Sum of 40*l.* one Moiety to the King, and the other to the Party that will ſue; and that the Juſtices of Aſſiſe in their Seſſions, Juſtices of the one Bench and of the other, and Juſtices of Peace in their County may determine the ſaid Offences."

By the 1 *H.* 5. *cap.* 4. it is enacted, "That they which be Bailiffs of Sheriffs by one Year, ſhall be in no ſuch Office for three Years next following, except Bailiffs of Sheriffs which be inheritable in their Sheriff-wicks; and that no Under-Sheriff, Sheriff's Clerk, Receiver, nor Sheriff's Bailiff, be Attorney in the King's Courts during the Time that he is in Office with any ſuch Sheriff."

Bailiffs, being Officers who are to execute the King's Writs, are moſt commonly puniſhed in thoſe Courts out of which ſuch Writs iſſue, by Attachment; but it is impoſſible to ſet down all ſuch Miſdemeanours, and oppreſſive Practices of which the Court is to determine, for which they ſhall be puniſhed; however Attachments have been granted againſt them where they have uſed needleſs Force, Violence and Terror in making an Arreſt; or where they have broke open Doors where by Law they could not, and there was no plauſible Excuſe for doing it; where they have treated the Perſons arreſted baſely and inhumanly, or kept them in Cuſtody till they conſented to pay Money for their Deliverance; or for taking (*a*) Money for taking Bail, or for making an Arreſt without Authority, by Force of a Blank Warrant filled up with the Name of a ſpecial Bailiff, by the Party himſelf, without the Privity or ſubſequent Agreement of the Sheriff; or if a Bailiff levy a Debt by Virtue of an Execution, and keep the Money in his Hands, and embezzle it; but even in theſe Caſes there may be ſuch Circumſtances or Matters of Alleviation as will induce the Court to excuſe if not wholly diſcharge them.

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Finch 237. Hob. 62. 263, 264. 11 H. 6. 42. b. 43. a. Noy 101. Moor 770. pl. 1064. 2 Rol. Abr. 278.

Barnard. K. B. 259, 296. 2 Barnard. K. B. 213. (*a*) 2 Bur. Rep. 926. *Vide* 2 Geo. 2, c. 22. ſee now 32 Geo. 2. c. 28. An excellent Statute, which provides a Remedy againſt ſeveral Abuſes committed by Sheriffs and their Officers in the Execution of their Offices.

(B) Of Bailiffs of Liberties or Franchiſes.

A Bailiff of a Liberty is one who hath the ſame Juriſdiction with the Sheriff's Bailiff, granted to him by the Lord of a Liberty or Franchiſe.

These Liberties and Franchiſes begun by the Lords purchaſing the Bailiwicks of the Hundreds, ſometimes for Years, for Life, or in Fee, at a certain Rate in Fee-farm; and for this the Lords had the Court Leet, the Aſſizes of Bread and Beer, and the Amends, *viz.* the Fines for the Breach of any of the Articles examinable in the Leet; and they likewiſe had the Return of Writs.

These Franchiſes proving very inconvenient, becauſe the Sheriff could not enter into them to execute the King's Writs, but was to direct them to the Bailiff of the Liberty, who had the Execution of all Writs, the Statute *Weſtm.* 2. *cap.* 29. enacts. That if ſuch Bailiffs give no Anſwer to the Sheriff, the Court ſhould grant a ſpecial Warrant with a *Non Omittas*, which authorizes the Sheriff to enter the Franchiſe; and it being uſual to take out the *Capias* and *Non Omittas* together, we have but little material in our Books relating to this Matter.

But there are ſome Caſes in which the Sheriff might enter without any Clauſe of *Non Omittas*; as in Caſe of a *Quo minus*. So where the Sheriff is by *Weſtm.* 1. *cap.* 17. to make Deliverance by Replevin; ſo where he is Judge, as in a Writ of *Rediſſeiſin*; ſo in *Waſte*; ſo in executing a Warrant for Breach of the Peace. Dalt. Sher. 463. 11 H. 4. 6. 94. Bro. Offic. 34. Bro. Ret. 26.

If the Sheriff executes the Writ of a common Perſon without a *Non Omittas*, the Execution is good; but the Sheriff is liable to an Action by the Lord for entering into his Bailiwick. 2 H. 4. 1. Plow. 216. 243.

The Bailiff of a Franchiſe cannot enter into the Guildable; and if he does, it is erroneous, becauſe he has no Authority out of the Franchiſe more than the Sheriff has in another County. 33 Aſſ. 19. 41 F. N. B. 95. Finch. 54. 11 H. 4. 9.

If there be two Liberties within a County, *viz. St. Edmund de Bury* and *St. Ethelbed de Ely* in *Com' Suffolk* and a *Capias* is directed to the Sheriff to take the Body of *B.* and the Sheriff returns that he has made his Mandate to the Bailiff of *Ethelbed*, who has made no Anſwer, the Sheriff, on a *Non Omittas*, ſhall enter into the Liberty of *Bury* though the Bailiff of that Liberty has made no Default. Bro. Offic 35 Dalt. Sher. 464. Offic. Brev. 135. Theſ. Brev. 166.

If the Bailiff of a Franchiſe had made an inſufficient Return, which the Sheriff returned to the Court, they formerly held the Sheriff was anſwerable, and not the Bailiff; for an inſufficient Return is no Return, and the Bailiff making no Return, the Sheriff ought to have ſaid *nullum dedit mihi reſponſum*; but this is altered by the 27 *H.* 8. *cap.* 24. which ſays that the Amercement for inſufficient Returns made by Bailiffs of Franchiſes, ſhall be ſet on the Bailiff's Head, and not on the Sheriff's. 3 H. 7. 12. 5 H. 7. 27. Bro. Ret. 89. *Vide* Hawk. P. C. 142.

* If the Bailiff of a Liberty dies after he has returned *Cepi* a *Diſtringas* iſſues againſt his Succeſſor, becauſe he takes it up under the Return of his Predeceſſor. *Page 235 Bro. Ret. Brev. 99. 14 E. 4. 1.

(C) Of Bailiffs to Lords of Manors.

BAILIFF of a Manor may himſelf, or may command another to take Cattle *Damage-feaſant* upon the Land; for he hath the Care of all Things within the Manor. Rol. Abr. 339.

But

5 Co. 76. *Pilkington* and *Hastings*. But for this *vide* 1 Brownl. 173. Hob. 154. Rol. Abr. 316. Dyer 222. Moor 141. pl. 282. Cro. Eliz. 22. 813.

But if a Diſtreſs be taken for *Damage feaſant*, Amends cannot be tendered to the Bailiff; for he cannot deliver a Diſtreſs when it is once taken, no more than he can change the Avowry of his Maſter, or Demand a Rent upon a Conditon of Re-entry.

Vide Cro. Jac. 178. Owen 28. Hob. 154.

A Bailiff of a Manor, though he has no Intereſt in the Land, has an Authority to receive Rents, take Fealty, pay Quit-Rents, repair Houſes and Fences, and in other Things act for his Maſter's Benefit; but he cannot do any Thing to his Prejudice, nor can he Tile a Houſe that was before thatched, nor impale a Place before mounded with a Hedge.

Cro. Jac. 178.

A Bailiff may be Steward of the ſame Manor; for thoſe are Offices which are compatible.

Cro. Jac. 178.

A Bailiff hath no permanent Eſtate, but is removeable at the Lord's Pleaſure.

Rol. Abr. 339.

A Bailiff of a Manor may leaſe the Piſcary for Years, but he cannot by any Uſage make a Leaſe of his Maſter's Land.

Diverſity where he may make a Leaſe at Will, though not a Leaſe for Years. Lit. Rep. 71. for this *vide* Rol. Rep. 258. Cro. Jac. 377. 2 Leon. 46.

Rol. Abr. 685. But for this *vide* Godb. 110. Kelw. 174. Fitz. Bailiff 7. Bro. Diſtreſs 83. Comp. Incumb. 481.

If a Man takes Cattle without any Command for Services due to the Lord, if the Lord after agree to the Taking, he ſhall be adjudged his Bailiff, although he was not his Bailiff in any Place before.

Rol. Abr. 339. But *Quære* if there muſt not be a Conſideration given for ſuch Licence. *vide* 1 Rol. Rep. 258. Cro. Jac. 337.

A Bailiff may give Licence to another to go over the Land; for this is a Treſpaſs to the Poſſeſſion only, and the Bailiff hath the Diſpoſal of the Profits of the Poſſeſſion.

Palm. 402.

In Debt for Rent, upon a Leaſe for Years, the Defendant pleaded that the Plaintiff made *J. S.* Bailiff of his Manor, of which the Lands in Leaſe were Part, and gave him Power to receive the Rents of the Leſſees, &c. and alſo Power to make Leaſes for Years; and that an Agreement between the ſaid Bailiff and Defendant was made, that he ſhould pay 100*l.* and alſo ſurrender his Leaſe to the Uſe of the Lord, and then ſhould be diſcharged of the Rent, which he hath done; and whether this Agreement would bind the Lord was doubted, and a peremptory Day given to the Defendant to maintain his Plea, after which the Reporter *Nil plus inde audivit*.

A. leaſes to *B.* for ninety-nine Years, if *B. C.* or *D* ſhall ſo long live, reſerving a Heriot of 5*l.* upon the Death of every of them; *B.* dies, and the Bailiff of *A.* makes Conuzance as Bailiff generally for a Heriot, but

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does * not ſhew that *A.* had made his Election; and whether this was not good and incident to the Place of Bailiff, or at leaſt whether this ſhould not be intended for the Benefit and Advantage of the Maſter till the contrary was ſhewn, *dubitatur*; and after the Parties agreed.

Lit. Rep. 33. 70, 71. Hetl. 12, 16, 17. S. C. ill reported.

3 Mod. 138. Cro. Eliz. 698, 748. Moor 57.

No Bailiff can diſtrain for a Fine or Amerciement without a ſpecial Warrant for ſo doing, which muſt be ſet forth by him in an Avowry or Juſtification of ſuch a Diſtreſs *.

Salk. 107. pl. 2. 108. Skin. 587. pl. 1. 2 Keb. 745.

* The Caſe in *Salkeld* ſays he ſhould have ſet out ſome *Eſtreat* from the Court, or Warrant from the Steward.

BAILMENT.

(A) Of ſimple Bailment, by which the Bailee has only the bare Poſſeſſion. 236.
(B) Of Pledging of Goods as a Security for Money. 237.
(C) Of Bailment, which veſts a ſpecial Property; and therein of Lending on ſpecial Contracts. 240.
(D) Where the Thing bailed is violated or deſtroyed, to whom is the Loſs, and to whom is the Remedy. 241.

(A) Of ſimple Bailment, by which the Bailee has only the naked Poſſeſſion.

IF a Man delivers Goods to another to be kept, or, which is all one, to be ſafely kept, the Bailee undertakes to keep them only from all Damage that ariſes from his own Negligence; and the Undertaking being only to keep them, he ought not to uſe them as though he had an Intereſt in them. *Vide Holt's* Argument in *Cogg's* and *Barnard's* Caſe at the End of this Title (243.) But it was formerly held, that where Goods were bailed generally, that if thoſe Goods with others of the Bailee's were ſtolen, though without his Default, that the Bailee ſhould be reſponſible for them, there being a Warranty in Law annexed to all ſuch Bailments. 4 Co. 83. *Southcote's* Caſe. But for this *vide* Co. Lit. 89. a. Cro. Eliz. 815. Kelw. 77. Sav. 74. Sid. 36. Rol. Abr. 3. pl. 2. Bro. Tit. *Bailment* 7. Tit. *Detinue* 35.

So a *fortiori*, if a Man delivers Goods to another to keep as a Man would keep his own; and this is called a ſpecial Bailment, in which the Bailee doth undertake for no more than for his Diligence in the keeping of them, and has no Manner of Uſe of the Thing to him committed, but the naked Poſſeſſion only. Co. Lit. 89. a. 4 Co. 83. b. Doct. & Stud. 129.

If *A.* leaves a Cheſt locked with *B.* to be kept, and take away the Key, without acquainting *B.* with the Particulars, the Goods in the Cheſt are in the Poſſeſſion of *A.* for ſince *A.* keeps the Key, the Goods * are locked out of the Poſſeſſion of *B.* and *B.* being unacquainted with the Particulars, cannot be ſuppoſed to have them under his Cuſtody; ſo that neither the Poſſeſſion nor Uſe of the Goods are in *B.* for though the Poſſeſſion of the Box is in *B.* yet is he ſhut out from the Poſſeſſion of the Goods in the Box; for that cannot be ſaid to be in his Poſſeſſion that he cannot take hold of and remove, or order, during the Continuance of ſuch Poſſeſſion *. Co. Lit. 89. a. b. 4 Co. 83. *Page 237 * See *poſt* 244.

The naked Poſſeſſion of Chattels Perſonal cannot be aliened, for ſuch Alienation if admitted would deſtroy the Right of the Proprietary; and if allowed to be tranſlated or handed about from one to another, by Concealment Bro. Attachment on Aſſize 20.

ment or Imbezilment might be loſt and deſtroyed, and would not be returned as they ought to the right Owners.

Rol. Abr. 607. If the Goods of *A.* are bailed by *B.* to *C.* *C.* muſt deliver them to *B.* for *C.* cannot pretend to remove or alter that Poſſeſſion committed to him, in order to reſtore it to the right Owner; for the Right of Reſtitution muſt be demanded of him that did the Injury of which *C.* has no Pretence to judge; and therefore it would be downright Treachery in him to deliver it to any other than him from whom he had it.

Rol. Abr. 607. *Vide* Tit. *Trover and Converſion.* But if *A.* bails Goods to *B.* to which *C.* has a Right, and *B.* dies, his Executors are chargeable only to *C.* that has Right, for the Executors came to the Poſſeſſion by the Law, and therefore muſt deliver it to thoſe Perſons in whom the Law has eſtabliſhed the Property; and the taking up of an Executorſhip is an Engagement to anſwer all Debts of the Deceaſed, and all Undertakings that create a Debt, ſo far as there are Aſſets, but doth not embark him in the Perſonal Truſts of the Deceaſed, no more than he is obliged to anſwer for his ſeveral Injuries, which no Man can tell how they might have been diſcharged or anſwered by the Teſtator.

(B) Of Pledging of Goods as a Security for Money.

Vent. & Stud. 130. Rol. Abr. 338, 675. Owen 124. 2 Salk. 522. pl. 1. PLEDGING is where Goods and Chattels are delivered in Security for Money lent, and by ſuch Pledging the Pawnbroker hath more than the naked Poſſeſſion in the Nature of a Bailment, for he hath the Property and Intereſt in the Thing itſelf; and by the better Opinions, ſhall have a reaſonable Uſe of it, ſo that it be without Damage to the Thing thus pledged.

Co. Lit. 89. a. 3. Inſt. 108. 4 Co. 83. Palm. 551. Owen 123. Yelv. 178. Cro. Jac. 244. Bulſt. 29 30. If a Man pledge Goods to *B.* and they are (*a*) ſtolen, *B.* ſhall not anſwer for them, becauſe he hath a Property in them; and his Cuſtody is but a Conſequent of that Property, and therefore he doth undertake to keep them as his own; though a Man that undertakes to ſecure what is another's, is bound to keep them at all Adventures, ſince the right Owner might poſſibly defend them with his Life; but where a Man is only obliged to keep them as his own, no unavoidable Accident is to be imputed to him.

Rol. Rep. 181. Co. Lit. 89. b. (*a*) The Law is the ſame in Caſe of Fire, and all other inevitable Accidents.

But if a Man pledge Goods, and tender the Money to the Pawnbroker, and he refuſes, this determines the qualified Property; and therefore if after ſuch Tender the Goods are ſtolen, &c. the Bailor ſhall have Satisfaction made him in an Action of *Trover*, for a Tender and Refuſal muſt in *Page 238 * thoſe Caſes amount to a Payment, becauſe otherwiſe no Man could again come to his own, ſince Pawns are over the Value lent.

Cro. Jac. 243. Yelv. 179. Bulſt. 29. Bro. Bailment 7. Rol. Rep. 129. Co. Lit. 89.

Cro. Jac. 243. Yelv. 179. Bulſt. 29 31. And though the Borrower tender the Money and recover the Goods in an Action of *Trover*, yet the Pawnbroker may have an Action of *Debt* for his Money; becauſe though the Security ceaſes, yet the Duty remains,

mains, inasmuch as the Money lent is not paid back to the Party from whence it came *.

If *A.* pawns Goods to *B.* for 25*l.* and *B.* delivers them over to *C.* and makes *D.* his Executor, and dies, *A.* shall tender the 25*l.* to the Executor, and not to *C.* for *C.* is no more than a Bailee, and hath only the Custody of them, but the Property of them is in *D.* as Representative of *B.* and therefore to him must the Tender be made; otherwise it is in the Case of a Mortgage, where the Tender may be to the Assignee, because the Property of the Land is in him. Cro. Jac. 244. Yelv. 178, 179.

* But where a Tender has been made, he should demand the Money, before he brings his Action.

So if a Man lend perishable Goods as a Pledge, and they decay, yet the Person to whom they are pledged may have an Action of *Debt* for his Money, because the Duty continues. Yelv. 179. Co.Lit. 209.

These Goods thus taken to Pledge cannot be forfeited by the Pawnbroker for his Offence, nor can they be taken in Execution, nor attached for his Debt, for the absolute Property is in another; and therefore they are not alienable, nor by Consequence forfeitable, because they cannot be forfeited without Loss and Danger to the absolute Owner; and all qualified Possessors do take the Property under the Restriction to preserve the Property of the right Owner. Bro. Attach. in Assise 20.

If a Man pledge Goods, and after is attainted of Felony, the King shall not have the Goods without paying the Sum for which they were pledged; for the Alteration of the general Property doth not alter the special Property in the Pawnbroker. 2 H. 7. 1. Bulst. 29.

If a Man pledge Goods, and then is outlawed, he cannot redeem them, because then the absolute Property of them is in the King; but if the Outlawry be reversed, then the outlawed Person is re-instated in his Property as if there had been no Outlawry, and therefore may redeem them. Bulst. 29.

If the Money be not paid at the Day, the Property is absolute at Law, but still the right Owner has his Redemption in Equity, as in Case of a Mortgage. Co.Lit. 205. Shep. 206.

One pawned Jewels to *A.* who signed a Writing that they were to be redeemed in twelve Months, otherwise for the 110*l.* lent they were to be as bought and sold; *A.* within a short Time after delivers over the Jewels, together with some Plate of his own to *B.* as a Pledge for 200*l.* afterwards *A.* borrowed 38*l.* and 50*l.* of *B.* on promissory Notes, to be repaid on Demand; *B.* by his Answer in Chancery, insisted it was agreed that the Pledge should be a Security as well for the Money on the Notes, as for the Money first lent, but could make no Proof of any such Promise or Agreement; and though a Redemption was decreed, yet it was on Payment of all that was due to *B.* as well upon the Notes as on the Pawns; but the Goods of *A.* which were pawned, were to be first applied as far as the Value of them would extend †. 2 Vern. 177. 691. 698. Abr. Ca. in Eq. 324. *Demaindray* and *Metcalf.*

† In this Case *B.* was an innocent *Lender*, not in Fault, and the Possession of the Jewels being in *A.* at the Time of the Loan by *B.* *A.* was the visible Owner.

In the old Books they took the Nature of a Pledge to be, that it ought to be delivered at the same Time that the Money was lent; and if the Goods were not delivered at the same Time, in Security of the Money, they did not plead it as a Pledge, but in the Nature of a License, to excuse the Trespass. 5 H. 7. f. 1.

But by later Authorities it appears that the Pawnbroker hath a special Property, though it be not delivered at the Time of the Money lent. 2 Leon. 30. Yelv. 164.

As if *A.* be indebted to *B.* and delivers Goods to *C.* in Satisfaction for the Debt of *B.* the Property is thereby altered, and the Right to the Goods 2 Leon. 30, 31. Yelv. 164.

Goods is veſted in *B.* ſo it is where the Goods are delivered to *C.* in Security
*Page 239 * of the Money of *B.* there *B.* hath a ſpecial Property in them; and in theſe Caſes *A.* cannot countermand ſuch Delivery to *C.* or take the Goods back again, becauſe the Property of theſe very Goods is veſted in *B.* for here there is a Conſideration to alter the Property, and that is the Debt due to *B.* ſo that it is not a bare naked Donation which the Party may poſſibly revoke before the Poſſeſſion be veſted in *B.* himſelf, for *ex nudo pacto non oritur actio*; for there is no Conſideration to found an Action on a naked Donation; but here there is a Conſideration to alter the Property; ſo that upon the immediate Delivery of the Goods, the Property is veſted in *B.*

Dyer 49. Before theſe Reſolutions that the Property was altered by the Delivery of the Goods by *A.* to the Uſe of *B.* the only Remedy for ſuch Goods when countermanded was in Equity, upon the Conſideration; for it was ever thought altogether inequitable that ſuch Delivery of the Goods upon a valuable Conſideration ſhould be countermanded at Pleaſure.

2 Co. 79. Bulſt. 29. *Vide* Head of *Mortgages.* There is great Difference between a Pawn and a Mortgage of Lands; for if Goods be pawned without Mention of Time for Redemption, they may be redeemed after the Death of the Pawnbroker; but if Lands are mortgaged without any Mention of the Time for Redemption, they cannot be redeemed after the Death of the Feoffee in Mortgage; for when the Feoffment is made to the Mortgagee and his Heirs, the Limitation is abſolute, and the Condition only goes in Derogation of that abſolute Feoffment; ſo that as far as the Condition doth not extend, the abſolute Words in the Feoffment muſt take Place; and from hence it is that a Condition muſt be taken ſtrictly, and can never be extended, becauſe ſince the Condition goes in Defeaſance of the Eſtate abſolutely limited, it abſolutely muſt come in to ſhut out all extended Conſtruction; and therefore in this Caſe, where the Feoffment is made on Condition that the Feoffor pay ſo much Money to the Feoffee, the Money muſt be paid to the Feoffee during his Life; for Money is not limited to be paid to his Heirs, and therefore there the Words of the abſolute Feoffment take Place; but where Goods are pawned, the Pawnbroker hath but a qualified Property, the abſolute Ownerſhip is in the Perſon that depoſits them; and this Property cannot be extended beyond the Intent for which it was created; and that is only for ſecuring the Money lent; for ſhould the Property be thus extended, it would be to the Injury of him that has the abſolute Ownerſhip. Now the Intent of the Parties in not limiting a Time of Redemption, was plainly in Eaſe of the Pledger, and therefore the Time of Redemption muſt be during his Life; and he cannot be confined to the Life of the Pawnbroker, for that might fall more to the Diſadvantage of the Perſon pledging than if a Time had been limited; and there are no abſolute Words to induce ſuch a rigorous Conſtruction, contrary to the Deſign of the Parties; but if the Pledger doth not redeem during his own Life, his Executors cannot redeem, for then the Words and Intent both agree to make an abſolute Property to the Pawnkroker. †

† *Qu.* In theſe Caſes Equity would not relieve, unleſs it was clearly proved, in Caſe of Death, the Benefit of Redemption was to be loſt?

Bulſt. 29 30. But if Time be ſet for the Redemption of a Pledge, and before the Time the Pledger dies, his Executors may redeem it, and it ſhall be Aſſets in their Hands; for when there is a Time limited, there by the expreſs Words the Party hath till the Time appointed; and the Time appointed is indefinite, and not during the Life of the Pledger; and therefore if he dies his Executors ſhall redeem; and therefore the Death of either Party cannot prejudice.

Bulſt. 31. Owen 124. Some have held that upon a valuable Conſideration a Pledge is aſſignable over, and that on ſuch Aſſignment the Tender of the Money from the Pledger

But if a

Pledger muſt be to the Aſſignee, becauſe the Pawnbroker hath a ſpecial Property, and what he hath he may transfer over.

Thing is not in my Poſſeſſion, I cannot grant it as a Pawn, though I have a Right to it; for a naked Right is not transferable over. 2 Rol. Rep. 439.

* If a Pawnbroker refuſes, upon Tender of the Money, to re-deliver the Goods pledged, he may be indicted; for being ſecretly pawned, it may be impoſſible to prove a Delivery in *Trover* for want of Witneſſes.

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2 Salk. 522. pl. 1. *per Holt* Ch. Juſt. and *Eyre* Juſt.

A Pawnbroker was indicted for refuſing to deliver a Silk Petticoat which the Wife of *J. S.* had given him in Pawn for the Repayment of 2 *s.* 6 *d.* after a Tender of the Money, and it being moved to quaſh the Indictment, the Court (*abſente Holt*) refuſed, becauſe of the great Abuſe by Pawnbrokers.

Carth. 277. *King* ver. *Gallwick*; but the Reporter adds a *Quære*, and ſays that if the Defendant had demurred to this Indictment, it could not have been maintained by Law, being only a Breach of Contract, which is actionable but not indictable. *Vide* 2 Hawk. P. C. 210. and Stat. 30. Geo. 2. c. 24. for preventing the unlawful Pawning of Goods, and the eaſy Redemption of Goods pawned.

(C) Of Bailment which veſts a ſpecial Property; and herein of Lending on ſpecial Contracts.

IF *A.* puts his Beaſts into *B.*'s Paſture, on Agreement to pay *B.* 6*d.* per Week ſo the Paſturage, *B.* cannot retain the Beaſts of *A.* until he hath paid him the Money, unleſs this were at firſt provided by their Agreement: but the only Remedy that *B.* has is upon the Contract *.

Cro. Car. 271. 2 Rol. Abr. 92.

* The Law did not oblige *B.* to take the Cattle into Paſture; conſequently *B.* gave Credit to the Perſon of the Owner.

But if a Horſe be committed to an Hoſtler, he ſhall detain him till he is paid for his Meat. †

8 Co. 147. 39 H. 6. 18. 5 H. 7. 15. 2 Rol. Abr. 85.

† He was obliged by Law, to take in the Horſe, if he had Room.

So if Cloth be committed to a Taylor to make up into a Garment, he ſhall detain the Cloth until he is ſatisfied for his Labour,

Bull. N. P. 45. 3 Burr. 1500.

2 E. 4. 49. Cro. Car. 271. 8 Co. 147. For in Behalf of Trade and Commerce, the Law doth annex the Condition that the Bailee ſhall retain in certain Caſes; for Men that get their Livelihood by Commerce, and by Entertainment of others, cannot annex ſuch diſobliging Conditions that they ſhall retain the Bailor's Property in Caſe of Non-payment, or make ſuch diſadvantageous and impudent Suppoſitions that they ſhall not be paid; and therefore the Law annexes ſuch a Condition, without any expreſs Agreement of the Parties. Beſides, Goods that are put into the Places of public Entertainment and Trade, are for the Sake of public Commerce taken into the Cuſtody of the Law as well as of the Party, and therefore cannot be there diſtrained. Now Goods that are in the Cuſtody of the Law, cannot come out thence till the Purpoſes are ſatisfied for which they were there placed; and the Purpoſe for which theſe Chattels are firſt committed to ſuch public Places is, that they might be there conſerved, and the Party to whom they were committed paid for his Trouble and Charge about them. Now ſince the Act of the Law doth no Man any Injury, it cannot free any Thing from ſuch Public Cuſtody till the Party is ſatisfied to whom they were thus committed. *Vide* Tit. *Inns and Innkeepers.*

A Taylor hath Cloth delivered to him to make up into a Garment, which he doth accordingly, he ſhall have an Action for his Work, without deli-

Palm. 223, 224.

delivering the Garment; and if the Taylor refuse to deliver the Garment upon Request, it ought to be shewn on the other Side in Excuse of the Action; for the Taylor's Action is founded upon the Promise, and if he hath done the Work, and is ready to deliver the Garment, he hath performed all that the Law requires on his Part, and on that Consideration is intitled to the Benefit of the Defendant's Promise.

Dost. & Stud. 129. If a Man lends another his Sheep, Oxen, or his Cart, the Borrower hath a qualified Property in them, according to the Purposes for which they were borrowed; and by Force of this Loan they may be used reasonably for these Purposes and for the Time agreed on; and if they Perish in such Occupation, it is at the Peril of the Lender; but if they Perish in any other Manner, the Borrower must answer for them.

Yelv. 172. If *A.* borrows a Horse to ride to *Dover*, and he ride out of his Way, and the Owner of the Horse meet him, he cannot take the Horse from him, for *A.* has a special Property in the Horse till the Journey is determined, and being in lawful Possession of the Horse, the Owner can-

*Page 241 * not violently seize and take it away, for the Continuance of all Property is to be taken from the Form of the original Bargain, which in this Case was limited till the appointed Journey was finished.

Rol. Rep. 128. *But if *A.* borrows a Horse to go to *Dover*, and goes to other Places, the Owner may have an Action on the Case against him, for exceeding the Purposes of the Loan; for so far it is a secret and fallacious Abuse of his Property; but no general Action of Trespass, because it is not an open and violent Invasion of it.

Co. Lit. 57. 5 Co. 15. Lev. 87, 88. Cro. Eliz. 784. 15 Ed. 4. 84. Mo. 248. Godb. 66, 67. Owen 52. If a Man lend another his Sheep to stock his Land, the Borrower hath the bare Use of them; but if he kill them, the Owner shall have a general Action of Trespass, or an Action of Trover at his Election; for though the Use is in the Borrower, yet the Property is in the Lender, and the Killing of the Sheep is an open Violation of another's Property, which is complained of in the general Action of Trespass.

Dyer 121. pl. 17.

5 E. 4. 2. 6. If I sell you a Horse for 20*l.* I shall retain him unless the Money be actually paid, or conditioned to be paid at a future Day, for unless there be *quid pro quo* the Property is not altered.

Dost. & Stud. 129. As to the borrowing of Things perishable, as Corn, Wine, Honey, or the like, a Man must from the Nature of the Thing have an absolute Property in them, otherwise it could not supply the Uses for which it was lent, and therefore he is obliged to return something of the same Sort, the same in Quantity and Quality with what is borrowed.

(D) When the Thing bailed is violated or destroyed, to whom is the Loss, and to whom is the Remedy.

4 Co. 83. *Southcote's* Case. Dost. & Stud. 129. IT is held by some, that if *A.* commits Goods to *B.* to be kept, or, which is all one, to be safely kept, and they are stolen, that *B.* must answer the Value of them to *A.* Others have made a Distinction, that if *B.* had undertaken for a Price to keep them, that then he should have been bound to answer for them if they had been stolen, because there is a Consideration to found the Promise; but where no Reward is agreed on, there they

they say there can be no Consideration on which the Promise is built, and therefore a naked Promise which affords no Action; but the Reasons urged against this are, That where another loses by my Undertaking, I am equally bound to make good the Value of my Promise, as if I myself was to receive Gain by the Bargain; for since another Man's Property, and possibly the whole Fruits of a long and painful Industry is lost, and wasted by my Undertaking to secure it, certainly I, from whom the Damage arose, ought to make him Satisfaction; for every Man is presumed to guard his own, and not easily to part with that which cannot be acquired without great Difficulty; and therefore it must be presumed that he would have safely kept it, and not have committed it to me, unless I had undertaken to secure it; and if I fail in that Undertaking, I am bound to a Restitution; for I am equally obliged to a Restitution where another Man suffers an Injury by my Means, as where I myself commit an Injury; and had the Law any other Course in these Cases it were a perfect Inlet into all Collusion, for Agreements and Contrivances might arise between the Men of Violence and such treacherous Undertakers, as are not easy to be discovered. Post (243.) *Coggs* and *Barnard*. 2 Ld. Raym. 913. 2 Stra. 1099. 12 Mod. 487.

* If a Carrier, Ferryman or Hostler be robbed, he shall answer the Value of the Goods, for the Carrier, *&c.* hath his Hire, which implies an Undertaking for the safe Custody and Delivery of them; for no Man would give another Money for securing his own, if the Party that received it were not to undertake on his Part to secure it. * Page 242 4 Co. 84. Co. Lit. 89. Sid. 36.

Palm. 523. Rol. Abr. 124. 2. Rol. Abr. 367. Rol. Rep. 79. Hob. 17, 18. Cro. Jac. 162, 330. Mod. 83. 2 Sand. 380. Bulst. 280.

If *A.* delivers Goods to *B.* to be delivered over to *C. C.* hath the Property, and *C.* hath the Action against *B.* for *B.* undertakes for the safe Delivery to *C.* and hath no Property or Interest but in order to that Purpose. Rol. Abr. 606.

But if the Bailment were not on valuable Consideration, the Delivery is countermandable; and in that Case if *A.* the Bailor bring Trover, he reduces the Property again in himself, for the Action amounts to a Countermand of the Gift; but if the Delivery was on a valuable Consideration, then *A.* cannot have Trover, because the Property is altered, and in Trover the Property must be proved in the Plaintiff. Bulst. 68. compared with 2 Leon. 30. Yelv. 164.

If a Man delivers Goods to another, the Bailee shall have a general Action of Trespass against a Stranger, because he is answerable over to the Bailor; for a Man ought not to be charged with an Injury to another, without being able to retire to the original Cause of that Injury, and in Amends there to do himself Right. 13 Co. 69. 14 H. 4. 28. 25 H. 7. 14.

If I deliver Goods to *B.* and *C.* that hath Right demands them of him, *B.* either before or pending the Action deliver over the Goods to me, this is a good Bar to the Action of *C.* brought against *B.* for since *B.* hath undertaken to deliver the Goods back to me, he shall not be chargeable for the honest Performance of that Undertaking; for *B.* that is trusted with my Possession, shall not remove nor alter my Possession, and therefore shall not be put to answer for that to which the Law obliges him. F. N. B. 137. Rol. Abr. 607.

But if I find Goods and convert them, and another recover them from me, yet a Stranger that has Right shall have his Action against me, and therefore two Persons claiming in Trover shall interplead with each other; for I have by my finding the Property in me till another shews a better Right; now this Property continues till the real Owner appears; and if I by weak Defences do not support that Property, that shall be no Injury to the Right of another; for the original Injury begins from me, by undertaking to intermeddle with what is anothers, and which I were sure was none of my own. Rol. Abr. 607.

If a Bailee deliver the Goods to another, there he shall have an Action of Detinue against him, because he hath his Possession, and undertakes for Rol. Abr. 607.

the Cuſtody: and the original Bailor may have his Action againſt either of them, becauſe in him is the Property which both are bound to anſwer to him.

If a Man lend or let another his Horſe, and for Want of ſafe Keeping he die, the Owner hath an Action on the Caſe to repair the Damage ſuſtained by the Negligence; ſo if a Man lend another Sheep to tath his Land, and by the Negligence of the Borrower they are drowned, an Action on the Caſe lies; ſo if a Man lend another a Horſe, and he put him into a Stable that is ruinous, and the Stable tumbles in upon the Horſe and kills him, an Action on the Caſe lies; but if the Stable had been Strong and ſubſtantial, and had fallen by violent Tempeſt, then is the Borrower excuſed; ſo if a
*Page 243 * Man lend another a Horſe, and he dies of divers Diſeaſes, the Borrower is excuſed.

5 Co. 14. Cro. Eliz. 777, 784. Owen 52. Dyer 121. Godb. 72. Doct. & Stud. 128. b. Doug. 688. The Reaſon of theſe Several Caſes is this, that when any Man borrows or hires any Thing, and only uſes it according to the Purpoſes of the Loan, that Contract bears him out from all Accidents that are conſequent upon ſuch Uſage; for there is no Reaſon why the Borrower ſhould not have the Uſe of it according as the Owner had licenſed and impowered him; and if any unavoidable Accident happen upon ſuch a Licence, the Lender muſt impute it to the Folly of his own Permiſſion; but if it happened through the Negligence of the Borrower, then it is fit he ſhould anſwer for that whereby he becomes injurious to the Lender.

Moor 543. If *A.* takes a Gelding to Paſture, and the Gelding be ſtolen, no Action lies againſt *A.* unleſs he had made a ſpecial *Aſſumpſit* to deliver him, for the Undertaking of *A.* is to feed the Gelding in the Fields and in the open Air, and not to keep him ſafely as the Hoſtler is obliged to do in his Stable; and the Law will not ſtretch Mens Promiſes beyond their firſt Undertaking.

Leon. 123, 223. Owen 141. 2 Bulſt. 21. If a Man find Goods and abuſe them, or if he find Sheep and kill them, this is a Converſion; but if a Man find Butter, and by his negligent keeping it putrefies; or if a Man finds Garments, and by negligent keeping they are Moth-eaten, no Action lies; ſo it is if a Man finds Goods and loſes them again; and the Reaſon of the Difference is this; where a Man delivers Goods to another, the Bailee by Acceptance of the Goods undertakes for the ſafe Cuſtody of them; and it is to be preſumed that the Owner would not have parted with them but under the Confidence of that Security; but where a Man only finds the Goods of another, the Owner did not part with them under the Caution of any Truſt or Engagement; nor did the Finder receive them into his Poſſeſſion under any Obligation: and therefore the Law only prohibits a Man in this Caſe from making an unjuſt Profit of what is another's, but the Finder is not obliged to preſerve thoſe Goods ſafer than the Owner himſelf did; for there is no Reaſon for the Law to lay ſuch a Duty on the Finder in Behalf of the careleſs Owner; and it ſeems too rigorous to extend the Charity of the Finder beyond the Diligence of the Proprietor, it is therefore a good Mean to puniſh an injurious Act, *viz.* The Converſion of the Goods to his own Uſe, but not to puniſh a Negligence in him, that is much greater in the Owner.

Allen 93. *Vide* Head of *Carriers.* A Carrier is bound to the ſafe Delivery of a Box, though he doth not know what is in the Box, unleſs he refuſes to carry it without he be inſtructed in the Particulars, for the Party is not obliged to tell him.

I ſhall, as applicable to this Doctrine, inſert the following noted Caſe, with the Argument at large of the Lord Chief Juſtice *Holt.*

Trin. Term. Anno 2 Ann. Reginæ in B. R. 1703. *Coggs v. Barnard,* 2 Ld. Ray. 909, *&c* *Holt* Chief Juſt. *Powel, Powis, Gould* Juſt. In an *Aſſumpſit* the Caſe was this: The Defendant did undertake to remove a Quantity of Brandy from *Brook's-Market* to *Water-Lane,* and by Reaſon of his Neglect one of the Caſks broke; and on Not guilty, a Verdict was for the Plaintiff; and in Arreſt of Judgment two Exceptions were taken:

1ſt, Becauſe in the Declaration he was not alledged to be a common Porter.

2dly, Becauſe it was not averred that he had a Reward.

But

But the whole Court reſolved, That in this Caſe the Plaintiff ought to have his Judgment. Salk. 26. pl. 12. 3 Salk. 11, 268. pl. 4. Holt 13. pl. 14. 131. pl. 2. 528. Comyns 133 And ſee 4 Vin. Abr. P. 6. pl. 4, 5, 6, 7. and Stat. 30 Geo. 2. c. 24. for preventing the unlawful Pawning of Goods, and the eaſy Redemption of Goods pawned.

Holt Chief Juſtice, his Argument was to this Purpoſe.

There be ſix ſeveral Sorts of Bailments, which lay a Care and Obligation upon the Party to whom the Goods are bailed.

1. The firſt is a bare and naked Bailment to another, to keep for the Uſe of the Bailor, which is called *Depoſitum.*

2. A delivery of Goods to another which are in themſelves uſeful to keep, and theſe are to be reſtored again in Specie, which is called *Accommodatum.*

3. A Delivery of Goods for Hire, which is called *Locatio* or *Conductio.*

4. A Delivery by Way of Pledge, which is called *Vadium.*

5. A Delivery of Goods to be carried for a Reward.

6. Such a Delivery as here in the Caſe at Bar, where Goods are delivered to do ſome Act about them, as the Carrying, and without a Reward. which is called *Mandatum*, by *Bracton*, *lib.* 3. 100. in *Engliſh*, an Acting by Commiſſion.

* And though I do not think all theſe immediately neceſſary to the Caſe in Queſtion, yet the Explanation of them will make the Caſe clearer. * Page 244

1. Then as to the firſt, if a Perſon out of Kindneſs keeps the Goods of another, he ſhall not be anſwerable if they be ſtolen, without there be a particular Default in him: And 2dly, Such a Bailee is not chargeable for a common Neglect, for it muſt be a groſs Neglect for which he ſhall be liable. I muſt confeſs I have a great Authority to encounter, which is *Southcott's* Caſe. 4 *Rep.* 83. *b.* However, my Lord *Coke* in his Report goes farther than the Caſe itſelf, for he there makes a Difference between Keeping generally, and ſafe Keeping; which in the Caſe itſelf is not mentioned, but in his Note at the End of it; and I cannot think it to be Juſtice to charge the Bailee if the Goods be loſt without any Default of his; for why ſhould he anſwer for the Wrongs of other People, againſt whom he undertook not?

There never was, before *Southcott's* Caſe, any ſolemn Determination of this Matter; the firſt Caſe of it was in 29 *Aſſ. pl.* 28. 8 *Ed.* 2. *Fitz. Detinue* 59. both quoted in *Southcott's* Caſe; but I cannot agree to the Reaſons of thoſe Caſes, for the Neglect of the Party may be as great where Goods are locked up in a Cheſt, as where not, and by that Reaſon ought to be chargeable as much in the one Caſe as in the other; and the 4 *Ed.* 4. is only a Debate of two Counſel at the Bar, for ——— was not then Ch. Juſt. and what he ſaid was only for his Client, and not of Authority; and 3 *H.* 7. is only a ſudden Opinion; now *Southcott's* Caſe came long after, *viz.* 43 *Eliz.* and there two Judges in the Abſence of the other two gave that Opinion, which Cauſe was improved by my Lord *Coke*; but it has been the conſtant Practice for as long as I knew the Court, that in all the Trials at *Guildhall*, where upon the Evidence no Default appeared in the Bailee, to direct for the Defendant; nor did ever any one venture, upon the Authority of *Southcott's* Caſe, to find the Matter ſpecially; I take it that this Bailee is ſo far from being charged, that though the Goods be loſt by a common Neglect, he ſhall not be anſwerable; as if he negligently keep his own Goods, and that his own and his Friend's Goods are both loſt; now the Loſs of his own is an Argument of his Sincerity, and therefore he ſhall not be chargeable; this is in *Bracton* 99. and though this is an antient Author, yet it is agreeable to Reaſon, and is not in this Point only the Law of *England*, but of foreign Countries, as may be ſeen in *Juſtinian's Inſt.* where I believe *Bracton* got his Notion; now if there be an apparent groſs Neglect, it is looked upon to be a Fraud; but otherwiſe if it be not a groſs Neglect; and I know no Reaſon why the Bailee upon taking

Goods, if it were in Writing, ſhall not be charged againſt the Wrong of a third Perſon, as in *Hob.* 34. *Cro. Jac.* 425. *and* 3 *Cro.* 514. and yet without Writing, as in *Southcott's* Caſe, to be charged; and the *Doctor and Student* 128, 212. ſays, it is for the Advantage of the Bailee, and that an Action does not lie unleſs they be loſt through negligent Keeping; ſo that I do not find ſufficient Reaſon nor Authority to ſupport the Opinion of *Southcott's* Caſe.

2. A Lending *gratis* to uſe for his Advantage, there the Borrower is ſtrictly bound to keep it, for if he be guilty of the leaſt Neglect he ſhall be anſwerable; as if I lend a Horſe to go to the *North* of *England*, and he goes to the *Weſt*, and the Horſe is ſtole, he ſhall in that Caſe be chargeable; for if he had gone as I directed, the Horſe, perhaps, would not have been ſtolen: this Sort of Bailment is mentioned in *Bracton* 99. but in this Caſe, if this Horſe had been in the Stable of the Bailee, and ſtolen thence without his Default, as perhaps the Thieves might firſt have bound the Bailee, and then have taken the Horſe, he ſhall not be anſwerable; but if he left the Stable Doors open, he ſhall for that Neglect be anſwerable. *Bracton* ſays, he ought to take the utmoſt Care, but in no Place ſays he ſhall be charged where no Default was in him.

*Page 245 * 3. As to the third Bailment, where Goods are hired out for a Reward, *Bracton* 62. ſays, the Hirer is to take all imaginable Care, and to reſtore it at the Time, and he is bound to ſuch a Care as a diligent Maſter of a Family uſeth to his Family, which Care, if he ſo uſeth, he ſhall not be bound; now the moſt diligent Man is liable to be robbed, and therefore I collect, that if he be ſo careful, as according to *Bracton's* Definition, and be robbed, he ſhall not be liable.

4. If Goods be pawned, the Pawnee has a ſpecial Property, which is in Nature of a Security to compel the Pawner to pay; and if the Goods be the worſe for uſing, the Pawnee muſt not uſe them; as Clothes, &c. but if they be not the worſe for uſing, he may uſe them at his Peril; as Jewels pawned to a Lady, and ſhe keeps them in a Box, and they are ſtolen, ſhe ſhall not be charged; but if ſhe goes abroad with them to a Play, and there they are ſtolen, ſhe ſhall be anſwerable. 2dly, If the Pawnbroker be at Charge in keeping of them, as if it were a Horſe, and he gives it Meat, he may uſe it for his reaſonable Charge he has been at, *Bracton* 99. If a Creditor takes a Pawn, he is bound to reſtore it upon Payment; but if he, notwithſtanding all his Diligence loſe it, he ſhall howſoever recover his Debt, 29 *Aſſ. pl.* 28. for the Law does not lay upon him an Obligation to keep againſt all Accidents; but if the Money be tendered, and he after detains, and then it is loſt, he ſhall then be liable, for he is then a Wrong-doer, and his keeping it after is the Occaſion of its being ſtolen, and he is then anſwerable at all Events.

5. Goods to be carried for a Reward. 1. If you deliver them to a public or common Carrier, and they are ſtolen, he muſt be liable, for the Law charges him at all Events; but yet the Act of God, or the Enemies of the Queen, may excuſe; and this is a political Inſtitution by the Laws of *England*, that People may be ſafe in their Dealing; for otherwiſe Carriers, that are frequently truſted with Things of great Value, would be often tempted to confederate with Thieves. 2dly, But he who has a particular private Employment, though he has a Reward, yet he is not bound againſt all Events as a Factor or a Bailiff, if they do to the beſt of their Power; and that is *Southcott's* Caſe; and he is bound no otherwiſe than as his Maſter himſelf ſhould do, for it were unjuſt to charge him with what he cannot prevent.

6. To this Point, Here is a Man not intruſted to keep, but to carry, and not to have any Thing for his Pains, and he through his own Negligence miſcarries; though he be to have nothing, yet it appears there was a No-

glect, and for that Reaſon he is chargeable; but if the Goods had been miſuſed by a third Perſon in the Way as he carried them, and without any Neglect of his, I hold that he would not then be liable, becauſe he had nothing for a Reward; in *Bracton*, *lib.* 3. 100. this is called *Mandatum*, and ariſeth upon the *Emendato*, in *Engliſh*, Acting by Commiſſion; and if he through his Negligence ſuffer his Goods to be damaged, he is liable. *Vinnius's* Comment upon *Juſt. Inſt.* 684. *Mandatum* is there defined to be a Contract whereby any Thing is committed *gratis* to be done for another; and with this agrees *Bracton*; and though this Word be not uſed in any other Book of the Law, and this be an old Authority, yet in this Point he is ſupported by Reaſon; and upon the Whole, I am of Opinion that the Defendant in this Caſe is liable, for it is a Deceit to the Plaintiff his being negligent; for it is upon the Confidence of his Carefulneſs that the Plaintiff intruſted him; and in *Godb.* 64. and 2 *H.* 7. For the negligent keeping of Sheep, *&c.* an Action lay, for there is a Conſideration, *viz.* the Truſting, though no Money be paid; and here he becomes chargeable by the Miſchief he has done. 29 *H.* 6. 49. 33 *H.* 6. 34. 11 *H.* 4. 33. By theſe Caſes, though a Man promiſes to build an Houſe for another, he ſhall not be bound, being *nudum Pactum*; yet I doubt not but if he had once gone about the Building it, and he do it ſo ill that it falls, an Action would lie; and in *Yelv.* 4. the Plaintiff declared, that in Conſideration that he delivered to the Defendant twenty Quarters of Corn, the Defendant aſſumed upon Requeſt to deliver the Corn again to the Plaintiff; and it was there held that the Action lay; but this Judgment was after reverſed in the *Exchequer-Chamber*; and contrary to it is a Caſe in *Yelv.* 128. but in the ſame Book 50. is the Caſe *fol.* 4. of *Biggs* and *Riches*, confirmed and allowed good Law; and there *Gaudy* and the Court held it a bad Reverſal, and contrary to that Reverſal ſolemnly adjudged in 2 *Cro.* 667. Now if a Truſt be once undertaken, that is a ſufficient Conſideration; the Caſes in the *Regiſter* 110. are full in Point, for there the very Precedent is *quod* (the Defendant) *tam negligenter, &c. carriavit quod Papa illa confracta fuit*, without any Mention of a Reward, or that he was a common Carrier; though in latter Days for the greater Caution they inſert theſe Words, *pro quadam mercede* *, ſo that he that is intruſted by Commiſſion, if he enters upon the Employment, and after any Loſs accrues to the Owner through his Neglect, he is liable though he receive no Reward; but if any Loſs accrues to the Owner not through any Neglect of his, though he receive a Reward as a Factor, *&c.* yet ſhall not he be liable: So that upon this whole Matter, I am of Opinion Judgment ought to be given for the Plaintiff.

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* Theſe Words ſhould not be inſerted, if not warranted by the Fact, as I conceive a Plaintiff would be nonſuited, if he could not prove it.

BANKRUPT.

THE granting Commiſſions of Bankrupt ſeems to be derived from the Civil Law, which conſtituted a Guardian to a Prodigal in the ſame Manner as to a Madman; and ſuch Guardian the Rector appointed on the Petition or Application of Relations, as well as Creditors: But the Feudal Law, though it admitted of Commiſſions

Digeſt. Lib. 27. Tit. 10. For the Definition and Derivation of the Word,

vide 4 Inſt. 277. A Commiſſion of Bankrupt is an Action and Execution in the firſt Inſtance.

of Lunacy *ex neceſſitate*, would allow of none for Prodigality, not being reckoned injurious, becauſe ſuch Prodigal could not alien his Lands without the Leave of his Lord; alſo the Condition of a Freeman was not to be altered without the Crime of Felony. But as Trade and Commerce increaſed, it was found neceſſary, for the Support of Credit, to introduce ſuch a Law amongſt us, and therefore our Acts of Parliament have confined it to Traders and Creditors only.

Atk. Rep. 67. pl. 22. Lord Chancellor *Hardwicke* ſaid he did not approve of *Caveats* againſt Commiſſions of Bankruptcy, from their general Inconvenience, as they give an Opportunity to Perſons, againſt whom Commiſſions are to be taken out, to make away with their Effects. Atk. Rep. 73. pl. 26. The Bankrupt Acts are not adopted in *Ireland*. Atk. Rep. 82. pl. 31.

We ſhall conſider the Laws of Bankruptcy, as moulded by ſeveral Statutes and Acts of Parliament, under the following Heads:

(A) What kind of Trade, Occupation or Profeſſion a Man muſt be of, or of what Nation, before he can be adjudged a Bankrupt, and what Acts he muſt do, permit or ſuffer, which will make him one. 247.

(B) Of the Commiſſion of Bankrupt; and herein of the Creditors who may obtain it, and what they are to do previous thereto. 251.

*Page 247 * (C) Of the Commiſſioners, their Duty; and herein of the Power they may exerciſe over the Bankrupt or others in diſcovering of the Bankrupt's Eſtate. 253.

(D) Of the Aſſignees; and herein of the Manner and Time of chuſing them. 256.

(E) Of the Creditors, who are ſuch; and herein of proving their Debts, and Time of coming in. 258.

(F) Of the Bankrupt's Eſtate and Effects, to which the Commiſſioners or Aſſignees are intitled, when it ſhall be ſaid to be veſted in them; and herein of fraudulent Diſpoſitions by the Bankrupt, and of the Actions the Aſſignees may bring for the Recovery thereof. 259.

(G) Of ſetting off, ſubmitting to Arbitration, and compounding Debts due to the Bankrupt. 263.

(H) Of the Diſtribution to be made of the Bankrupt's Eſtate. 264.

(I) How the Bankrupt is to demean himſelf; and herein of the Crime in not appearing, not diſcovering his Eſtate, and the Privilege he is to enjoy during his Attendance. 266.

(K) Overplus of the Bankrupt's Eſtate, and the Allowances to be made him; and herein of his Diſcharge and Certificate. 269.

(A) What

(A) What kind of Trade, Occupation or Profession a Man must be of, or of what Nation, before he can be adjudged a Bankrupt, and what Acts he must do, permit or suffer, which will make him one.

BY the 13 *Eliz. cap.* 7. "Any Person being a Subject or Denizen, "using or exercising the Trade of Merchandize by way of Bargaining, Exchange, Rechange, Bartry, Chevisance, or otherwise in Gross or by Retail, or seeking his or her Trade of Living by buying and selling, "that departs the Realm, or begins to keep House, or otherways to absent "himself, or take Sanctuary, or suffers himself willingly to be arrested for "any Debt not due, or suffers himself to be outlawed, to defraud any of "his Creditors, being Subjects born, shall be deemed a Bankrupt." * A Clergyman may be a Bankrupt. 1 Atk. Rep. 196. pl. 103.

* The Chancellor was of Opinion the Commissioners should proceed in the Commission, but so as not to prejudice any Remedy the Petitioner might have by an Action at Law.

The 1 *Ja.* 1. *cap.* 15. *sect.* 1. is the same with the foregoing Statute, the following Addition only, *viz.* "Or fraudulently procures his Goods to be "attached or sequestered, or makes any (a) fraudulent Grant of his Land, "* &c. to the Intent that his Creditors, being Subjects born, may be de- "frauded, shall be adjudged a Bankrupt." *Page 248 Bur. 467. 2 Bur. 829.

(a) In Trover and Conversion a special Verdict was found, that a Merchant had made a fraudulent Deed to the Defendant of the Goods contained in the Declaration, and that afterwards he went to the *Exchange* and appeared publicly in Trade, and then absconded: and afterwards a Commission being taken out, these Goods were assigned by the Commissioners; the executing of the Deed does not make him a Bankrupt, because the Jury find that he was afterwards abroad, and that then he absconded, and that the Commissioners pitched upon that Act of Bankruptcy to declare him a Bankrupt; and that though they have found it a fraudulent Deed, yet they did not find it *in fraudem Creditorum*, and it might only be a fraudulent Deed in respect of some subsequent valuable Sale; and therefore no Title was found for the Plaintiff. Hutton 42, 43. *Cartwright* and *Underhill*. See 2 Ld. Raym. 852. *

* But *qu.* If it would not now be adjudged an Act of Bankruptcy. See *Worseley* v. *Demattos*. 1 Burr. 467. and *Wilson* and *Day*. 2 Burr. 827.

21 *Jac.* 1. *cap.* 19. *sect.* 2. sets forth, "That every Person that uses "the Trade of Merchandize, or that uses the Trade of a Scrivener, re- "ceiving other Men's Money into his Trust and Custody, who by himself "or others shall procure any Protection, except such as shall be lawfully "protected by Privilege of (b) Parliament, or by Petition, Bill, &c. shall "endeavour to compel their Creditors to take less than their just Debts, "or gain longer Time than was given upon the original Contract; or be- "ing arrested for Debt, shall after such Arrest lie in Prison two (c) Months "or more, upon that or any other Arrest or Detention in (d) Prison for "Debt, 1 *Jac. c.* 15. or being arrested for 100 *l.* or more just Debts, "procure his Enlargement, by putting in common or hired Bail, shall be "adjudged a Bankrupt; and in Case of Arrest, lying in Prison, or get- "ting forth by common or hired Bail from the Time of the Arrest." See Atk. Rep. 141. pl. 82.

(b) *Vide* Skin. 21. pl. 21.

(c) The lying in Prison two *lunar* Months makes a Man a Bankrupt from the first Arrest; and although the Commission was taken out before the two Months were expired, yet the Party appearing to be Bankrupt by Relation to a Time before the suing it out, it was held sufficient, by Lord Ch. Just. *Raym.* at *Guildhall*, in *Mich.* Term 5 *Geo.* 2. 1732. MSS. Rep. *Hope* v. *Gill*. S. C. in *Bennet's Lex Mercator. Redeviv.* 489. (d) See Bur. Rep. 439. 2 Bur. 814.

By

By the 14 *Car.* 2. *cap.* 24. it is provided, "That whereas divers Noblemen and Gentlemen, and Persons of Quality, no ways bred up to Trade, do often put in great Stocks of Money into the *East-India* * and *Guinea Company*, no Persons Adventurers for putting in Money or Merchandize into the said Companies, or for adventuring or managing the Fishing, called the Royal Fishing Trade, shall be (*b*) reputed or taken to be a Merchant or Trader within any Statutes for Bankrupts; provided, that Persons Trading in any other Way or Manner, shall be liable to a Commission as fully, and not otherwise, as if that Act had not been made."

(*b*) But if a Trader put in Money into the *East India* Company, and abscond, he is a Trader within this Act, because such Goods being bought and sold, were within the original Statutes touching Bankrupts; for they make no Distinction between the Manner of Trade, whether in Companies or out of them; and though this Statute hath excepted the Nobility and Gentry for the Encouragement of these Companies, yet Traders are left as they were before. 2 Keb. 487. *Hugh Abr.* Tit. *Bankrupt*, Sir *John Wollaston. Vide Goodinge, of Bankrupts* &c. where it is said to have been adjudged, that such Trading did bring a Man within the Statutes before this Act. If a Share in the Stationer's Company will make a Man liable to the Statutes of Bankrupts, see 2 Ld. Raym. 852.

* By 9 and 10 W. 3. c. 44. No Member of the *East-India Company*, in Respect of his Stock therein only, shall be a Bankrupt.

(*c*) Atk. Rep. 218. pl. 119.

This Act is continued to *September* 1771, by 4 *Geo.* 3. c. 35. f. 36. and from thence to the End of the then next Session of Parliament, before which it was held, that a Drover might be a Bankrupt. Jones 304.

By the 5 *Geo.* 2. *cap.* 30. *sect.* 39. it is provided, "That whereas Persons dealing as (*c*) Bankers, Brokers and Factors, are frequently intrusted with great Sums of Money, and with Goods and Effects of very great Value belonging to other Persons, that such Bankers, Brokers and Factors, shall be and are hereby declared to be subject and liable to that and all other the Statutes made concerning Bankrupts."

By the said 5 *Geo.* 2 *cap.* 30. *sect.* 40. it is enacted, "That no (*d*) Farmer, Grasier, or Drover of Cattle, or any Person or Persons who is or are, or shall be Receiver General of the Taxes granted by Act of Parliament, shall be intitled as such to any of the Benefits given by this Act, or be deemed a Bankrupt within the same, or within any of the Statutes now in Force concerning Bankrupts.

(*d*) See Stra. 513. 8 Mod. 46.

Note; It is provided in the latter End of the Statute of 21. *Jac.* 1. *cap.* 19. "That that Act, and all other Acts heretofore made against Bankrupts, shall extend to Strangers born, as well Aliens as Denizens, as effectually as to Natural-born Subjects, both to make them subject to the Laws as Bankrupts, as also to make them capable of the Benefit, or Contribution as Creditors, by these Laws."

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For though the Commissioners declare him a Bankrupt, he may traverse it.

Upon these Statutes which describe a Bankrupt there have been several Resolutions, especially in the Common Law Courts, the Judges being the proper Expositors of all Acts of Parliament; and therefore the usual Method when Bankruptcy is denied, is for my Lord Chancellor to order it to be tried in a Common-Law Court, on an Issue, *Bankrupt*, or Not *?

Palm. 325. 8 Co. 121. a. 4 Inst. 277.

* Or by Action of Trover, at the Suit of the Bankrupt, against the Assignees, or the Messenger.

Cro. Eliz. 268. pl. 6. Cro. Jac. 584. pl. 6. Cro. Car. 31. pl. 1. 3 Mod. 330. 2 Stra. 762.

A Shoemaker is within 13 *Eliz. cap.* 7. for he lives by his Credit in buying Leather, and selling it again in Shoes, and not on his manual Labour only, as Labourers and Husbandmen do; for the Thing bought and sold under different Forms is the Leather; and though the Shoemaker's Labour is employed in the Alteration of the Form, yet Men do not contract for the Labour, but for the Thing itself.

4 Burr. 2142. 1 Com. Dig. 503.

A Wea-

A Weaver and Dyer are within the Statute, for they get their living by buying and ſelling, and therefore may have an Action for calling them Bankrupt. Cro. Jac. 584. pl. 6.

If one covenants with the King to victual the Fleet at a certain Rate, and thereupon buys up a great Quantity of Proviſion, &c. though with the Surplus he victuals Merchants, yet being originally deſigned for the Uſe of the Navy, it will not make him a Trader within the Act; and it is one Act or Contract only, and not a continued Trading. Vent. 270. Sir *Thomas Littleton's* Caſe, adjudged. 3 Keb. Rep. 451. pl. 16.

1 Show. Rep. 270. Com. Rep. 356. S. C.

An Inn-keeper, as ſuch, can be no Bankrupt; for though he buys Proviſions to be ſpent in his Houſe, yet he does not properly ſell them, but utter them at ſuch Rates which he thinks reaſonable, and the Attendance of his Servants, Furniture of his Houſe, &c. are to be conſidered; and the Statutes only mention Merchants that uſed to buy and ſell in Groſs, or by Retail, and ſuch as get their Living by Buying and Selling; ſo that their principal Subſiſtence is by Bying and Selling; now the Contracts with Inn-keepers are not for any Commodities in Specie, but they are Contracts for Houſe-Room, Trouble, Attendance, Lodging and Neceſſaries, and therefore cannot come within the Deſign of ſuch Words, ſince there is no Trade carried on by Buying and Bartering Commodities; and though in this Caſe a Jury ſhould find that the Inn-keeper got his Living by Buying and Selling, it would not bring him within the Statute, for the Reaſons aforeſaid. Cro. Car. 549. Jones 437. *Criſp* and *Prat*, March 35. S. C. 3 Lev. 309. S. P. adjudged between *Newton* and *Trigg*. 3 Mod. 327. Carth. 149. Ld. Raym. 287. 8 Mod. 46.

48. 2 Will. Rep. 308. 3 Will. Rep. 298. pl. 75. 12 Mod. 159, 307. Ld. Raym. 287. 2 Ld. Raym. 852. 8 Mod. 46. 2 Stra. 513, 809. Show. 264. Salk. 109. pl. 4. 110. Skin. 291. pl. 2. Comb. 181. And in theſe Books it is ſaid, that there is no material Difference between an Inn-keeper and a Maſter of a Boarding School, who buys and dreſſes Proviſions for young Scholars. See Ld. Raym. 287, 852. 2 Wilſ. 169. 3 Wilſ. 146. 1 Brown's Chanc. Caſ. 174. 1 Term Rep. 38.

A Carpenter that ſells wrought Timber ſeems to be within the Statute, for he ſells the Materials, though altered by his Workmanſhip, ſo that he gets his Living by Buying and Selling out the Timber; but otherwiſe it ſeems it is of a mere working (*a*) Carpenter. 3 Mod. 155.

(*a*) But a Ship-Carpenter is. Ld. Raym. 741.

The Buying Part of a Ship makes no Trading, becauſe it is no Buying and Selling within the Statute; but the Buying Part in the Ship, and the Party's employing it in carrying and recarrying Goods for himſelf, is an Evidence of Trade, becauſe the Exportation and Importation of Goods is the Buſineſs of a Merchant; but if a Man buys a Part of a Ship which he lets to Freight, this is no Evidence of Trade, for their is no Exportation or Importation; but if a Man repairs a Ship, which is uſual on the Credit of the Bottom, and afterwards takes a Share in it for his Debt, and employs the Ship in Exportation, it has been held by ſome, that ſince in this he is compulſory, having no other Way to obtain his Debt, that it ſhall not be taken as an Evidence of Trading, becauſe this is only accidental, and not the Way the Party hath put himſelf in to get his Livelihood. Sid. 411. Vent. 29. 2 Keb. 487. Infant tho' a Trader, cannot be made Bankrupt, 2 Black. Com. 477. Atk. Rep. 146. pl. 86. Ld. Raym. 443. Holt. 360.

pl. 4. 12 Mod. 443. Sel. Caſ. in Chanc. 46. but a Feme Covert in *London*, being a ſole Trader according to the Cuſtom, may. *La Vie* v. *Philipps*. *M.* 6 *G.* 3. *K. B.* 2 Black. Com. 477. So may the Daughter of a Freeman of *London*, if ſhe trades ſeparately from her Huſband. Atk. Rep. 206. pl. 110.

* A Man's Buying and Selling brings him not within the Statutes, for they intend ſuch as gain the greateſt Part of their Living thereby; and therefore where a Farmer (*b*) bought and ſold Cattle, it was adjudged that he was not a Bankrupt, for a Farmer is (*c*) not within the Statutes, becauſe *Page 250 March 35. Cro. Car. 549. Danv. Abr.

687. (*b*) See Stat. 5 Geo. 2. *c.* 30. ſ. 40. (*c*) But if he deals in Buying and Selling Potatoes, Wool, &c. as a Trader in thoſe Commodities, he may be Bankrupt. Str. 513. 8 Mod. 146. Buying and Selling Stock will not make one a Bankrupt. 2 Will. Rep. 308.

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he only ſells the Profits originally raiſed from the Ground; and if he buys in Commodities, and ſells them again, this is only accidental.

Palm. 325. Vent. 5. Lev. 17. Sid. 411. Sir *Robert Cotton's* Caſe. 3 Keb. 451.

If a Man contracts a Debt while he is a Trader, and after leaves off, and lives upon his Eſtate in the Country, and after abſconds for this Debt, he is a Bankrupt, becauſe he lived by his Trade when the Debt was contracted; but if a Merchant leaves off his Trade, and after contracts Debts, and then ſells off the Surpluſage of his Goods, but hath neither Factor, Correſpondent nor Packer, he is (*d*) no Bankrupt.

(*d*) *Tamen Q.* For in Vent. 166. where the ſame Caſe comes on again, the Court holds that he is a Bankrupt; otherwiſe the Miſchief would be great; for Men cannot take Notice when another withdraws his Trade, or when he commands his Factors beyond Sea to deal no farther for him; but they ſeeing great Quantities of Goods and Merchandize in his Hands, are apt to truſt him; ſo that is fit they ſhould be relieved by the Statutes.

Sid. 411. Vent. 5. Comb. 463. But if ſuch a Perſon leavesgoods

If a Trader gives over his Trade, and then contracts Debts, and then goes into Trade again upon a new Stock, it ſeems upon the Petition of ſuch intermediate Creditors he cannot be made a Bankrupt, becauſe ſuch Creditors did not truſt him upon the Credit of his Trade.

in the Hands of another to be diſpoſed of, and is to be Partner with him in Loſs and Gain, he may be a Bankrupt, for he ſtill carries on his Trade by Proxy. Palm. 325. But the having of a Joint Stock does not make a Bankrupt, without ſome Proof of a Diſpoſal thereof; for otherwiſe there is no Commerce driven. 2 Keb. 487.

Palm. 325.

If a Trader becomes Security for another, he is a Bankrupt within the Statute, becauſe he is truſted upon the Reputation of his Stock and Dealings, as well where he is Security, as where he contracts for his own Debts.

Raym. 375. *Dowſeworth* and *Anderſon.*

A Man buys in *England* only, and ſells in *Ireland*, he may be a Bankrupt, for many Merchants buy beyond Sea, and ſell in *England* only, and others buy here, and ſell beyond Sea; for it is Trading that makes a Man capable of being a Bankrupt.

2 Jones 141. S. C. 2 Vern. 162. S. C. cited.

Salk. 110. pl. 5. *Bird* and *Sedgwick*, on a Trial at Bar. So determined upon the Authority of this

A Gentleman of the *Temple* went from thence to *Liſbon*, where he turned Factor, and traded to *England*, and broke; it was inſiſted upon that the Statutes of Bankrupt did not extend to Perſons out of the Realm, the Subject of them being Caſes of Arreſts, Outlawries, and departing the Realm; and that the 21 *Jac.* 1. *c.* 19. which extends to Aliens, is to be underſtood of Aliens here; but the Court held him a Bankrupt, by reaſon of his Trading hither and back again, which gained him a Credit here.

Caſe, in the Matter of *Aſhley* a Bankrupt, by the late Lord Chancellor *Hardwicke*, MSS. *Mich.* 1737. See *Beawes's Lex Mercator. Redivivus*, 488. Atk. Rep. 82. pl. 31. Executor not liable to be Bankrupt on Account of his Teſtator's Eſtate. Comb. 185. Show. Rep. 294. Denying one's Self to a Creditor at Eleven o'Clock at Night, is no Act of Bankruptcy. Atk. Rep. 201. pl. 104. † Stopping Payment by a Banker is no Act of Bankruptcy. 2 Black. Com. 479. 7 Vin. Abr. 61. pl. 12. Moſeley's Rep. 3. Sel. Caſ. in Chan. 422. 11 Mod. 138. See Will. Rep. 254. 10 Mod. 161. 245. L. C. B. Gilb. Caſ. 323. Atk. Rep. 102. pl. 51. Drawing and redrawing Bills of Exchange for large Sums, and continuing it, is a Trafficing in Exchange, and Trading which will make a Man liable to become Bankrupt. Atk. Rep. 178. pl. 72.

† This muſt mean one ſingle Act, and a Denial not for Fear, &c.

Palm. 325.

If a Man keeps his Houſe for a long Time, this does not immediately make him a Bankrupt; but if he conceals himſelf within his Houſe but for a Day, or Hour, to delay or defraud his Creditors, he is a Bankrupt.

Cro. Eliz. 13. Godb. 25. Lev. 13. 2 Sid. 177.

If there be a Proceſs out againſt a Merchant, who thereupon keeps Houſe to ſave himſelf from an Arreſt, and after goes out to Market, and other Places, but hearing of a new Proceſs keeps Houſe again, and after goes

Stra. 809. Cook, Bankr. Laws, 72. 1 Atk. 201. Bull. N. P. 39.

at

at large; *per Cur'*, He is no Bankrupt, becauſe the Keeping in Houſe is an Act of Bankruptcy, for which a Commiſſion might have been taken out at that Time, yet by his going abroad it is afterwards purged; for though the Statute makes the Keeping of Houſe an Act of Bankruptcy, yet it muſt be underſtood of a Keeping in order to conceal himſelf ‡.

‡ See the next Caſe.

* If *A.* commits a plain Act of Bankruptcy, as keeping Houſe, &c. though he after goes abroad, and is a great Dealer, yet that will not purge the firſt Act of Bankruptcy, but he will ſtill remain a Bankrupt; but if the Act was not plain, but doubful, then going abroad and Dealing, &c. will be an Evidence to explain the Intent of the firſt Act; for if it was not done to defraud Creditors, and keep out of the Way, it will not be an Act of Bankruptcy within the Statute: Alſo if after a plain Act of Bankruptcy he pays off, or compounds with all his Creditors, he is become a new Man.

*Page 251 Salk. 110. pl. 6. *Hopkins* and *Ellis*, ruled by *Holt*, Ch. Juſt. on an Iſſue directed out of Chancery. Keb. 11. *Bradford's* Caſe.

If a Man permit himſelf to be outlawed, to the Intent or Purpoſe to defraud his Creditors of a juſt Debt, it is one of the Cauſes of Bankruptcy; ſo that on a Special Verdict, if a Jury find that he was outlawed, and do not find that it was *in fraudem Creditorum*, that is not a ſufficient Finding to make him a Bankrupt; becauſe the Intent of the Statute was, that it muſt be ſuch an Outlawry as the Debtor permits by keeping out of the Way to defraud his Creditors.

Going out of Town to gain the Term, an Act of Bankruptcy.

2 Stra. 809. Removing Goods for fear of an Execution, no Act of Bankruptcy. Ld. Raym. 725. Neglecting to make Satisfaction for any juſt Debt of 100l. within two Months after Service of legal Proceſs, for ſuch Debt, upon any *Trader* having *Privilege* of Parliament. Stat. 4 Geo. 3. c. 33. ſ.

† A Victular or common Alehouſe-Keeper, cannot, as ſuch, be a Bankrupt. *Perkins* v. *Proctor* and another. *Vide* 2 Wilſ. 382. By the Stat. 4 *Geo.* 3. c. 33. Members of Parliament are made ſubject to the Bankrupt Laws; but not ſubject to Arreſt, except in Caſes made Felony by thoſe Laws.

(B) Of the Commiſſion of Bankrupt; and herein of the Creditors who may obtain it, and what they are to do previous thereto.

THE Commiſſion of Bankrupt, which arms the Commiſſioners with all the Power they are to exerciſe over the Bankrupt and his Eſtate, is to be granted by the Lord Chancellor, Lord Keeper, or Commiſſioners of the Great Seal, on the Application of Creditors (*a*) only; and this is a Matter not diſcretionary, but to be granted (*b*) *de Jure*.

(*a*) For if twenty ſwear that ſuch a one is a Bankrupt, yet a Commiſſion cannot be awarded without a Petition from the Creditors for that Purpoſe. 2 Chan. Ca. 190. (*b*) As if the Words of the Act had been, ſhall or ought to grant. Vern. 152. 2 Chan. Ca. 191.

By the 34 *H.* 8 *cap.* 4. "The Lord Chancellor, Treaſurer, &c. were to "take Order with the Bankrupt's Lands and Goods for Payment of his "Debts."

And by the 13 *Eliz. cap.* 7. "The Lord Chancellor or Keeper, upon "Complaint in Writing, ſhall have Power, by Commiſſion under the "Great Seal, to appoint honeſt and diſcreet Perſons, who, or the moſt "of them, may take ſuch Order with the Body, &c."

Where ſuch Commiſſion may be ſuperſeded, *vide* Vern. 208, 209.

By

Vide 2 Chan. Ca. 193. By the 1 Jac. 1. c. 15. The Commiſſioners may proceed after the Death of the Bankrupt.

By the 5th *Geo.* 2. *cap.* 30. *ſect.* 44. it is enacted, "That no Commiſſion "of Bankrupt ſhall abate by the Death of the King; and that if it ſhall be "neceſſary to renew any ſuch Commiſſion by reaſon of the Death of the "Commiſſioners named in ſuch Commiſſion, ſo that a ſufficient Number "of Commiſſioners ſhall not be living who can act therein, or for any other "Cauſe; in every ſuch Caſe ſuch Commiſſion ſhall be renewed, and but "half of the (*e*) Fees uſually paid upon granting or obtaining of Commiſ-"ſions of Bankrupt, ſhall be paid for any ſuch renewed Commiſſion."

On a joint Commiſſion againſt two Bankrupts, they muſt be each found Bankrupt, and though one of them ſhould die, the Commiſſion may ſtill go on, but if one of the joint Traders be dead at the Time of taking out the Commiſſion, it abates, and is abſolutely void, Atk. Rep. 97. pl. 44. (*e*) By this Statute a Maſter in Chancery is to ſettle the Fees of the Clerk to the Commiſſion.

The 5 *Geo.* 2. *cap.* 30. *ſect.* 23. for preventing the taking out Commiſſions of Bankrupt maliciouſly, enacts, "That no Commiſſion of Bank-"rupt ſhall be awarded againſt any Perſon whatſoever, upon the Petition "of one or more Creditors, unleſs the ſingle Debt of the Creditor, or of "two or more Perſons, being Partners, petitioning for the ſame, do amount "to the Sum of one hundred Pounds, or upwards; or unleſs the Debt of
Page 252 " two Creditors ſo petitioning as aforeſaid, ſhall amount to 150*l.* or up-"wards; or unleſs the Debt of three or more Creditors ſo petitioning, as "aforeſaid, ſhall amount to 200*l.* or upwards, and the Creditor or Cre-"ditors, petitioning for ſuch Commiſſion, ſhall, before the ſame ſhall be "granted, make an Affidavit, or (being one of the People called Quakers) "make a ſolemn Affirmation in Writing, before one of the Maſters of "the High Court of Chancery (which Oath or Affirmation they are hereby "impowered to adminiſter; and which ſhall be filed with the proper Of-"ficer) of the Truth and Reality of ſuch his, her and their reſpective Debt "and Debts; likewiſe give Bond to the Lord Chancellor, Lord Keeper, or "Commiſſioners of the Great Seal, for the Time being, in the Penalty of "200*l.* to be conditioned for proving his, her, or their Debts, as well by "the Commiſſioners named in ſuch Commiſſion, as upon a Trial at Law, "in caſe the due iſſuing forth of the ſame ſhall be conteſted and tried; and "alſo for proving the Party a Bankrupt at the Time of taking out ſuch "Commiſſion, and further to proceed on ſuch Commiſſion, as by the Act "is directed; and if ſuch Debt or Debts ſhall not be really due or owing; "or if, after ſuch Commiſſion taken out, it cannot be proved that the "Party was a Bankrupt at the Time of the Iſſuing the ſaid Commiſſion; "but on the contrary it ſhall appear that ſuch Commiſſion was taken out "fraudulently or maliciouſly; that then the Lord Chancellor, Lord Keeper, "or Commiſſioners of the Great Seal, for the Time being, ſhall and may, "upon the Petition of the Party or Parties grieved, examine into the ſame, "and order Satisfaction to be made to him, her or them, for the Damages "by him, her or them ſuſtained; and for the better Recovery thereof, "may, in caſe there be Occaſion, aſſign ſuch Bond or Bonds to the Party "or Parties ſo petitioning, who may ſue for the ſame in his, her or their "Name and Names."

He who has the Body in Execution cannot be a petitioning Creditor, Stra. 653. Readings upon the Statute Law 189. A Debt contracted after an Act of Bankruptcy, no Ground for a Commiſſion. 2 Stra. 744. Note of Hand of above ſix Years ſtanding, Ground for a Commiſſion. 2 Stra. 746. Moſely 37. *contra.* A Note given before an Act of Bankruptcy, though indorſed after, is a Debt upon which the Indorſee may take out a Commiſſion againſt the Drawer. Atk. Rep. 73. pl. 27. *id.* 126. pl. 70. Aſſignee of a Bond cannot petition for a Commiſſion. 2 Stra. 899. Select Caſ. in Chan. 6. Executor of Bankrupt, unleſs Commiſſion againſt his Teſtator be ſuperſeded, cannot take out one for a Debt due to the Teſtor. Atk. Rep. 100. pl. 49.

By *ſect.* 22. it is enacted, "That Perſons who have Bills, Bonds, "Promiſſory Notes, or other Perſonal Security for their Money, pay-"able at a future Day, who by the 7th *Geo.* 1. *cap.* 31. are enabled to "come in as Creditors, and allowed to diſcount ſuch Debts, allowing

"5 *per*

" 5 *per Cent. &c.* may (though disabled by the Statute) petition for, or " join with others in petitioning for any Commission of Bankrupt."

And by the said Statute 5 *Geo.* 2. *cap.* 30. *sect.* 24. *For preventing Fraud in Creditors, in extorting their whole Debts from the Bankrupt, or that one Creditor should be preferred before another*, it is enacted, " That if any Bank- " rupt or Bankrupts shall, after issuing of any Commission against him, her, " or them, pay to the Person or Persons who sued out the same, or other- " wise give or deliver to such Person or Persons Goods, or any other Satis- " faction or Security for his, her, or their Debt, whereby such Person or " Persons, suing out such Commission, shall privately have and receive more " in the Pound, in respect of his, her or their Debt, than the other Credi- " tors; such Payment of Money, Delivery of Goods, or giving greater or other " Security or Satisfaction, shall be deemed and taken to be such an Act of " Bankruptcy, whereby, on good Proof thereof, such Commission shall and " may be superseded; and it shall be lawful for the Lord Chancellor, Lord " Keeper, or Commissioners for the Custody of the Great Seal, to award to " any Creditor or Creditors petitioning, another Commission; and such " Person or Persons so taking or receiving such Goods or other Satisfaction, " as aforesaid, shall forfeit and lose as well his, her, or their whole Debt, " as the Whole, he, she or they shall have taken or received, and shall pay " back and deliver up the same, or the full Value thereof, to such Person " or Persons as the said Commissioners, acting under such new Commis- " sion shall appoint, in Trust for, and to be divided amongst, the other " of the Bankrupt's Creditors, in Proportion to their respective Debts."

* Also by *sect.* 25. it is enacted. " That the Creditor or Creditors * Page 253
" who shall petition for and obtain any Commission of Bankrupt, shall " be, and is and are hereby obliged, at his, her or their own Costs and Ex- " pences, to sue forth and prosecute the same, until an Assignee or As- " signees shall be chosen of such Bankrupt's Estate and Effects, and the " Commissioners to be named in any such Commission, shall at the same " Meeting which shall be appointed for the Choice of the Assignees, " ascertain such Costs, and by Writing under their Hands shall direct and " order the Assignee or Assignees of such Bankrupt's Estate, who is and " are hereby required to pay and reimburse such petitioning Creditor or " Creditors, such his, her or their Costs and Charges as aforesaid, out of " the first Monies or Effects of the Bankrupt that shall be got in and re- " ceived under the said Commission; and every Creditor of the said Bank- " rupt shall be at Liberty to prove his, her or their Debt or Debts under " the said Commission, without paying any Contribution or Sum of Mo- " ney whatsoeve for or on Account of such Debt or Debts."

(C) Of the Commissioners, their Duty; and herein of the Power they may exercise over the Bankrupt and others in discovering his Estate.

" THE Commissioners, by the 5 *Geo.* 2. *cap.* 30. *sect.* 43. before they proceed in the Execution of any Commission of Bankrupt to them directed, shall each of them take the following Oath. *I* A. B. *do* *swear that I will faithfully, impartially and honestly, accordingly to the best of my Skill and Knowledge, execute the several Powers and Trusts reposed in me as a Commissioner in a Commission of Bankrupt against — and that* " *without*

Their Commission and Power is by Force of the several Acts of Parliament which

ought to be purſued, or elſe they are ſubject to the Action of the Party

" *without Favour or Affection, Prejudice or Malice.* Which Oath any two " or more of the ſaid Commiſſioners are impowered and required to ad- " miniſter to each in the ſame Commiſſion named and authorized, of " which they are to enter a Memorial ſigned by them reſpectively, among " their other Proceedings.

grieved; for he hath no other Remedy. 4 Inſt. 277. But if in their Proceedings they commit ſome Miſtake, which appears to be only an Error of their Judgment, they ſhall not be liable to an Action. Comb. 390. Ld. Raym. 99, 153. 2 Stra. 1065. Salk. 348. pl. 3. 5 Mod. 308. Carth. 153.

(*a*) Though ſuch Perſons have been examined by the Commiſſioners, yet a Bill for Diſcovery of the ſame Matters may be

By the 13 *Eliz. cap.* 7. *ſect.* 5. " The Commiſſioners may call before " them, by ſuch Proceſs, Ways or Means as they think proper, any Perſon " ſuſpected to have any of the Bankrupt's Eſtate, *&c.* in his Cuſtody, or " to be indebted to him, and upon Oath, or *(a)* otherwiſe, examine ſuch " Perſons of the Certainty thereof; and by the ſaid Statute, if ſuch Perſon " refuſe to ſwear, or, being ſworn, *(b)* diſcloſes not the whole Truth, he " ſhall forfeit double the Value of the Goods, to be levied by the ſame " Statute. He that fraudulently demands or detains any of the Bank- " rupt's Goods, *&c.* ſhall forfeit double the Value.

filed againſt them in Chancery. 2 Chan. Ca. 73. (*b*) Muſt diſcloſe and anſwer directly to the Queſtion put to him. *Vent.* 324.

By the 1 *Jac.* 1. *cap.* 15. " They may examine the Bankrupt upon In- " terrogatories touching his Lands, *&c.* and by the ſaid Statute, if he re- " fuſes, *&c.* they may commit him, *&c.*

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This Act continues in Force, notwithſtanding the ſubſequent Statutes. 2 Bur. 1224.

* And by the 1 *Jac.* 1. *cap.* 15. " If any Perſon, after Warning, refuſes " or comes not before the Commiſſioners to be examined, *&c.* having no " Excuſe to be allowed by the Commiſſioners at their Meeting, or having " Warning of any other Meeting of the Commiſſioners, appears not before " them, having no lawful Impediment to be allowed as aforeſaid, they " may direct their Warrant, *&c.* to apprehend and bring him before " them, *&c.* or if being before them, he refuſes to be ſworn or to anſwer " interrogatories, he ſhall be (*a*) committed to ſuch Priſon as the Com- " miſſioners think fit, until he ſhall ſubmit and be examined, *&c.*

(*a*) *A.* was ſummoned before Commiſſioners of Bankrupt, and the Queſtions demanded of him were, firſt, to give an Account of all Matters which he knew concerning the Bankrupt's Eſtate; ſecondly, when and in what Manner did he aid and abet the Bankrupt in carrying away his Effects, or in imbezling or concealing the ſame, to which he refuſed to anſwer; becauſe the firſt was too general, and the ſecond tended to accuſe himſelf, and bring him within the 13 Eliz. c. 7. which gives a Penalty of double the Value of the Goods againſt him who conceals them; for which Refuſal the Commiſſioners committed him; and their Warrant of Commitment concluded *that he ſhould be committed until he conform to the Authority of the Commiſſioners.* On an *Habeas Corpus* brought by *A.* in *B. R.* the Court inclined that a Witneſs was not to pay univerſal Obedience to all Queſtions aſked him by the Commiſſioners; nor was he to anſwer to any Thing which tended to accuſe himſelf; but for the Concluſion of the Warrant of Commitment, they held clearly that he ſhould be diſcharged; for the Act directs *that he ſhall remain without Bail until he ſubmit to the Commiſſioners to be examined,* which being a particular Authority, and in Reſtraint of Liberty, ought to be conſtrued ſtrictly, and the very Words of the Statute purſued. 5 Mod. 308. Salk. 348. pl. 3. Comb. 390. Set. & Rem. 236. pl. 278. Carth. 153. Ld. Raym. 99, 100. Caſ. Temp. Holt 94. pl. 3. See Seſ. Caſ. 331. pl. 264. 2 Stra. 880. Barnard *K. B.* 398. 2 Ld. Raym. 851. See the Queſtion propoſed by the Commiſſioners to *Perrot* a Bankrupt, in 2 *Bur.* 1122.

By the 21 *Jac.* 1. *cap.* 19. " The Wife of a Bankrupt ſhall be exa- " mined; and for not coming or refuſing to be ſworn, *&c.* ſhall incur the " ſame Penalty as other Witneſſes.

Vide 2 Show. 247. that it is only the Bankrupt's own Houſe they can break open. *Quære.* The Power of the

By the 1 *Jac.* 1. *cap.* 15. " The Commiſſioners, in Caſe of Reſiſtance, " may break, or by Warrant under their Hands and Seals authorize others " to break open any Doors, *&c.* where the Bankrupt or his Goods, *&c.* " are, or are reputed to be.

By the 5 *Geo.* 2. *cap.* 30. *ſect.* 16. it is enacted, " That the Commiſ- " ſioners, or the major Part of them, may examine as well by Word of " Mouth, as on Interrogatories in Writing, all and every Perſon or Per- " ſons

" ſons againſt whom any Commiſſion of Bankrupt is or ſhall be awarded, touching all Matters relating to the Trade, Dealings, Eſtate and Effects of all and every ſuch Bankrupt and Bankrupts; and alſo to examine, in the Manner aforeſaid, all and every other Perſon duly ſummoned before, or preſent at any Meeting of the ſaid Commiſſioners, or the major Part of them, touching all Matters relating to the Perſon, Trade, Dealings, Eſtate and Effects of all and every ſuch Bankrupt and Bankrupts; and any Act or Acts of Bankruptcy committed by him, her or them; and alſo to take down or reduce into Writing the Anſwers of verbal Examinations of every ſuch Bankrupt or other Perſon had or taken before them as aforeſaid; which Examination ſo taken down or reduced into Writing, the Party examined ſhall, and is hereby required to ſign and ſubſcribe: and in Caſe any ſuch Bankrupt or Bankrupts, or other Perſon or Perſons ſhall refuſe to anſwer, or ſhall not fully anſwer to the Satisfaction of the Commiſſioners, or the major Part of them, all lawful Queſtions put to him, her or them by the ſaid Commiſſioners, or the major Part of them, as well by Word of Mouth, as by Interrogatories in Writing, or ſhall refuſe to ſign and ſubſcribe his, her or their Examination ſo taken down or reduced into Writing as aforeſaid, (not having a reaſonable Objection either to the Wording thereof, or otherwiſe, to be allowed by the ſaid Commiſſioners) it ſhall and may be lawful to and for the ſaid Commiſſioners, or the major Part of them, by Warrant under their Hands and Seals, to commit him, her or them to ſuch Priſon as the ſaid Commiſſioners, or the major Part of them, ſhall think fit, there to remain without Bail or Mainprize, until ſuch Time as ſuch Perſon or Perſons ſhall ſubmit him, her or themſelves to the ſaid Commiſſioners, and full Anſwer make, to the Satisfaction of the ſaid Commiſſioners, to all ſuch Queſtions as ſhall be put to him, her or them as aforeſaid, and ſign and ſubſcribe ſuch Examination as aforeſaid, according to the true Intent and Meaning of this Act.

Commiſſioners to examine the Bankrupt, is not limited, and confined within the Time allowed him to ſubmit to be examined. They may compel him to make further Anſwer after that Time. 2 Bur. 1123. 1124.

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" *Provided always*, That in Caſe any Perſon or Perſons ſhall be committed by the ſaid Commiſſioners for refuſing to anſwer, or not fully anſwering any Queſtion or Queſtions put to him, her or them by the ſaid Commiſſioners, by Word of Mouth or on Interrogatories, that the ſaid Commiſſioners ſhall in their Warrant of Commitment ſpecify ſuch Queſtion or Queſtions.

Sect. 17.

" *Provided alſo*, That in Caſe any Perſon or Perſons committed by the Commiſſioners Warrant, by Virtue of this or any other Acts now in Force concerning Bankrupts, ſhall bring any *Habeas Corpus* in order to be diſcharged from any ſuch Commitment, and on the Return of any ſuch *Habeas Corpus* there ſhall appear any ſuch Inſufficiency whatſoever in the Form of the Warrant, whereby ſuch Perſon was committed by Reaſon whereof the Party might be diſcharged of ſuch Commitment, that then it ſhall and may be lawful for the Court, or Judge, before whom ſuch Party ſhall be brought by *Habeas Corpus* as aforeſaid, and ſuch Court or Judge ſhall, and is hereby required by Rule, Order or Warrant, to commit ſuch Perſon or Perſons to the ſame Priſon, there to remain as aforeſaid, unleſs it ſhall be made appear to ſuch Court or Judge, by the Party committed, that he, ſhe or they have fully anſwered all lawful Queſtions put to him, her or them by the ſaid Commiſſioners; or in Caſe ſuch Perſon was committed for not ſigning his, her or their Examination, unleſs it ſhall appear to ſuch Court or Judge, that the Party ſo committed had a good and ſufficient Reaſon for refuſing to ſign the ſame: and in Caſe any Gaoler or Keeper of any Priſon, to whom any ſuch Bankrupt or Bankrupts, Perſon or Perſons ſhall be committed as aforeſaid, ſhall wilfully ſuffer ſuch Bankrupt or Bankrupts, Perſon or Perſons to eſcape from ſuch Priſon, or to go without the Walls or Doors

Sect. 18.

By the ſaid Statute, a Gaoler refuſing to ſhew or produce ſuch Priſoner to a Creditor,

" of forfeits 100l.

" of the ſaid Priſon, until he, ſhe or they ſhall be duly diſcharged as afore-
" ſaid, ſuch Gaoler or Keeper ſhall for ſuch his Offence, being duly con-
" victed by Indictment or Information, forfeit 500*l.* for the Uſe of the
" Creditors of ſuch Bankrupt or Bankrupts."

By *ſect.* 20. it is enacted, " That all and every Perſon and Perſons,
" who ſhall, at any Time after the Time allowed to ſuch Bankrupt to
" ſurrender and conform himſelf as the Act directs, voluntarily come and
" make Diſcovery of any Part of ſuch Bankrupt's Eſtate, not before come
" to the Knowledge of the Aſſignees, either to the ſaid Aſſignees or to the
" Commiſſioners, or the major Part of them, ſhall be allowed 5 *per Cent.*
" and ſuch further and other Reward as the Aſſignees, and the major
" Part of the Creditors, ſhall think fit to be paid out of the neat Proceed
" of ſuch Bankrupt's Eſtate, and the Aſſignee or Aſſignees ſhall be al-
" lowed the ſame in their Accounts."

Alſo by *ſect.* 21. " *For the better Diſcovery of the Eſtate of a Bankrupt,*
" it is enacted, That all and every Perſon or Perſons who ſhall have ac-
" cepted of any Truſt or Truſts, and ſhall wilfully protect or conceal any
" Eſtate Real or Perſonal of any Perſon or Perſons becoming Bankrupt,
" from his her or their Creditors, and ſhall not within forty-two Days next
" after ſuch Commiſſion ſhall iſſue forth, and Notice thereof be given in
" the *London Gazette*, diſcover and diſcloſe ſuch Truſt and Eſtate in Wri-
" ting, to one or more of the Commiſſioners or Aſſignees of ſuch Bank-
" rupt or Bankrupt's Eſtate, and likewiſe ſubmit him or herſelf to be ex-
" amined by the Commiſſioners, in and by the Commiſſion authorized, or
Page256 " * the major Part of them, if thereunto required, and truly diſcover the
" ſame, ſhall forfeit the Sum of 100*l.* and double the Value of the Eſtate,
" either Real or Perſonal, ſo concealed, to and for the Uſe and Benefit of
" the ſaid Creditors, to be recovered by Action of Debt, in any of his
" Majeſty's Courts of Record at *Weſtminſter*, in the Name of the Aſſignee
" or Aſſignees of the ſaid Commiſſioners, in which Caſe full Coſts ſhall
" be allowed to either Party."

(D) Of the Aſſignees; and herein of the Manner and Time of chuſing them.

By 5 *Geo.* 2. c. 30. ſ. 27. No Creditor, or any on his Behalf, to have a Vote in the Choice of an Aſſignee, unleſs his Debt amounts to 10*l.* Commiſſioners upon the Day for chuſing Aſſignees are not to examine critically into the Debt, but to

BY the 5 *Geo.* 2. *cap.* 30. *ſect.* 26. it is enacted, " That where any
" Commiſſion of Bankrupt ſhall iſſue out, the Commiſſioners therein
" named, or the major Part of them thereby authorized, ſhall forthwith,
" after they have declared the Perſon or Perſons, againſt whom ſuch Com-
" miſſion ſhall iſſue, a Bankrupt or Bankrupts, cauſe Notice thereof to be
" given in the *London Gazette*, and ſhall appoint a Time and Place for the
" Creditors to meet, which Meeting for the City of *London*, and all Places
" within the Bills of Mortality, ſhall be at the *Guildhall* of the ſaid City,
" in order to chuſe an Aſſignee or Aſſignees of the ſaid Bankrupt's Eſtate
" and Effects, at which Meeting the Commiſſioners ſhall admit the Proof
" of any Creditor's Debt that ſhall live remote from the Place of ſuch
" Meeting of the Commiſſioners, by Affidavit, or (being of the People
" called Quakers) by ſolemn Affirmation; and alſo permit any Perſon duly
" authorized by Letter of Attorney from ſuch Creditor, (Oath or Affirma-
" tion being made of the due Execution thereof, either by an Affidavit
" ſworn, or Affirmation made, before a Maſter in Chancery, Ordinary or
" Extra-

" Extraordinary, or before the Commiſſioners *viva voce*, (which Oath or " Affirmation they are hereby reſpectively authorized to adminiſter) and in " caſe of Creditors reſiding in foreign Parts, ſuch Affidavits or ſolemn Af- " firmations to be made before a Magiſtrate where the Party ſhall be " reſiding, and ſhall, together with ſuch Creditor's Letter of Attorney, " be atteſted by a Notary Publick,) to vote in the Choice of an Af- " ſignee or Aſſignees of ſuch Bankrupt's Eſtate and Effects, in the Place " and Stead of ſuch Creditor; and the Commiſſioners, or the major " Part of them authorized, ſhall aſſign over ſuch Bankrupt's Eſtate and " Effects unto ſuch Perſon or Perſon's as the major Part in Value of " ſuch Creditors, according to the ſeveral Debts then proved, ſhall chuſe " as aforeſaid; and the Aſſignee or Aſſignees ſo choſen, ſhall be obliged " to keep one or more diſtinct Book or Books of Account, wherein he " or they ſhall duly enter all Sum and Sums of Money, or other Effects " which he or they ſhall have got in or received out of the ſaid Bankrupt's " Eſtate; to which Book or Books of Account every Creditor, who " ſhall have proved his or her Debt, ſhall at all ſeaſonable Times have " free Reſort, and inſpect the ſame as often as he or ſhe ſhall think fit."

admit Creditors for what they ſwear is due to them as they are liable to an Account afterwards. Atk. Rep. 68. pl. 24. Aſſignees muſt make good the Embezzlements of their Agent, unleſs appointed by the Creditors. Atk. Rep. 88.

Each Aſſignee ſeparately anſwerable only for what he receives. Atk. Rep. 89. pl. 36. The Words "*jointly and ſeverally*" ſhould be inſerted in the Aſſignment, for the Safety and Security of each reſpective Aſſignee. Atk. Rep. 90. And there ought alſo to be a Covenant from the Aſſignees that they will pay the Monies they receive out of the Bankrupt's Eſtate, as often as they amount to the Sum of 100l. according to the Directions of the major Part in Value of the Bankrupt's Creditors who ſhall be preſent, at the Meeting for the Choice of Aſſignees. The Court will not ſet aſide the Choice of Aſſignees becauſe ſome of the Creditors live beyond Sea, and had no Opportunity of voting. Atk. Rep. 91. pl. 40. Or only remote from *London*. *id.* 94.

By *ſect.* 30. it is further enacted, " That it ſhall and may be lawful " for the Commiſſioners, or the major Part of them, as often as they " ſhall ſee Cauſe, for the better preſerving and ſecuring the Bankrupt's " Eſtate, immediately to appoint one or more Aſſignee or * Af- " ſignees of the Eſtate and Effects, or any Part thereof, which Aſſignee " or Aſſignees, or any of them, ſhall or may be removed or diſplaced at " the Meeting of the Creditors, ſo to be appointed as aforeſaid, for Choice " of Aſſignees, if they, or the major Part in Value of them (whoſe Debts " reſpectively amount to 10*l.* or upwards) then preſent, and of ſuch Per- " ſons duly authorized, ſhall think fit; and ſuch Aſſignee or Aſſignees as " be ſo removed and diſplaced, ſhall deliver up and aſſign all the Eſtate and " Effects of ſuch Bankrupt which ſhall have come to his or their Hands or " Poſſeſſion, or which ſhall have been aſſigned by the ſaid Commiſſioners, " as aforeſaid, unto ſuch other Aſſignee or Aſſignees who ſhall be ſo choſen " by the Creditors, as aforeſaid; and all the Eſtate and Effects of the " Bankrupt which ſhall be delivered up or aſſigned, ſhall be to all In- " tents and Purpoſes as effectually and legally veſted in ſuch new Aſſignee " or Aſſignees, as if the firſt Aſſignment had been made to him or them " by the ſaid Commiſſioners; and if ſuch firſt Aſſignee or Aſſignee ſhall " refuſe or neglect, by the Space of ten Days next after Notice given of the " ſaid Choice of ſuch new Aſſignee or Aſſignees, and of his and their Con- " ſent to accept of ſuch Aſſignment, ſignified to the firſt Aſſignee or Af- " ſignees, by Writing under his or their Hand or Hands, to make ſuch " Aſſignment and Delivery, as aforeſaid, every ſuch firſt Aſſignee or Af- " ſignees ſhall reſpectively forfeit the Sum of 200*l.* to be divided and diſ- " tributed amongſt the Creditors, towards Satisfaction of their Debts, in " ſuch Manner as the Eſtate of the Bankrupt is or ought to be divided and " diſtributed, and to be recovered by Action of Debt, Bill, Plaint or In- " formation, in any of his Majeſty's Courts of Record at *Weſtminſter*, by " ſuch Perſon or Perſons, as ſuch the major Part of the Commiſſioners au- " thoriſed as aforeſaid, ſhall appoint to ſue for the ſame, with full Coſts of " Suit,

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" Suit, wherein no Privilege, Protection, or Wager in Law, or more than " one Imparlance ſhall be allowed.

Sect. 31. Aſſignees ought not to be removed unleſs it is ſhewn that they are not Perſons of Subſtance or Integrity. Atk. Rep. 92. Where Aſſignee becomes Bankrupt and is removed, his Aſſignees as well as himſelf muſt join with the Commiſſioners in executing an Aſſignment to the new Aſſignees. Atk. Rep. 97. pl. 43.

" And whereas it may be found neceſſary, that as well Aſſignments " of Bankrupts Eſtates already made by Commiſſioners, as Aſſignments " hereafter to be made purſuant to the Choice of Creditors, ſhould be va- " cated, and a new Aſſignment or Aſſignments be made of the Debts " and Effects received and not diſpoſed of, by the then Aſſignees, to other " Perſons to be choſen by the Creditors, as aforeſaid, it is enacted, that " it ſhall and may be lawful to and for the Lord Chancellor, Lord " Keeper, or Commiſſioners of the Great Seal, upon Petition of any " Creditors, to make ſuch Order therein as he or they ſhall think juſt " and reaſonable; and in Caſe a new Aſſignment ſhall be ordered to be " made, as aforeſaid, that then ſuch Debts, Effects and Eſtate of ſuch " Bankrupt ſhall be thereby effectually and legally veſted in ſuch new Aſ- " ſignee or Aſſignees; and it ſhall and may be lawful for him and them " to ſue for the ſame, in his or their Name or Names, and to diſcharge any " Action or Suit, or to give any Acquittance for ſuch Debts, as effectual- " ly, to all Intents and Purpoſes, as the Aſſignee or Aſſignees in the former " Aſſignment might have done in Caſe no new Aſſignment had been made; " and that the ſaid Commiſſioners ſhall cauſe public Notice to be given " in the two *London Gazettes* that ſhall immediately follow the Removal " of ſuch Aſſignee or Aſſignees, and the Appointment of ſuch other Aſ- " ſignee or Aſſignees as aforeſaid, that ſuch Aſſignee or Aſſignees is or are " removed, and ſuch other Aſſignee or Aſſignees appointed in his or their " Stead; and that ſuch Perſons as are indebted to the ſaid Bankrupt's " Eſtate, do not pay ſuch Debt or Debts to ſuch Aſſignee or Aſſignees as " ſhall be removed as aforeſaid."

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(E) Of the Creditors, who are ſuch, and herein of proving their Debts.

BY the 1 *Jac. cap.* 15. " The Commiſſioners may examine upon " Oath, or by other Ways, any Perſon for the Diſcovery of the " Truth of Debts owing to ſuch Creditors as ſeek Relief; and Creditors by " Judgment, Statute, Recogniſance, Specialty, or other Security, or hav- " ing no Security, and having made Attachments in *London*, or other " Place, by Cuſtom, of the Goods of the Bankrupt, whereof there is no " Execution or Extent ſerved upon any Lands, &c. before he become a " Bankrupt, ſhall be relieved for no more than a (*a*) ratable Part of their " juſt Debts, without reſpect to any Penalty in any Judgment, Sta- " tute, &c."

(*a*) Creditors upon what Security ſoever they be, come in all equal, unleſs ſuch as have obtained actual Execution before the Bankruptcy, or had taken Pledges for their juſt Debts; and the Reaſon is, becauſe from the Act of Bankruptcy all the Bankrupt's Eſtate is veſted in the Commiſſioners, who are eſtabliſhed as Courts of Juſtice touching the Bankrupt's Eſtate, and before whom the Creditors muſt authenticate their Debts, in order to receive their Dividends; and therefore they muſt equally admit all Perſons to make Proof of their Debts; but ſuch as have Pawns or Mortgages have a Property in the Thing ſo pledged, precedent to the Tranſlation of the Property to the Commiſſioners; in which Caſe they have only an Equity of Redemption, and are in better Condition than the Bankrupt himſelf. That the Bankrupt, before the Aſſignment of the Commiſſioners, has ſuch a Property as will maintain an Action for the Recovery of the Goods. *Vide* Salk. 108. pl. 1. Landlord may diſtrain for Rent on Bankrupt's Goods either

If

If *A.* ſells Lands to *B.* who afterwards becomes a Bankrupt, and Part of the Purchaſe Money is not paid *A.* ſhall not be obliged to come in as a Creditor under the Statute of Bankrupt, but the Land ſhall ſtand charged with the Money unpaid, though there be no Agreement for that Purpoſe. Vern. 267. *Chapman* and *Tanner.*

If *A.* being beyond Sea, conſigns Goods to *B.* then in good Circumſtances in *London*, and before the Goods arrive *B.* becomes a Bankrupt, whereupon *A.* conſigns them to another, and the Aſſignees of the Commiſſion pray Relief and a Diſcovery, and a Trial at Law is directed, Whether ſuch Conſignment veſted a Property in *B.* and a Verdict is found for the Aſſignees; yet Equity will not permit the Aſſignees to have the Value of the Goods by virtue of the Aſſignment or Verdict, and put the Conſignor to come in as a Creditor, it being allowable by any means to prevent the Goods from coming into the Hands of the Bankrupt, or the Aſſignees; and the Court held Plaintiffs were not intitled to a Diſcovery, much leſs Relief. 2 Vern 203. *Wiſeman* and *Vandebut*, a Bill was brought againſt a Man who had bought Goods of a Perſon really a Bankrupt; who in his Anſwer ſets forth, that he bought them for a full and valuable Conſideration, not knowing that he was a Bankrupt; but did not ſet forth the Conſideration, nor the Time, and refuſed to do it; the Court ordered that he ſhould ſet out what the Conſideration was, otherwiſe he would make himſelf the Judge; but they would not compel him to ſhew the Time when he bought the Goods, for fear it ſhould over-reach, and be within the Time after an Act of Bankruptcy committed. And *North* ſeemed to hold, That upon a Contract where there is *quid pro quo*, an Act of Bankruptcy ſhall not over-reach. *Skin.* 149. If one lends Money to a Bankrupt after a Commiſſion iſued out againſt him, but before actual Notice of it, he cannot come in under the Statute as a Creditor. 2 Vern. 157.

By the 7 *Geo.* 1. *cap.* 31. it is enacted, "That every Perſon who hath "or ſhall give Credit on Securities, to any Perſon or Perſons who ſhall "become Bankrupts, upon a good and valuable Conſideration *bona fide*, "for any Sum or Sums of Money, or other Matter or Thing whatſoever, "which is or ſhall not be due or payable, at or before the Time of ſuch "Perſons becoming Bankrupt, ſhall be (*b*) admitted to prove, his, her and "* their ſeveral and reſpective Bills, Bonds, Notes, or other Securities Pro- "miſe or Agreements for the ſame, in like Manner as if they were made "payable preſently, and not at a future Day, and ſhall be intitled unto, and "ſhall have and receive a proportionable Part, Share and Dividend of ſuch "Bankrupt's Eſtate, in Proportion to the other Creditors of ſuch Bank- "rupt, deducting only thereout a Rebate of Intereſt, and diſcounting ſuch "Securities payable at future Times, after the Rate of 5*l. per Cent. per* "*Annum*, for what he ſhall ſo receive, to be computed from the actual "Payment thereof, to the Time ſuch Debt, Duty, or Sum of Money "ſhould or would have become due and payable in and by ſuch Securities." 2 Stra. 869. 1211. Atk. Rep. 113. pl. 64. *Page 259

(*b*) But whether Creditors, who have Debts due to them payable at a future Day on Contingency, can, before the Contingency has happened, come in under the Statute Q. & *vide* Abr. Equ. 54. 55. Perſons having Bonds or Notes payable at a future Day, may petition for a Commiſſion before they become due. 5 *Geo.* 2. c. 30. ſ. 22. Demands on Policies of Inſurance, &c. may be claimed before the Contingency. 19 *Geo.* 2. c. 32. ſ. 2. A Creditor by Bond, and an open Account likewiſe ſhall be admitted to prove the Bond. Atk. Rep. 70. A Creditor in Caſe of open Accounts ought not to be excluded till Account taken, becauſe then the Choice of Aſſignees might ariſe from a minor Part in Value of the Creditors, but ſtill if Commiſſioners have juſt Ground to doubt the Debt, they do right in admitting it only as a Claim. Atk. Rep. 70. pl. 25. An Inhabitant of a Pariſh admitted a Creditor, and allowed to prove for himſelf and the reſt of the Pariſhioners, Collector of the Land-Tax for the Pariſh becoming Bankrupt. Atk. Rep. 111. pl. 62. Creditor excluded from Length of Time. Atk. Rep. 111. pl. 63.

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either before or after Aſſignment, but where ſold by Aſſignee, he can only come in *pro rata* with the other Creditors. Atk. Rep. 102. pl. 52. *id.* 103. pl. 53. may diſtrain for the whole Rent even after Aſſignment and Sale by *Aſſignees*, if Goods not removed. Atk. Rep. 103. pl. 54. *id.* 104. pl. 55. ‡

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‡ But then the Landlord ſhould not have proved his Debt under the Commiſſion. *Vide* 1 Atk. 104.

By the 1 *Jac.* 1. *cap.* 15. "Any (*a*) Creditor within four Months after the Commiſſion ſued forth, and until Diſtribution made, may partake and join with thoſe who ſued out the Commiſſion; the Creditors ſo coming in to (*b*) contribute to the Charges of the Commiſſion; and if they come not within (*c*) four Months, then the Commiſſioners to diſtribute."

(*a*) Extends to Sureties of the Bankrupt that have Counter Bonds to ſave them harmleſs. Cro. Jac. 127. Noy 142. 1 Com. Dig. 510. 1 Atk. 106, 123. 3 Wilſ. 13, 262. Cowp 525. Doug. 166. 1 Term. Rep. 599. 2 Term. Rep. 100. 640. For the Caſes and Reſolutions on this Statute, *vide* Hut. 37. Chan. Ca. 307. Hob. 287. 2 Chan. Ca. 143, 190. (*b*) But by the 5 Geo. 2. c. 30. ſect. 25. the Creditor or Creditors who ſued out the Commiſſion ſhall be reimburſed their Expence, out of the firſt Monies or Effects that ſhall be got in and received under the Commiſſion; and every Creditor ſhall be at Liberty to prove his Debt without paying any Contribution. (*c*) *Vide* of the Diſtribution to be made of the Bankrupt's Eſtate, Letter (H. 264)

By the 5 *Geo.* 2. *cap.* 30. *ſect.* 26. it is enacted, "That if any Perſon ſhall before the acting Commiſſioners in any Commiſſion of Bankrupt, or by Affidavit or Affirmation exhibited to them, ſwear or depoſe, or, being of the People called *Quakers*, affirm, that any Sum of Money is due to him or her from ony Bankrupt or Bankrupts, which Sum of Money is not really due or owing, or ſhall ſwear or affirm that more is due than is really due or owing, knowing the ſame to be not due or owing, and that ſuch Oath or Affirmation is falſe and untrue; and being thereof convicted by Indictment or Information, ſuch Perſon ſhall ſuffer the Pains and Penalties inflicted by the ſeveral Statutes now in Force againſt wilful Perjury, and ſhall moreover be liable to pay double the Sum ſo ſworn or affirmed to be due or owing, as aforeſaid; to be recovered and levied as other Penalties and Forfeitures are upon Penal Statutes after Conviction to be levied and recovered; and ſuch double Sum ſhall be equally divided among all the Creditors ſeeking Relief under the ſaid Commiſſion."

Power of Attorney from a foreign Creditor to be atteſted by a Notary. 24 Geo. 2. c. 57. ſ. 10. Separate Creditors may come under a joint Commiſſion and prove their Debts. Atk. Rep 67. pl. 22. The Commiſſioners have no Power of admitting ſeparate Creditors to prove Debts under a joint Commiſſion, without the Sanction of the Court. Atk. Rep. 68. pl. 23. Where Bankrupt's Eſtate is ſufficient to pay all with a large Surplus, Creditors whoſe Debts carried Intereſt ſhall be allowed it from the Time it was ſtopped by the Commiſſioners, but not to exceed Penalties of Bonds. Atk. Rep. 75. pl. 29. *Note*—Creditors cannot prove Intereſt, unleſs expreſſed in the Body of them. Atk. Rep. 151. Legal Diſcount on them may be proved. Atk. 150. pl. 90. Proof of Debts before Commiſſioners concluſive. Atk. Rep. 77.

(F) Of the Bankrupt's Eſtate and Effects, to which the Commiſſioners or Aſſignees are intitled, when it ſhall be ſaid to be veſted in them; and herein of fraudulent Diſpoſitions by the Bankrupt, and the Actions the Aſſignees may bring for the Recovery thereof.

BY the 13 *Eliz. cap.* 7. "The Commiſſioners, or the major Part of them, by Virtue of the Act and their Commiſſion, may at their Diſcretion take Order and Direction with the Body of the Bankrupt, and his Lands and Tenements, as well (*d*) Copy as Freehold, which he had

See Atk. Rep. 93. pl. 41. (*d*) For this *vide* Cro. Car. 569. Jones 439. 451. *March* 39. 3 Lev. 327. Aſſignee muſt ſurrender Copyhold to a Purchaſer, notwithſtanding the Lord may exact two Fines. Atk. Rep. 95. pl. 42. Such Aſſignee is a Vendee within 13 Eliz. c. 7. and not the Purchaſer from the Aſſignee of ſuch Eſtate. An Extent does not affect a Copyhold. Atk. Rep. 96.

" before he became a Bankrupt, or hath purchaſed for Money, or other
" Recompence, jointly with * his Wife or Children, to the only Uſe of *Page 260
" ſuch Offender, or for ſuch Uſe, Title, &c. as he may lawfully depart
" with; or with any Perſon of Truſt, to any ſecret Uſe of ſuch Of-
" fender; and his Money, Goods, Chattels, &c. and Debts wherever
" found, and cauſe the ſame to be ſearched, viewed, rented and apprized,
" and by Deed indented inrolled in one of his Majeſty's Courts of Re-
" cord, ſell the (a) Lands, Tenements and Hereditaments, and all Deeds
" touching the ſame, and all Fees, Annuities, Offices, Goods and Chat-
" tels, or otherwiſe order the ſame for the Satisfaction of the Creditors:
" And by the ſame Statute, *Par.* 8. Lands, &c. purchaſed, deſcending, re-
" verting, or any Way coming to him after he is declared a Bankrupt,
" ſhall be ſold."

(a) But may ſell Lands without Deed inrolled. 2 Co. 26. The Inrolment operates not by Relation, ſo as to paſs an Eſtate *ab initio*. Vent. 360, 361. Jones 196. Carth. 178, 179.

" Provided the Act ſhall not extend to Lands, Tenements or Hereditaments, Free or Copy, *bona fide* conveyed by the Bankrupt before he became ſo, and not to the Uſe of himſelf or his Heirs, or ſuch who are " privy or conſenting to his fraudulent Purpoſe."

By the 1 *Jac.* 1. *cap.* 15. " If any Perſon who ſhall be a Bankrupt ſhall " convey, or cauſe to be conveyed, any Lands or Goods to his Children, " or others, or transfer his Debts into other Men's Names, except upon " Marriage of a Child (both Parties being of the Age of Conſent) or " ſome valuable Conſideration, the Commiſſioners may ſell them." See Atk. Rep. 94. pl. 41.

By *Par.* 13. " They may grant and aſſign, or otherwiſe order and diſ-
" poſe the Debts due to the Bankrupt, by which Aſſignment or Diſpoſal,
" the Property, Right and Intereſt of the Debt ſhall be ſo veſted in the
" Aſſignees, as if to them originally made or due; and it ſhall not be
" recovered or releaſed by, or attached for the Debt of the Bankrupt, but
" the Aſſignees ſhall have like Remedy for it in their own Name, as the
" Bankrupt had; provided that no Debtor be prejudiced by Payment of
" his Debt to the Bankrupt before he became ſo."

By the 21 *Jac.* 1. *cap.* 19. " If the Lands, &c. after the Bankruptcy are
" extended by the King's Accountant, the Commiſſioners upon Oath,
" may examine, Whether upon a Contract, &c. originally made between
" the Accountant and Bankrupt? And if not, they may order and diſpoſe
" of the Lands."

And by *Par.* 11. " Whereas Bankrupts, commonly before they become " ſo, convey their Goods upon good Conſideration, and yet continue the " Poſſeſſion of them, and are reputed the Owners thereof, it is enacted, " That if at the Time of the Bankruptcy they have in their Poſſeſſion. " Order or Diſpoſition, as Owners, the Goods of others, with their Con-
" ſent, the Commiſſioners may ſell them, &c." See Atk. Rep. 159. Bur. 467. 2 Bur. 829.

By *Par.* 12. " They may ſell any Lands whereof the Bankrupt is ſeiſed
" in Tail, in Poſſeſſion, Reverſion or Remainder, whereof there is no Re-
" verſion or Remainder in the King, of the Gift or Proviſion of the King,
" which ſhall bind the Iſſue in Tail, and all others whom the Bankrupt by
" common Recovery might cut off."

By *Par.* 13. " If the Bankrupt hath granted any Land, &c. upon Con-
" dition to be void upon Payment of Money, or other Performance, the
" Commiſſioners, before the Time of Performance under their Hands
" and Seals may appoint one to tender the Money, or make other Per-
" formance, and may after ſell the Lands, &c." The Commiſſioners may ſell an Equity of Redemption. Chan. Ca. 71.

In the Conſtruction of theſe Statutes the following Opinions have been holden. 2 Ver. 97.

If

Chan. Ca. 71. 2 Vern. 97. S. C. cited. If a Leſſor covenants with his Leſſee to renew his Leaſe, and the Leſſee becomes a Bankrupt, the Commiſſioners cannot aſſign this Covenant.

*Page 261 * An Action for Words is not aſſignable, but when by the Judgment the Damages and Coſts are reduced to a certain Sum, that may be aſſigned.

Jones 215. Cro. Car. 166. Cowp. 25. Cooke Bank. L. 406. 1 Com. Dig. 520. Doug. 584 (n). 3 Term Rep. 435. If the Judgment is executed, and the Money in the Sheriff's Hands, Q. If the Commiſſioners may aſſign before the Return of the Writ? 2 Keb. 372. For being in *Curia Legis*, adjudged that it could not be aſſigned. Cro. Car. 166. Aſſignee may maintain *Trover* againſt Sheriff who took Bankrupt's Goods in execution after the Act of Bankruptcy, and before the Aſſignment, and ſells them after the Aſſignment, the Property of them being after Aſſignment, in the Aſſignee, from the Time of the Act of Bankruptcy, by Relation. Bur. 31, &c.

3 Lev. 13, 14. Keb. 11, 12, 728. 2 Sid. 69, 114, 176. *Vide* Salk. 109. If a Man commits an Act of Bankruptcy, and after continues in Poſſeſſion of his Lands four Years, and then ſells, and after commits another Act of Bankruptcy, and two Years after a Commiſſion is taken out, &c. this Sale ſhall ſtand, for the Act of Bankruptcy by which the Sale is to be avoided, muſt be done within five Years before the Commiſſion ſued out.

3 Lev. 59. Skin. 22. pl. 22. If *A.* having committed an Act of Bankruptcy, keeps on his Trade, and four Years after binds his Son Apprentice with a Goldſmith, and pays with him 120*l.* being the uſual Sum in ſuch Caſes, and two Years after a Commiſſion is taken out againſt *A.* this Money is not aſſignable by the Commiſſioners, being paid ſo long before the Commiſſion, and without any Fraud.

Cro. Car. 550. *Criſp* and *Pratt.* Jones 438, 439. March 37. Cowp. 124, 705. Doug. 716. If *A.* purchaſes a Copyhold to himſelf and Wife for Life, Remainder to his Son and his Heirs, and two Years after he becomes a Trader, and four Years after a Debtor and Bankrupt; there being no Fraud in this Caſe, nor any Intent to deceive Creditors, the Intereſt of the Wife and Heirs of the Bankrupt cannot be defeated by this Act of Bankruptcy.

If the Father conveys to his Children to ſecure them Money given by their Grandfather, if it can be proved the Father had Effects of the Grandfather's in his Hands at the Time of the Execution of the Deed, it ſhall not be avoided. Mod. 76. But if there be no Conſideration, Settlement on his Wife and Children ſhall be conſtrued a Settlement on himſelf; and ſuch an Intereſt veſts in the Aſſignees. Stile 289. An Obligation taken in the Name of another to the Uſe of a Bankrupt, is ſuch an Intereſt in the Bankrupt, that the Commiſſioners may aſſign it, and after ſuch Aſſignment the Obligee cannot releaſe it. Palm. 505.

2 Vern. 96. *Vandenaker* and *Deſbrough.* If a Father agrees to pay his Son 15*l.* during his Life, and the Son becomes a Bankrupt, Equity will not enforce this Agreement in Favour of the Creditors under the Commiſſion of Bankruptcy. If *A.* deviſes 800*l.* to be inveſted in Land for the Benefit of the Wife of *J. S.* for her Life, and afterwards for her Children, and the Intereſt of the Money in the mean Time to go to ſuch Perſons as ought to receive the Profits; and *J. S.* becomes a Bankrupt, the Intereſt of this 800*l.* ſhall not be liable to the Bankruptcy, this not being any Truſt created by the Bankrupt, but a Maintenance intended the Wife, and given to her by her Relation.

2 Vern. 194. But if a Father deviſes a Legacy of 600*l.* payable to his Son at twenty-one, and the Son obtains a Decree for it, and a certain Sum is reported due for Principal and Intereſt, the Commiſſioners may aſſign this Legacy and Benefit of the Decree. 2 Vern. 432.

Abr. Eq. 54. pl. 6. A Man deviſes his Lands which were in Mortgage to be ſold, and the Surplus of the Money to be paid his Daughter; the Daughter married a Man who ſoon after became a Bankrupt, and the Commiſſioners aſſigned this Intereſt of the Wife's; the Huſband died, and the Aſſignees brought their Bill againſt the Wife and Truſtees, to have the Land ſold and the Surplus of the Money paid them; but the Court would not aſſiſt in ſtripping the Wife who was wholly unprovided for) of this Intereſt, but diſmiſſed the Bill.

A. puts

A. puts out 1000*l.* at Intereſt to the *Eaſt-India* Company, and takes Bond for it in the Name of *J. S.* his Wife's Relation; *A.* becomes a Bankrupt; *J. S.* is ſummoned before the Commiſſioners, but before Examination he tells the *Eaſt-India* Company that the Money was not his, but that they ſhould pay it to the Perſon that brought the Bond; *A.*'s Wife brings the Bond, and has the Money paid her; Equity will not relieve againſt it *. Preced. Chan. 18.

*Qu. If ſuch a Caſe would now receive a ſimilar Determination?

* A Legacy of 1000*l.* was given to one after the Death of her Mother, when ſhe ſhould attain the Age of twenty-one Years, and the Defendant was appointed Truſtee for the Raiſing and Payment thereof out of certain Lands; the Legatee was drawn into an improvident Match with one who ſoon after became a Bankrupt, and the Commiſſioners aſſigned all his Effects, and gave him a Certificate of his Conformity; and the Aſſignees brought a Bill againſt the Truſtee for this 1000*l.* who inſiſted that the Aſſignees could be in no better Condition than the Huſband, and that if he were Plaintiff, he could not prevail without making a ſuitable Proviſion for his Wife, and that this Legacy being liable to a double Contingency, *viz.* the Death of the Mother, and the Legatee's arriving at the Age of twenty-one Years, at the Time of the Bankruptcy was not ſuch an Intereſt as could be aſſigned; and the Court held, that though both Contingencies have ſince happened, yet thoſe being ſince the Aſſignment of the Bankrupt's Eſtate, and ſince a Certificate of his having conformed himſelf in every Thing to the Acts, he was now diſcharged as a Bankrupt; and this Portion could not paſs without a new Aſſignment, which the Commiſſioners could not make, their Commiſſion being determined; and ſo diſmiſſed the Bill. *Page 262 Ca. in Eq. Abr. 54. *Jacobſon* and *Peer Williams*.

The Aſſignees have an Intereſt in the Bankrupt's Eſtate, from the very Act of Bankruptcy, ſo as to avoid all meſne Acts done by the Bankrupt during that Time, and the iſſuing out the Commiſſion; ſo that the Privity of Contract between the Bankrupt and his Creditors being from that Time transferred to the Aſſignees, they have the ſame Right as an Adminiſtrator, who has a Property from the Death of the Inteſtate, and may declare generally *ut de bonis ſuis propriis*. Sand. 239. Sid. 327. Salk 111. pl. 8. But it has been held, that before an actual Aſſignment the Bankrupt has ſuch a Property for which he may maintain an Action. Salk. 108. If upon a *Capias ad Satisfaciendum* the Money is levied, and after the Plaintiff becomes a Bankrupt, and the Money is aſſigned before the Return of the Writ, this Aſſignment is void, for being in the Hands of the Sheriff it is *quaſi in Cuſtodia Legis*, and not the Bankrupt's Money before it is paid him. Cro. Car. 166. If the Conuſor after the *Extent* and before the *Liberate* becomes a Bankrupt, and the Goods are after delivered upon the *Liberate*, and a Commiſſion is after taken out, *&c.* they cannot be ſold; for by the *Extent* they were *in Cuſtodia Legis*; and it was not in the Power of the Conuſor by any ſubſequent Act to deſtroy the Effect of the *Extent*. Cro. Car. 148. Jones 202, 203. If between the Act of Bankruptcy and before Aſſignment the Goods of the Bankrupt are ſeized; and in the Officer's Hands, for the Debt of the King, it ſeems that theſe Goods cannot be aſſigned; for the King's Title and that of a Subject's commencing at the ſame Time, the King ſhall be preferred; alſo the King cannot come in as a Creditor under the Statutes. Salk. 108. pl. 2. 109.

If a *Fieri Facias* is taken out and indorſed according to the Statute, and delivered to the Sheriff, and after, the ſame Day, the Defendant becomes a Bankrupt, and the Sheriff levies 400*l.* of the Goods of the Defendant, and pays it to the Plaintiff; yet the Commiſſioners may aſſign theſe Goods notwithſtanding, *&c.* for by the Delivery of the Writ to the Sheriff, the Goods are bound in no other Manner than before the Statute they were bound from the *Teſte* of the Writ; and by the Delivery of the Writ the Execution is not ſerved or executed. Lev. 67, 191, 192. For this *vide* Keb. 930, 932. Sid. 271. Cro. Eliz. 174. Lev. 95, 173. 8 Co. 143.

13 Co. 21. Vent. 193. Mod. 93. 3 Keb. 1, 14, 68. 10 Mod. 244, 432.

Though

Though the Bankrupt's Eſtate is transferred to the Aſſignees, yet muſt they purſue the ſame Remedies for the Recovery of it as the Bankrupt himſelf; therefore if a Debt upon a ſimple Contract due to the Bankrupt is aſſigned, an Action of Debt will not lie againſt the Executor of the Debtor, but the Aſſignee muſt bring his Action on the Caſe.

Cro. Car. 187. Jones 223. 1 Com. Dig. 526—7. Eſpinaſſe Dig. 183.

1 Term Rep. 91. 619. 4 Term Rep. 94. Where Wager of Law lay againſt the Bankrupt, it lies againſt the Aſſignee. Cro. Jac. 105.

Allen 28, 29. Stile 62. S. C. Raym. S. C. cited.

The Plaintiff declares upon an *Aſſumpſit* for 43*l.* 1*s.* and ſets forth an Aſſignment of the Debts of the Bankrupt, *mentionat' in quadam Schedula continen' prædict' ſummam* 43*l.* 1*s.* and the Jury find he was indebted only in 41*l.* 1*s.* which he promiſed, &c. and that the Commiſſioners aſſigned *Debita præd' in quadam Schedula continen' præd' ſummam* 43*l.* 1*s.* and if this is the ſame Promiſe, concludes for the Plaintiff; and becauſe the Iſſue and Verdict were concluded to the Promiſe, and the Aſſignment not in Queſtion, * and the Statute giving the like Remedy to the Aſſignee as the Bankrupt had, it was adjudged for the Plaintiff. *

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* This Caſe is not worth attending to—Aſſignees now declare *generally*, as ſuch without mentioning any Aſſignment; they ſtate the Cauſe of Action accruing to the Bankrupt, before he became ſuch, the Promiſe in like Manner, and in the Breach alledge the Defendant has not paid to the Bankrupt before he became ſuch, nor to the Aſſignees ſince, and conclude to the Damage of the Aſſignees.

Lev. 17. Raym. 6, 7. Keb. 167.

If there be a joint Bond to *A.* and *B.* and *A.* becomes a Bankrupt, &c. the Aſſignee cannot bring an Action alone; but if aſſigned to *B.* he alone may bring an Action, being intitled to one Moiety in his own Right, and to the other for the Benefit of Creditors, by Virtue of the Aſſignment. †

† But the Facts muſt appear on the Record.

Carth. 29. *Petyt* and *Low*, Comb. 108. S. C. That the Aſſignee muſt lay the Promiſe to be made to the Bankrupt, *vide* 6 Mod. 131. Stra. 697. 7 Mod. 83, 96. 2 Ld. Raym. 810, 1548. 8 Mod. 171. 10 Mod. 244, 246. 12 Mod. 324. Ld. Raym. 741.

In *Aſſumpſit* the Plaintiff declared as Aſſignee under a Commiſſion of Bankruptcy awarded againſt *J. S.* who became a Bankrupt, &c. and that the Defendant was indebted to the ſaid *J. S.* &c. and on Demurrer to the Declaration it was objected, that it was uncertain, it not being ſhewn how *J. S.* became a Bankrupt, *viz.* either by keeping cloſe within his Houſe, by ſuffering himſelf to be arreſted, &c. and that in pleading Simony, the particular Act muſt be ſet forth; but it was held well enough in this Caſe, for the Statutes mention the Word *Bankrupt*, but in the Statute againſt Simony no Mention is made of the Word; beſides, in this Caſe the Plaintiff is a Stranger to the Bankrupt, and it cannot be preſumed that it lies in his Knowledge in what Manner he became a Bankrupt ‡.

‡ See preceding Notes.

Creditors cannot give a general Power to Aſſignees to proſecute Suits at their own Diſcretion, but there muſt be a Meeting of Creditors upon Notice in the *Gazette*, to conſider of each particular Suit. Atk. Rep. 91. pl. 39, ſee *id.* 106. pl. 58.

By the 5 *Geo.* 2. *cap.* 30. *ſect.* 38. it is enacted. "That no Suit in Equity ſhall be commenced by any Aſſignee or Aſſignees, without the Conſent of the major Part in Value of the Creditors of ſuch Bankrupt, who ſhall be preſent at a Meeting of the Creditors, purſuant to Notice to be given in the *London Gazette* for that Purpoſe."

By *Stat.* 19 *Geo.* 2. *cap.* 32. No *bona fide* Creditor of any Bankrupt for Goods *bona fide* ſold, or Bills *bona fide* drawn, negociated or accepted by him in the uſual Courſe of Trade, ſhall be liable to refund, &c. any Money *bona fide* received in the ordinary Courſe of Dealing, not knowing, underſtanding or having Notice of his being a Bankrupt, or in inſolvent Circumſtances.

(G) Of ſetting off, ſubmitting to Arbitration, and compounding Debts due to the Bankrupt.

BY the 5 *Geo.* 2. *cap.* 30. *ſect.* 28. it is enacted, "That where it ſhall "appear to the Commiſſioners or the major Part of them, that there "hath been mutual Credit given by the Bankrupt, and any other Perſon, "or mutual § Debts between the Bankrupt and any other Perſon, the ſaid "Commiſſioners, or the major Part of them, or the Aſſignees of ſuch "Bankrupt's Eſtate, ſhall ſtate the Account between them, and one Debt "may be ſet off againſt another; and what ſhall appear to be due on either "Side on the Ballance of ſuch Account, and on ſetting off ſuch Debts "againſt one another, and no more, ſhall be claimed or paid on either Side "reſpectively."

Atk. Rep. 119. *id.* 185. pl. 97. *Vide* 2 Bulſt. 26. Mod. 215. 10Mod. 432. 12Mod. 446. Fitzgib. 282, 283. 2Vern. 203. 428.

Eq. Ca. Abr. 55. 2 Ld. Raym. 871. Salk. 392. pl. 1. Show 173. Comb. 217. Will. Rep. 238. 2 Will. Rep. 500. pl. 160. 3 Will. Rep. 23. pl. 7. 405. pl. 113. 408. 2 Stra. 995. 1157. *Vide* Co. Abr. 8, 9. Doubtful whether a Creditor under a ſeparate Commiſſion againſt *A.* and Debtor under a joint Commiſſion againſt *A.* and *B.* can ſet off the Debt he owes the latter by his Demand againſt the former. Atk. Rep. 100. pl. 48. * Where there is mutual Credit between Bankrupt and Creditor, Commiſſioners ought to ſtop Intereſt on both Sides to Time of Commiſſion, or allow Intereſt to both till ſettling Account. Atk. Rep. 80.

§ In *Ryal* and others Aſſignees againſt *Larkin*, 1 Wilſ. 155,-6, in Action of *Aſſumpſit*, Defendant pleaded a Set-off of Bankrupt's Bond, adjudged the Act for ſetting off Debts did not extend to Aſſignees.

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* One would ſuppoſe it could not be done, becauſe the Creditor of *A.* has not any Demand againſt *B.* nor conſequently, are the Debts mutual.

By the ſaid Statute, "Whereas Aſſignees are and may ſometimes be "prevented from making ſuch ſpeedy Dividends of the Eſtate and Effects "of Bankrupts, as by this Act is intended, by reaſon of Debts due, or pre-"tended and claimed to be due from ſuch Bankrupts, upon long and intri-"cate Accounts or Demands, which are diſputed or not admitted by the "* Commiſſioners and Creditors to be juſt and fair Debts, and ſuch Claim-"ants are thereby obliged to aſcertain ſuch their Demands by Actions or "Suits in Law or Equity; which are oftentimes many Years depending, "and many other Differences and Difficulties do ariſe under Commiſſions "of Bankrupts, which might he determined by Arbitration, if Aſſignees "had Power to ſubmit the ſame: The Aſſignees with Conſent of the ma-"jor Part in Value of the Bankrupt's Creditors, who ſhall have duly "proved their Debts under ſuch Commiſſion, and who ſhall be preſent at "any Meeting of the ſaid Creditors, purſuant to Notice for that Purpoſe "to be given in the *London Gazette*, to ſubmit any Difference or Diſpute "between ſuch Aſſignee or Aſſignees, and any Perſon or Perſons what-"ſoever, for or on Account, or by Reaſon or Means of any Matter, "Cauſe or Thing whatſoever relating to ſuch Bankrupt or Bankrupts, "his, her or their Eſtate or Effects, to the final End and Determina-"tion of Arbitrators, to be choſen by the ſaid Aſſignee or Aſſignees, "and the major Part in Value of ſuch Creditors, and the Party or Par-"ties with whom they ſhall have ſuch Difference, and to perform the "Award of ſuch Arbitrators, or otherwiſe to compound and agree the "Matters in Difference and Diſpute between them, in ſuch Manner as "the Aſſignees with ſuch Conſent as aforeſaid ſhall think fit and can "agree;

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Sect. 34. Creditors cannot give a general Power to Aſſignees to ſubmit Matters to Arbitration, at their own Diſcretion, but there muſt be a Meeting of Creditors upon Notice in *Gazette* to conſider each particular Caſe. Atk. Rep. 91. pl. 39.

" agree; and the ſame ſhall be binding to all the Creditors, and the Aſ-
" ſignees are hereby indemnified for what they ſhall fairly do according to
" the Direction aforeſaid."

Sect. 35. And by the ſaid Statute it is further enacted, " That any Aſſignee or
" Aſſignees made or choſen as aforeſaid, ſhall be, and is and are hereby
" impowered, by and with the Conſent of the major Part of the Bankrupt's
" Creditors in Value, who ſhall be preſent at a Meeting to be had for that
" Purpoſe, of which public Notice ſhall be given in the *London Gazette*,
" to make Compoſition with any Perſon or Perſons, Debtors or Account-
" ants to ſuch Bankrupts, where the ſame ſhall appear neceſſary and rea-
" ſonable, and to take ſuch reaſonable Part as can upon Compoſition be
" gotten in full Diſcharge of ſuch Debts and Accounts."

(H) Of the Diſtribution to be made of the Bankrupt's Eſtate.

If the Commiſſioners make a fraudulent Diſtribution, it may be ſet aſide in Chancery. 2 Vern. 158, 162. For the Caſes which have been on this Statute, *vide* 2 Co. 26. 8 Co. 98. b. Jones 203. 2 Sid. 177. Godb. 195. How Diſtribution is to be under a joint Commiſſion taken out againſt Partners, *vide* Chan. Ca. 139. 2. Vern. 293, 706.

BY the 13 *Eliz. cap.* 7. " The Commiſſioners are to ſell, or otherwiſe
" order the Bankrupt's Lands, *&c.* for the Satisfaction and Payment
" of the Creditors, to every Creditor a Portion Rate-like, according to the
" Quantity of his Debt."

There ought to be a Covenant from the Aſſignees in the Aſſignment to inforce them to the Obſervance of this Clauſe of the Statute.

By the 5 *Geo.* 2. *c.* 30. *ſect.* 32. it is enacted, " That before the Creditors
" ſhall proceed to the Choice of an Aſſignee or Aſſignees of any Bankrupt's
" Eſtate, the major Part in Value of the ſaid Bankrupt's Creditors then
" preſent ſhall, if they think fit, direct in what Manner, how, and with
" whom, and where the Monies ariſing by, and to be received from Time
" to Time out of the Bankrupt's Eſtate, ſhall be paid in and remain until
" the ſame ſhall be divided amongſt all the Creditors, as by this Act is
" directed; to which Rule and Direction every ſuch Aſſignee and Aſ-
" ſignees afterwards to be choſen, ſhall conform as often as 100*l.* ſhall be
" got in and received from ſuch Bankrupt's Eſtate; and ſhall be and are
" hereby indemnified for what they ſhall do in Purſuance of ſuch Direc-
" on of the ſaid Creditors."

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Where Aſſignees do not divide Bankrupt's Effects in proper Time, but make private Advantage of them, they are chargeable with Intereſt. Atk. Rep. 90 pl 37. Commiſſioners may order Dividend to be advertized.

* By *ſect.* 33. " Every Perſon choſen Aſſignee, ſhall at ſome Time
" after the Expiration of four Months, and within twelve Months from
" the Time of iſſuing of ſuch Commiſſion, cauſe at leaſt twenty-one Days
" public Notice to be given in the *London Gazette*, of the Time and Place
" the Commiſſioners and Aſſignees intend to meet, to make a Dividend,
" at which Time the Creditors who have not before proved their Debts,
" ſhall then be at Liberty to prove the ſame; which Meeting for the City
" of *London*, and all Places within the Bills of Mortality, ſhall be at the
" *Guildhall* of the ſaid City, and upon every ſuch Meeting the Aſſignee or
" Aſſignees ſhall produce to the ſaid Commiſſioners and Creditors then
" preſent, fair and juſt Accounts of all Receipts and Payments touching
" the Bankrupt's Eſtate and Effects, and of what ſhall remain out-
" ſtanding, and the Particulars thereof; and ſhall, if the Creditors then
" preſent, or the major Part of them require the ſame, be examined
" upon Oath, or, being of the People called *Quakers*, upon ſolemn Af-
" firmation, before the ſaid Commiſſioners, or the major Part of them,
" touching the Truth of ſuch Accounts; and in ſuch Accounts the Aſ-

" ſignees

" ſignees ſhall be allowed, and retain all ſuch Money as they ſhall have " expended in ſuing out and proſecuting of ſuch Commiſſion, and all other " juſt Allowances on Account of their being Aſſignees; and the Commiſ- " ſioners, or the major Part of them, ſhall order ſuch Part of the neat " Produce of the Bankrupt's Eſtate, as ſhall appear to be in the Hands " of the Aſſignees, as they or the major Part of them ſhall think fit, to " be forthwith divided amongſt the Creditors who have duly proved their " Debts under ſuch Commiſſion, in Proportion to their ſeveral and re- " ſpective Debts; and the Commiſſioners or the major Part of them, " ſhall make ſuch their Order for a Dividend in Writing under their " Hands, and ſhall order one Part of ſuch Order to be filed amongſt the " Proceedings under the ſaid Commiſſion, and ſhall deliver unto each of " the Aſſignees a Duplicate under the Hands of the Commiſſioners; which " Order ſhall contain an Account of the Time and Place of making ſuch " Order, and the Sum total or *Quantum* of all the Debts proved under " the Commiſſion, and the Sum total of the Money remaining in the " Hands of the Aſſignee to be divided, and how much in particular in the " Pound, is then ordered to be paid to every Creditor, and the Aſſignees " in Purſuance of ſuch Order, and without any Deed or Deeds of Diſtri- " bution to be made for that Purpoſe, ſhall forthwith make ſuch Dividend, " and ſhall take Receipts from each Creditor, and ſuch Order and Re- " ceipt ſhall be an effectual Diſcharge to ſuch Aſſignee, for ſo much as " he ſhall fairly pay."

Atk. Rep. 91 pl. 39. Aſſignees cannot ſtop Creditor's Dividend on Account of his own private Debt due from ſuch Creditor.

Atk. Rep. 90 pl. 38. Upon Affidavit of Creditor that he has not read the *Gazette*, he will be admitted ſo as not to diſturb former Dividends, nor can Commiſſioners proceed to make a ſecond till he is brought up equal to the Creditors under the firſt.

Atk. Rep. 209.

By *ſect.* 37. " Within eighteen Months next after the Iſſuing of any Com- " miſſion, the Aſſignees ſhall make a ſecond Dividend of the Bankrupt's " Eſtate and Effects, in Caſe the ſame was not wholly divided upon the " firſt Dividend, and ſhall cauſe a Notice to be inſerted in the *London* " *Gazette*, of the Time and Place the Commiſſioners intend to meet; " and for the Creditors who ſhall not before have proved their Debts, to " come and prove the ſame; and at ſuch Meeting every ſuch Aſſignee " ſhall * produce upon Oath or Affirmation, &c. his, her or their Account " of the Bankrupt's Eſtate and Effects, and what upon the Ballance there- " of ſhall appear to be in his, her or their Hands; and ſhall by the like " Order of the Commiſſioners, or the major Part of them, be forth- " with divided among ſuch of the Bankrupt's Creditors who ſhall have " made due Proof of their Debts, in Proportion to their ſeveral and " reſpective Debts, which ſecond Divident ſhall be final, unleſs any Suit " at Law or in Equity ſhall be depending, or any Part of the Eſtate ſtand- " ing out that cannot have been diſpoſed of, or that the major Part of the " Creditors ſhall not have agreed to be ſold and diſpoſed of in Manner " aforeſaid, or unleſs ſome other future Eſtate or Effects of the ſaid Bank- " rupt ſhall afterwards come to or veſt in the Aſſignees; in which Caſe " they ſhall, as ſoon as may be, convert ſuch future or other Eſtate and " Effects into Money, in Manner aforeſaid; and ſhall within two Months " next after the ſame ſhall be converted into Money, by the like Order of " the Commiſſioners, or the major Part of them, divide the ſame amongſt " ſuch Bankrupt's Creditors who ſhall have made due Proof of their Debts " under ſuch Commiſſion."

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(I) How the Bankrupt is to demean himself; and herein of the Crime in not appearing, and discovering his Estate, and the Privilege he is to enjoy during his Attendance.

BY the 5 *Geo.* 2. *cap.* 30. *sect.* 1. it is enacted, "That if any Person "who shall become Bankrupt, within the Intent and Meaning of the "several Statutes made, and now in Force concerning Bankrupts, or any "of them, and against whom a Commission of Bankrupt hath been "awarded and issued out, whereupon the Person or Persons against whom "such Commission hath issued, or shall issue, hath or have been, or shall "be declared Bankrupt or Bankrupts, shall not within forty-two Days "after Notice thereof in Writing, to be left at the usual Place of Abode "of such Person or Persons, or personal Notice in Case such Person or "Persons be then in Prison, and Notice given in the *London Gazette*, "that such Commission or Commissions is, are or have been issued, and of "the Time and Place of a Meeting of the Commissioners therein named, "or the major Part of them, surrender (*a*) him, her or themselves "to the said Commissioners named in the said Commission, or the ma-"jor Part of them, and sign or subscribe such Surrender, and submit to "be examined from Time to Time upon Oath, or (being of the People "called Quakers) upon the solemn Affirmation by Law appointed for such "People, by and before such Commissioners, or the major Part of them "by such Commission authorized, and in all Things conform to the several "Statutes already made, and now in Force concerning Bankrupts; and "also upon such his, her or their Examination, fully and truly disclose and "discover all his, her or their Effects and Estate Real and Personal; and
Page 267 " how and in what Manner, to whom, and upon what Consideration, and "at what Time or Times he, she or they have or hath disposed of, assigned "or transferred any of his, her or their Goods, Wares, Merchandizes, "Monies, or other Estate and Effects and all Books, Papers and Writ-"ings relating thereto) of which he, she or they was or were possessed, or "in or to which he, she or they was or were any ways interested or in-"titled, or which any Person or Persons had or hath, or have had in "Trust for him, her or them, or for his, her or their Use, at any Time "before or after the Issuing of the said Commission, or whereby such "Person or Persons, or his or their Family or Families, hath or have, or "may have or expect any Profit, Possibility of Profit, Benefit or Advan-"tage whatsoever, except only such Part of his, her or their Estate and "Effects as shall have been really and *bona fide* before sold or disposed of "in the Way of his, her or their Trade and Dealings, and except such "Sums of Money as shall have been laid out in the ordinary Expence of "his, her or their Family or Families; and also upon such Examination "deliver up unto the said Commissioners by the said Commission authorized

(*a*) *Alexander Thompson*, an Embroiderer by Trade, was convicted for not surrendering, tho' his Time had never been enlarged; and was executed in the Beginning of the Year 1756. Petition to Lord Chancellor *Hardwicke* that the Clerk of the Commission might be ordered to attend at the *Old Baily* with the Proceedings upon a Prosecution against the Bankrupt for Felony in not surrendering: Petition not granted, for upon a Penal Law, a Court of Equity will not lend it's Aid to such a Prosecution. Atk. Rep. 221. pl. 123. Lord Chancellor *Macclesfield* in several Instances superseded the Commission in order to prevent such a Prosecution, where a Bankrupt did not surrender himself in due Time; there not appearing any Intention in him to defraud his Creditors. *id.* 222.

"or

" or the major Part of them, all ſuch Part of his, her or their the ſaid " Bankrupt's Goods, Wares, Merchandizes, Money, Eſtate and Effects; " and all Books, Papers and Writings relating thereunto, as at the Time of " ſuch Examination ſhall be in his, her or their Poſſeſſion, Cuſtody or " Power, (his, her or their neceſſary wearing Apparel, and the neceſſary " wearing Apparel of the Wife and Children of ſuch Bankrupt only ex- " cepted); then he, ſhe or they the ſaid Bankrupt or Bankrupts, in Caſe " of any Default and wilful Omiſſion in not ſurrendering and ſubmitting " to be examined as aforeſaid; or in Caſe he, ſhe or they ſhall remove, " conceal (*a*) or embezzle any Part of his, her or their Eſtate Real or Per- " ſonal, to the Value of twenty Pounds; or any Books of Account, Papers " and Writings relating thereto, with an Intent to defraud his, her or their " Creditors, and being thereof lawfully convicted by Indictment or In- " formation) ſhall be deemed and adjudged to be guilty of Felony, and " ſhall ſuffer as Felons, without Benefit of Clergy, or the Benefit of any " Statute made in Relation to Felons; and in ſuch Caſes ſuch Felon's " Goods and Eſtate ſhall go and be divided among the Creditors ſeeking " Relief under ſuch Commiſſion; any Law, Uſage, *&c.*"

(*a*) *Richard Town*, a Tallow Chandler by Trade, was convicted for concealing his Effects, and was the firſt Perſon who ſuffered capitally by the Bankrupt Laws; he was executed 12 *Dec.* 1712. *John Perrot* was convicted of a like Concealment, and was executed on *Wedneſday* 11 *Nov.* 1762, on a Gallows erected in *Smithfield*. *Vide* 2 Burr. 1216. It is *obſervable*, that *Perrott* was called in the Proceedings under the Commiſſion of Bankrupt, " *Merchant*." In his Trial he was *proved* to be a " *Linen-Draper*;" and the Editor of his authentic Narrative declared he was a " *Laceman*."

By *ſect.* 2. " The Commiſſioners may appoint within the ſaid forty- " two Days, (ſo appointed as aforeſaid) for the Bankrupt to ſurrender " and confirm, not leſs than three ſeveral Meetings, for the Purpoſes " aforeſaid, the laſt of which ſhall be on the forty-ſecond Day hereby " limited for ſuch Bankrupt's Appearance."

The Commiſſioners may ſummon the Bankrupt perſonally to attend them before the firſt Day appointed in the *Gazette* for his Examination. 2 Eq. Caſ. Abr. 99. pl. 2.

By *ſect.* 3. " The Lord Chancellor or Lord Keeper, or Commiſſioners " may enlarge the Time for ſurrendering, *&c.* as the ſaid Lord Chancellor, " *&c.* ſhall think fit, not exceeding fifty Days, to be computed from the " End of the ſaid forty-two Days, ſo as ſuch Order for enlarging the Time " be made by the ſaid Lord Chancellor, *&c.* ſix Days at leaſt before the " Time on which ſuch Perſon or Perſons was or were ſo to ſurrender him, " her or themſelves, and make ſuch Diſcovery as aforeſaid."

By *ſect.* 4. " Every ſuch Bankrupt, after any Aſſignee ſhall be choſen " and appointed, ſhall deliver up upon Oath, before one of the Maſters " of the High Court of Chancery, * or before any Juſtice of the Peace " within his reſpective Juriſdiction, all his, her or their Books of Ac- " counts, Papers and Writings not ſeiſed by the Meſſenger of the ſaid " Commiſſion, or not before delivered up to the Commiſſioners, or the " major Part of them, and then in his, her or their Cuſtody or Power, " and diſcover ſuch as are in the Cuſtody or Power of any other Perſon " or Perſons that any Ways relate to or concern his, her or their Eſtate " or Effects; and all and every ſuch Bankrupt or Bankrupts not in Pri- " ſon or Cuſtody, ſhall at all Times after ſuch Surrender as aforeſaid be " at Liberty, and is and are hereby required to attend ſuch Aſſignee or " Aſſignees, upon every reaſonable Notice in Writing for that Purpoſe " given by ſuch Aſſignee or Aſſignees, unto ſuch Bankrupt or Bankrupts, " or left for him, her or them, at his, her or their Houſe or Place of " Abode, in order to aſſiſt, and ſhall aſsiſt ſuch Aſſignees in making out " the Accounts of the ſaid Bankrupt's Eſtate and Effects."

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See Atk. Rep. 148. pl. 88.

By

By *ſect.* 5. "Every Bankrupt, having ſurrendred as aforeſaid, ſhall at all "ſeaſonable Times before the Expiration of the ſaid forty-two Days, or "ſuch further Time as ſhall be allowed to ſuch Bankrupts to finiſh his, "her or their Examination, be at Liberty to inſpect his, her or their "Books, Papers and Writings in the Preſence of ſuch Aſſignee or "Aſſignees, or ſome Perſon to be appointed by ſuch Aſſignee or Aſ-"ſignees for that Purpoſe, and to take and bring with him, her or "them, for his, her or their Aſſiſtance, ſuch Perſons as he, ſhe or they "ſhall think fit, not exceeding two Perſons at any one Time, and to "make out ſuch Extracts and Copies from thence as he, ſhe or they "ſhall think fit, the better to enable him, her and them to make a full "and true Diſcovery and Diſcloſure of his, her or their Eſtate and Ef-"fects; and in order thereto the ſaid Bankrupt or Bankrupts ſhall be free "from all Arreſts, Reſtraint or Impriſonment of any of his, her or their "Creditors in coming to ſurrender, and from the actual Surrender of ſuch "Bankrupt to the ſaid Commiſſioners, for and during the ſaid forty-two "Days, or ſuch further Time as ſhall be allowed to ſuch Bankrupt or "Bankrupts for finiſhing his, her or their Examinations as aforeſaid, pro-"vided ſuch Bankrupt was not in Cuſtody at the Time of ſuch Surrender "and Submiſſion to be examined; and in Caſe ſuch Bankrupt ſhall be "arreſted for Debt, or on any Eſcape Warrant, coming to ſurrender him "or herſelf to the ſaid Commiſſioners, or after his or her Surrender ſhall "be ſo arreſted within the Time before mentioned, that then on producing "ſuch Summons or Notice, under the Hands of the ſaid Commiſſioners, "Aſſignee or Aſſignees, to the Officer who ſhall arreſt him, her or them, "and making it appear to ſuch Officer that ſuch Notice of Summons is "ſigned by the ſaid Commiſſioners, or the major Part of them, or ſuch "Aſſignee or Aſſignees, and giving ſuch Officer a Copy thereof, ſhall be "immediately diſcharged; and in Caſe any Officer ſhall detain ſuch Bank-"rupt or Bankrupts (after he, ſhe or they ſhall have ſhewn ſuch Notice or "Summons to him, and made it appear that it was ſigned as aforeſaid) in "his Cuſtody, ſuch Officer ſhall forfeit and pay to ſuch Bankrupt, for his "own Uſe the Sum of 5*l.* for every Day ſuch Officer ſhall detain ſuch "Bankrupt, to be recovered by Action of Debt, in any of his Majeſty's "Courts of Record at *Weſtminſter*, in the Name of ſuch Bankrupt, with "full Coſts of Suit."

See Atk. Rep. 148. pl. 88.

Sect. 6. "*Provided* that in Caſe any Bankrupt be in Priſon or in Cuſtody at "the Time of iſſuing of the ſaid Commiſſion as aforeſaid, and is will-"ing to ſurrender and ſubmit to be examined, according to the Direc-"tions of this Act, and can be brought before the ſaid Commiſſioners "and Creditors for that Purpoſe, the Expence thereof ſhall be paid "out of the ſaid Bankrupt's Eſtate and Effects; but in caſe ſuch Bank-"rupt is in Execution, or cannot be brought before the Commiſſion-"ers, that then the acting Commiſſioners ſhall from Time to Time at-"tend the ſaid Bankrupt in Priſon or Cuſtody, and take his or her "Diſcovery, as in other Caſes; and the Aſſignees of the ſaid Eſtate "ſhall have Power, and are hereby required to appoint one or more "* Perſons to attend ſuch Bankrupt, being in Priſon or in Cuſtody, as "aforeſaid, from Time to Time, and to produce to him or her, his or her "Books, Papers and Writings, in order to prepare his or her laſt Diſcovery "and Examination, according to the Directions before mentioned, a Copy "whereof the Aſſignees of the ſaid Eſtate ſhall apply for, and the ſaid "Bankrupt ſhall deliver to them, or their Order, ten Days at leaſt before "ſuch Examination."

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By *ſect.* 36. "After ſuch Bankrupt ſhall have obtained his Certificate, "and the ſame ſhall be duly confirmed, ſuch Bankrupt ſhall give his "Attendance upon every reaſonable Notice in Writing, to be given to "or left at his uſual Place of Abode, by the Aſſignees or their Order,

"thereby

" thereby requiring him to attend the Aſſignees in order to make up, ad-
" juſt or ſettle any Account between ſuch Bankrupt and any Debtor to or
" Creditor of ſuch Bankrupt's Eſtate, or to attend any Court of Record,
" in order to be examined touching the ſame, or for ſuch other Buſineſs
" which ſuch Aſſignee ſhall judge neceſſary for getting in the ſaid Bank-
" rupt's Eſtate and Effects, for the Benefit of his Creditors; for which
" Attendance the Bankrupt ſhall be allowed and paid the Sum of 2*s.* 6*d.*
" *per diem*, by ſuch Aſſignee out of the Bankrupt's Eſtate; and in caſe
" ſuch Bankrupt ſhall neglect to attend, or on ſuch Attendance ſhall re-
" fuſe to aſſiſt in ſuch Diſcovery, without good and ſufficient Cauſe to be
" ſhewn to the Commiſſioners, or the major Part of them, for ſuch Ne-
" glect or Refuſal, to be by them allowed as ſufficient, ſuch Aſſignee mak-
" ing due Proof thereof upon Oath before the ſaid Commiſſioners autho-
" riſed as aforeſaid, or the major Part of them, they are hereby impow-
" ered and required to iſſue a Warrant directed to ſuch Perſon as they
" ſhall think proper for apprehending ſuch Bankrupt, and him to commit
" to the County Gaol, there to remain in cloſe Cuſtody, without Bail or
" Mainprize, until he ſhall duly conform to the Satisfaction of the ſaid
" Commiſſioners authoriſed as aforeſaid; and be by the ſaid Commiſſion-
" ers or the Special Order of the Lord Chancellor, or otherwiſe by due
" Courſe of Law diſcharged; and ſuch Gaoler, or Keeper of ſuch Priſon,
" to which ſuch Bankrupt ſhall be committed, is to keep ſuch Perſon in
" cloſe Cuſtody, within the Walls of the ſaid Priſon, until duly diſ-
" charged, *&c.*"

(K) Of the Overplus of the Bankrupt's Eſtate, and the Allowances to be made him; and herein of his Diſcharge and Certificate.

BY 13 *Eliz. cap.* 7. " Upon Requeſt by the Bankrupt, the Commiſſion-
" ers ſhall declare how they have beſtowed his Lands, *&c.* and pay
" the Overplus to the Bankrupt, *&c.*"

By the 5 *Geo.* 2. *cap.* 30. *ſect.* 7. it is enacted, " That every Bankrupt,
" who ſhall by the Time limited in this Act ſurrender to the acting Com-
" miſſioners, and in all Things conform, as in and by this Act is *Page 270
" directed, ſhall be allowed the Sum of 5*l. per Cent.* out of the neat Pro-
" duce of all the Eſtate that ſhall be recovered in and received, which
" ſhall be paid unto him by the Aſſignees, in caſe the neat Produce of
" the ſaid Eſtate, after ſuch Allowance made, ſhall be ſufficient to pay
" the Creditors of the ſaid Bankrupt, who have proved their Debts under
" the ſaid Commiſſion, the Sum of 10*s.* in the Pound, and ſo as the ſaid
" 5*l. per Cent.* ſhall not amount in the whole to above the Sum of 200*l.*
" and in caſe the neat Produce of the Eſtate ſhall, over and above the
" Allowance hereafter mentioned, be ſufficient to pay the ſaid Creditors
" the Sum of 12*s.* 6*d.* in the Pound for their reſpective Debts, that then
" every Perſon ſo conforming ſhall be allowed the Sum of 7*l.* 10*s.* *per*
" *Cent.* out of ſuch neat Produce, to be paid by the Aſſignees, ſo as ſuch
" 7*l.* 10*s.* *per Cent.* ſhall not amount in the Whole to above the Sum of
" 250*l.* And in caſe the neat Produce of the Eſtate ſhall, over and above
" the Allowance hereafter made, be ſufficient to pay the ſaid Creditors
" the Sum of 15*s.* in the Pound for their reſpective Debts, that then every
" ſuch

1 *Jac.* 1. *c.* 15. A Clauſe to the ſame Effect.

Bankrupts are not intitled to Allowance under this Act till a *final* Dividend is made. Ark. Rep. 208. pl. 113. Repreſentative of a Bankrupt who had in his Lifetime divided ten

Shillings in the Pound, is, as ſtanding in his Place, intitled to the Allowance. Atk. Rep. 209. pl. 114.

" ſuch Perſon ſo conforming, ſhall be allowed the Sum of 10*l. per Cent.* " out of ſuch neat Produce, to be paid by the Aſſignees, ſo as ſuch 10*l.* " *per Cent.* ſhall not amount in the whole to above the Sum of 300*l.* and " every ſuch Bankrupt ſhall be diſcharged from ſuch Debts owing at the " Time that he did become Bankrupt; and in caſe any ſuch Bankrupt " ſhall afterwards be arreſted, proſecuted or impleaded for any Debt due " before ſuch Time as he became Bankrupt, ſuch Bankrupt ſhall be diſ- " charged upon Common Bail, and ſhall and may plead in general, that

(*a*) Before this Act the Bankrupt's Certificate was no Evidence of the Bankruptcy. Stra. 533.

" the Cauſe of ſuch Action or Suit did accrue before ſuch Time as he, " ſhe or they became Bankrupt, and may give this Act and the Special " Matter in Evidence; (*a*) and the Certificate of ſuch Bankrupt's conform- " ing, and the Allowance thereof, according to the Directions of this Act, " ſhall be, and ſhall be allowed to be ſufficient Evidence of the Trading, " Bankruptcy, Commiſſion and other Proceedings, precedent to the ob- " taining ſuch Certificate, and a Verdict ſhall thereupon paſs for the De- " fendant, unleſs the Plaintiff in ſuch Action can prove the ſaid Certificate

Bankrupt not admitted to prove his own Act of Bankruptcy. 2 Stra. 829.

" was obtained unfairly and by Fraud, or unleſs the Plaintiff in ſuch Ac- " tion can make appear any Concealment by ſuch Bankrupt to the Value " of 10*l.* and if a Verdict paſs for the Defendant or the Plaintiff ſhall " become nonſuited, or Judgment be given againſt the Plaintiff, the De- " fendant ſhall recover his full Coſts.

Sect. 8.

" Provided that if the neat Proceed of ſuch Bankrupt's Eſtate, ſo to be " diſcovered, recovered and received, together with what ſhall be other- " wiſe recovered and received, ſhall not amount to ſo much as will pay all " and every the Creditors of ſuch Bankrupt who ſhall have proved their " Debts under the ſaid Commiſſion the Sum of 10*s.* in the Pound for " their reſpective Debts, after all Charges firſt had and deducted, that then " and in ſuch Caſe ſuch Bankrupt ſhall not be allowed the Sum of 5*l. per* " *Cent.* out of ſuch Eſtate as ſhall be ſo recovered in, but ſhall be allowed " and paid by the Aſſignees ſo much Money as the ſaid Aſſignees and Com- " miſſioners authorized ſhall think fit to allow to ſuch Bankrupt, not ex- " ceeding 3*l. per Cent.*

Sect. 9.

" Provided that in caſe any Commiſſion of Bankruptcy ſhall iſſue againſt " any Perſon or Perſons, who after the 24th Day of *June* 1732, ſhall have " been diſcharged by Virtue of this Act, or ſhall have compounded with " his Creditors, or delivered to them his Eſtate or Effects, and been releaſed " by them, or been diſcharged by any Act for the Relief of Inſolvent Deb- " tors, after the Time aforeſaid, that then and in either of theſe Caſes, the " Body only of ſuch Perſon conforming as aforeſaid, ſhall be free from

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" Arreſt and Impriſonment by * Virtue of this Act, but the future Eſtate " and Effects of every ſuch Perſon ſhall remain liable to his Creditors, as " before the making of this Act (the Tools of Trade, the neceſſary " Houſhold Goods and Furniture, and neceſſary Wearing Apparel of ſuch " Bankrupt and his Wife and Children, only excepted) unleſs the Eſtate " of ſuch Perſon ſhall produce clear, after all Charges, ſufficient to pay to " every Creditor under the ſaid Commiſſion, 15*s.* in the Pound for their " reſpective Debts.

Sect. 10. A Certificate under a joint Commiſſion diſcharges Bankrupt from all Debts, ſeparate as well as joint. Atk.

" Provided that no Diſcovery upon Oath or ſolemn Affirmation, to be " made by any Bankrupt, of his Eſtate and Effects, purſuant to this Act, " ſhall intitle ſuch Bankrupt to the Benefits allowed by this Act, unleſs " the Commiſſioners, or the major Part of them, ſhall, in Writing under " their Hands and Seals (*b*) certify to the Lord Chancellor, that ſuch " Bankrupt hath made a full Diſcovery of his Eſtate and Effects, and in " all Things conformed himſelf, according to the Directions of this Act, " and that there doth not appear to them any Reaſon to doubt of the " Truth of ſuch Diſcovery, or that the ſame is not a full Diſcovery of all

" ſuch

" ſuch Bankrupt's Eſtate and Effects; and unleſs four Parts in five in " Number and Value of the Creditors of ſuch Bankrupt who ſhall be " Creditors for no leſs than 20*l.* reſpectively, and who ſhall have duly " proved their Debts under ſuch Commiſſion, or ſome other Perſon by " them reſpectively duly authorized thereunto, ſhall ſign ſuch Certificate, " and teſtify their Conſent to ſuch Allowance and Certificate, and to the " ſaid Bankrupts Diſcharge, in purſuance of this Act, to be alſo certified " by ſuch Commiſſioners, but the ſaid Commiſſioners ſhall not certify the " ſame till they ſhall have Proof by Affidavit or Affirmation in Writing of " ſuch Creditors, or of the Perſon by them reſpectively authorized for that " Purpoſe, ſigning the ſaid Certificate; and of the Power and Authority " by which any Perſon ſhall be authorized by any Creditor to ſign ſuch " Certificate for any Creditor; which Affidavit or Affirmation, together " with ſuch Warrant or Authority to ſign, ſhall be laid before the Lord " Chancellor, in order for the Allowing and Confirming the ſame; and " unleſs ſuch Bankrupt make Oath that ſuch Certificate and Conſent of the " Creditors thereunto, were fairly obtained, and without Fraud; and un- " leſs ſuch Certificate ſhall, after ſuch Oath or Affirmation of the Bank- " rupt, be allowed and confirmed by the Lord Chancellor, Lord Keeper, " or Commiſſioners for the Cuſtody of the Great Seal of *Great Britain*, for " the Time being, or by ſuch two of the Juſtices of the Courts of *King's* " *Bench*, *Common Pleas*, or Barons of the Court of *Exchequer* at *Weſtmin-* " *ſter*, to whom the Conſideration of ſuch Certificate ſhall be referred by " the Lord Chancellor; and any of the Creditors of ſuch Bankrupt are to " be allowed to be heard, if they ſhall think fit, before the reſpective Per- " ſons aforeſaid, againſt the making ſuch Certificate; and againſt the " Confirmation thereof; nor ſhall any Commiſſioner ſign ſuch Certificate " till after four Parts in five in Number and Value of the ſaid Creditors " ſhall have ſigned the ſame."

Rep. 67. pl. 22. Certificate being ſtayed on Petition of a Claimant who ſuggeſted Fraud againſt Bankrupt; on Examination thereof before the Commiſſioners, ſeveral new Creditors proved their Debts, but not petitioning to ſet aſide Certificate, Court would not delay Allowance thereof, but left Claimant to his Bill. Atk. Rep. 73. pl. 28 ſee *id.* 81. pl. 30.

Certificate allowed in Life-time of Bankrupt, though not confirmed till after his Death, good Atk. Rep. 77. Certificate diſcharges Perſon of Bankrupt, and his Eſtate *ſubſequently* accrued, but not the Eſtate in Hands of Aſſignees. Atk. Rep. 79. *Mandamus* will not lie to compel an Allowance of a Certificate. Atk. Rep. 82. pl. 31. Signing Certificate of a Bankrupt Trader in *Ireland*, in three Months after Commiſſion is ſued, too ſoon, and therefore diſallowed. Atk. Rep. 82. pl. 31. See *id.* 84. pl. 32. Party muſt either prove a Debt, or ſhew a reaſonable Ground for a Claim for aſſenting to or diſſenting from Certificate. Atk. Rep. 85. Certificate does not diſcharge Bankrupt's Sureties. Atk. Rep. 84. Certificate ſigned the ſame Day with Bankrupt's laſt Examination ſtayed. Atk. Rep. 86. Where there is a joint and ſeparate Commiſſion, a Creditor under the joint, may come under the ſeparate one, and aſſent or diſſent to the Certificate under the ſeparate one. Atk. Rep. 97. pl. 45. *Superſedeas* of Commiſſion entirely defeats Certificate. Atk. Rep. 145. pl. 84. Certificate not compleat till allowed. 2 Bur. 717, *&c.* (*b*) Atk. Rep. 207. pl. 111. *

* Power of Attorney from a foreign Creditor to be atteſted by a Notary. 24 *Geo.* 2. c. 57. ſ. 10.

By the ſaid Statute it is enacted, " That every Bond, Bill, Note, Con- Sect. 11.
" tract, Agreement, or other Security, whatſoever, to be made and given
" by any Bankrupt, or by any other Perſon, unto, or to the Uſe of, or in
" Truſt for any Creditor or Creditors, or for the Security of the Payment
" of any Debt or Sum of Money due from ſuch Bankrupt at the Time of *Page 272
" his becoming Bankrupt, or any Part thereof, between the Time of his
" becoming Bankrupt, and ſuch Bankrupt's Diſcharge, as a Conſideration
" or to the Intent to perſuade him, her or them, to conſent to, or ſign any
" ſuch Allowance or Certificate, ſhall be wholly void and of no Effect,
" and the Monies thereby ſecured, or agreed to be paid, ſhall not be reco-
" vered or recoverable; and the Party ſued on ſuch Bond, Bill, Note,
" Contract or Agreement, ſhall and may plead the General Iſſue, and give
" this Act and the Special Matter in Evidence."

" Provided that nothing in this Act ſhall be conſtrued to extend, or Sect. 12.
" give or grant any Privilege, Benefit or Advantage to any Bankrupt what-
" ſoever

The Lord Chancellor *Hardwicke* ſaid that this Clauſe muſt be conſtrued ſtrictly, and not extended further than the Children of the Bankrupt. Atk. Rep. 86.

" ſoever, againſt whom a Commiſſion of Bankrupt under the Great Seal " hath iſſued, or hereafter ſhall iſſue, who hath or ſhall, for or upon " Marriage of any of his or her Children, have given, advanced or paid " above the Value of 100*l.* unleſs he or ſhe ſhall prove, or by his or her " Books fairly kept, or otherwiſe, upon his or her Oath, or, being of the " People called *Quakers*, upon ſolemn Affirmation, before the major Part " of the Commiſſioners in ſuch Commiſſion named and authorized, that " he or ſhe had at the Time thereof, over and above the Value ſo given " advanced or paid, remaining in Goods, Wares, Debts, ready Money " or other Eſtate Real or Perſonal, ſufficient to pay and ſatisfy unto each " and every Perſon to whom he or ſhe was any ways indebted, their full " and entire Debts; or who hath or ſhall have loſt in any one Day, the " Sum or Value of 5*l.* or in the Whole the Sum or Value of 100*l.* within " the Space of twelve Months next preceding his, her or their becoming " Bankrupt, in playing at or with Cards, Dice, Tables, Tennis, Bowls, " Billiards, Shovelboard, or in or by Cock-fighting, Horſe-races, Dog- " matches, or Foot-races, or other Paſtimes, Game or Games whatſoever, " or in or by bearing a Share or Part in the Stakes, Wagers or Adventures, " or in or by Betting on the Sides or Hands of ſuch as do or ſhall play, " act, ride, or run as aforeſaid; or that within one Year before he or ſhe " became Bankrupt, ſhall have loſt the Sum of 100*l.* by one or more " Contracts for the Purchaſe, Sale, Refuſal or Delivery of any Stock of " any Company or Corporation whatſoever, or any Parts or Shares of any " Government or Publick Funds or Securities, where every ſuch Contract " was not to be performed within one Week from the Time of the mak- " ing ſuch Contract, or where the Stock, or other Thing ſo bought or ſold " was not actually transferred or delivered in purſuance of ſuch Con- " tract."

Though a Creditor elects to proceed at Law, he may ſtill aſſent or diſſent to the Certificate. Atk. Rep. 220. pl. 121.

It is further enacted, " That if any Bankrupt, who ſhall have obtained " his Certificate, and ſuch Certificate ſhall have been allowed and confirm- " ed, ſhall be taken in Execution, or detained in Priſon, on Account of " any Debts due or owing before he became Bankrupt, by reaſon that " Judgment was obtained before ſuch Certificate was allowed and confirm- " ed, it ſhall and may be lawful for any one or more of the Judges of the " Court wherein Judgment has been ſo obtained againſt ſuch Bankrupt, on " ſuch Bankrupt's producing his Certificate allowed and confirmed, to or- " der any Sheriff or Sheriffs, Bailiff or Officer, Gaoler, or Keeper of any " Priſon, who hath or ſhall have any ſuch Bankrupt in his Cuſtody by " virtue of any ſuch Execution, to diſcharge ſuch Bankrupt out of Cuſtody " on ſuch Execution, without Payment of any Fee or Reward; and ſuch " Sheriff or Sheriffs, Bailiff or Officer, Gaoler or Keeper, is and are hereby " required to diſcharge ſuch Bankrupt out of Cuſtody accordingly, and is " and are hereby indemnified from any Action for an Eſcape for his or " their ſo doing."

Certificate does not diſcharge Bankrupt from a Commitment under an Extent of the Crown.

Atk. Rep. 262. pl. 142. Certificate obtained, pending an Action, diſcharges the *Bail* of a Bankrupt, if *not* before *fixed*, *otherwiſe* not. Bur. 244. But the *Bankrupt himſelf*, though diſcharged of the *original* Debt, is yet *liable* to the Judgment againſt him in an Action upon the Bail-Bond. Bur. 436.

Bargain

* Bargain and Sale.

*Page 273

BARGAIN and Sale is a Contract in Conſideration of Money, paſſing an Eſtate in Lands by Deed indented and inrolled: This Manner of conveying Lands is created and eſtabliſhed by the 27 *H.* 8. *cap.* 10. which executes all Uſes raiſed; and as this has introduced a more ſecret Way of Conveyancing than was known to the Policy of the Common Law, therefore the Inrolment of the Deed of Bargain and Sale was made neceſſary by the 16th Chapter of the Statute; but the Learning of this Head depending on Statutes, it is firſt proper to recite that, Co. Lit. 273 2 Inſt 672. Kelw. 85. Co. 87.

By the 27 *H.* 8. *cap.* 10. "Where any Perſon or Perſons ſtands or is ſeiſed of or in any Honours, *&c.* Lands, Tenements, Rents, Services, *&c.* to the Uſe, Confidence or Truſt of any other Perſon or Perſons, or Body Politick, by reaſon of any Bargain, Sale, Feoffment, *&c.* ſuch Perſon or Perſons, *&c.* that have any ſuch Uſe, ſhall be deemed and adjudged in lawful Seiſin, Eſtate and Poſſeſſion thereof, to all Intents and Purpoſes, of or in ſuch like Eſtates as they have in the Uſe, *&c.* and the Eſtate, Right and Poſſeſſion of him and them ſo ſeiſed to any Uſe, *&c.* ſhall be deemed and adjudged in him or them which have the Uſe, *&c.* after ſuch Quality, Manner, *&c.* as they had before in or to the Uſe, *&c.*

By the 27 *H.* 8. *cap.* 16. "No Manors, Lands, Tenements, or other Hereditaments ſhall paſs from one to another, whereby any Eſtate of Inheritance of Freehold ſhall be made or take Effect, or any Uſe thereof to be made, by reaſon only of any Bargain and Sale, except by Writing indented, ſealed and inrolled in one of the Courts at *Weſtminſter*, or elſe within the County or Counties where the Lands, *&c.* ſo bargained and ſold lie, before the *Cuſtos Rotulorum*, and two Juſtices of Peace, and the Clerk of the Peace of, *&c.* or two of them, whereof the Clerk of the Peace to be one; the ſame Inrolment to be made within ſix Months after the Date of the ſame Writing indented.

"Provided this Act extends not to any Lands, *&c.* lying within any City, Borough, *&c.* wherein the Mayors, *&c.* or other Officers have uſed to inrol any Evidences, Deeds or other Writings within their Precinct or Limits."

By the 5 *Eliz. cap.* 26. "Bargains and Sales of Lands, *&c.* in the County of *Lancaſter*, being within ſix Months inrolled in the Chancery at *Lancaſter*, or before the Judges of Aſſiſe there, of Lands, *&c.* in *Cheſhire*, in the Exchequer at *Cheſter*, or before the Judges of Aſſiſe there, of Lands, *&c.* in the Biſhoprick of *Durham*, in the Chancery at *Durham*, or before the Juſtices of Aſſiſe there, ſhall be as effectual as if inrolled in any Courts at *Weſtminſter*. Provided this Act extends not to any Lands lying within any City, *&c.* wherein the Mayors, *&c.*"

We ſhall now conſider,

(A) Who may bargain and ſell, and to whom. 274.

(B) What may be bargained and ſold. 275.

Page 274 (C) In what Manner a Bargain and Sale may be made; and herein of the Words to be made uſe of. 276.
(D) Of the Conſideration. 276.
(E) Of the Inrolment. 277.

And herein,

1. The Relation between the Inrolment and the Deed. 277.
2. What Eſtates are to be inrolled; and herein of the Exception as to Lands, in Cities, Boroughs, &c. 278.
3. The Time of Inrolment. 279.

(F) The Manner of Pleading Bargains and Sales. 279.

(A) Who may bargain and ſell, and to whom.

Bro. Feoffment to Uſes 33. Hard. 468. Poph. 72.

THE King, and all other Perſons that cannot be ſeized to a Uſe, cannot bargain and ſell; for at Common Law, when a Man had ſold his Land for Money without giving Livery, the Uſe only paſſed in Equity, and this is now executed and becomes a Bargain and Sale by the Statute; but antecedent to any ſuch Execution there muſt be a Uſe well raiſed, which cannot be without a Perſon capable of being ſeiſed to a Uſe, which the King is not, there being no means to compel him to perform the Uſe or Truſt; for the Chancery has only a delegated Power from the King over the Conſciences of his Subjects; and the King, who is the univerſal Judge of Property, ought to be perfectly indifferent, and not to take upon him the particular Defence of any Man's Eſtate as a Truſtee.

10 Co. 96, 98. Sand. 260, 261. Co. 14, 15. Co. Lit. 151. b.

If Tenant in Tail bargains and ſells his Land in Fee, this paſſes an Eſtate determinable upon the Life of Tenant in Tail; for at Common Law the Uſe could not be granted of any greater Eſtate than the Party had in him; now Tenant in Tail had an Inheritance in him, but he could diſpoſe of it only during his own Life; and therefore when he ſells the Uſe in Fee, *Ceſtui que Uſe* has a kind of Inheritance yet determining within the Compaſs of a Life; and the Statute executes it in the ſame Manner as he has the Uſe, and conſequently he will have ſome Properties of a Tenant in Fee, and ſome of a Tenant for Life only; but if Tenant for Life bargains and ſells in Fee, this paſſes only an Eſtate for *(a)* Life, for he could not paſs the Uſe of an Eſtate for Life to the Bargainee, and the Statute executes the Poſſeſſion as the Party has the Uſe.

(a) And creates no Forfeiture. Sand. 260. 2 Inſt. 674.

Mo. 42. 1 Co. 98. 10 Co. 96.

Mo. 41.

If a Huſband ſeiſed of Lands in Right of his Wife, or Tenant in Tail bargains and ſells the Trees growing on the Lands, and dies before Severance, the Bargainee cannot afterwards cut them down and take them away.

* If a Son and Heir bargains and ſells the Inheritance of his Father, this is void, becauſe he hath no Right to transfer; the ſame Law of a (a) Releaſe. *Page 275 Kelw. 84. Co. Lit. 265.

But if the Son makes a Feoffment of the Inheritance of his Father, this paſſes an Eſtate during the Son's Life, for it is a *Diſſeiſin* to the Father, and the Son, after the Father's Death, cannot avoid it: for no Man can alledge an Injury in any voluntary Act of his own. Co. Lit. 265. a.

(a) But if the Son releaſes with Warranty, he and his Heirs are for ever hereafter barred by the Rebutter. Co. Lit. 265. a.

If there be two Jointenants, and one of them makes a Bargain and Sale of his own Eſtate in Fee, and then the other dies, the other Moiety ſhall ſurvive to the Bargainor; for ſince the Freehold is in the Bargainor, the Inheritance continues; but if ſuch Jointenant had bargained and ſold *totum Statum ſuum* in Fee, though he died before Inrolment, yet if the Deed were afterwards inrolled, the Moiety would not ſurvive, but would paſs to the Bargainee, Cro. Jac. 53. Co. Lit. 186. Bulſt. 3. Prec. in Chanc. 124.

If an Infant bargains and ſells his Land by Deed indented and inrolled, yet he may plead Non-age; for notwithſtanding the Statute the Bargainee claims by the Deed as at Common Law, which was, and therefore is ſtill, defeaſible by Non-age. 2 Inſt. 673.

If a Wife joins with her Huſband in a Bargain and Sale by Deed indented and inrolled of her Lands, yet it ſhall not bind her, for the Wife cannot be examined by any Court without Writ, and there is no Writ allowed in this Caſe, which is for the better Security of Wives, who are by our Law entirely ſubjected to the Will of the Huſband. 2 In6. 673.

A Man may bargain and ſell to a Corporation, for they may take a Uſe, though the Money be given by the Governors in their Natural Capacity. 10 Co. 24. 34. 2 Rol. Abr. 788.

A Man may bargain and ſell to his Son, but then the Conſideration of Money ought to be expreſſed, and it ought to have all the other Circumſtances of a Bargain and Sale; but this ſhall operate as a Covenant to ſtand ſeiſed, if there be none but the Conſideration of Natural Love and Affection expreſſed, 7 Co. 40. 2 Co. 24. Cro. Eliz. 894. Vent. 137. Lev. 56. 1 Wood's Conv. 176.

(B) What may be bargained and ſold.

ANY Freehold or Inheritance in Poſſeſſion, Reverſion or Remainder, upon an Eſtate for Years, or Life, or in Tail, may be bargained and ſold, but the Deed ſhall be inrolled. 2 Co. 54. Dyer 309. 2 Inſt. 671.

But a Man ſeiſed of a Freehold may bargain and ſell it for Years, and this ſhall be executed by the Statute of Uſes, but it need not be inrolled by the Statute of Inrolments. 8 Co. 93. 2 Rol. Abr. 204. 2 Inſt. 671.

A Man poſſeſſed of a Term cannot bargain and ſell it ſo as to be executed by the Statute, 2 Co. 35. 36. Poph. 76.

A Rent *in eſſe* may be bargained and ſold, becauſe this is a Freehold within the Statute; and before the Statute a Rent newly created might be bargained and ſold, becauſe when Money, as an Equivalent, was given, and Ceremonies or Words of Law were wanting, the Chancery ſupplied them; but it ſeems, that ſince the Statute, a Rent newly created cannot be bargained and ſold, becauſe there ought to be a Freehold in ſome other Perſon, to be executed in *Ceſtui que Uſe*; but here can be no Seiſin of this Rent in the Bargainor, becauſe no Man can be ſeiſed of a Rent in his own Land, and conſequently there can be no Eſtate to be executed in the Bargainee. Kelw. 85. 1 Co. 126. And. 327. Jones 175.

If

*Page 276 * If *A.* by Indenture inrolled Bargains and ſells Lands to *B.* and his Heirs, with a Way over other of the Lands of *A.* this is void as to the Way: for nothing but an Uſe paſſes by the Deed, and there can be no Uſe of a Thing not *in eſſe*, as a Way, Common, *&c.* before they are created. †

Cro Jac. 189. *Leaudly* v. *Trook.*

† But *qu.* the Grant would not amount, in many Caſes, to a Licence, at leaſt during the Life of the Grantor?

(C) In what Manner a Bargain and Sale may be made; and herein of the Words to be made uſe of.

2 Inſt. 675. Dyer 229. Poph. 48. Dalt. 63.

AT Common Law Lands might be bargained and ſold by Words only, for it was the Conſideration that in Equity raiſed the Uſe, but ſince the Statute of 27 *H.* 8. *cap.* 16. Lands cannot paſs without Indenture.

And therefore Lands in Cities and Boroughs might, ſince this Act, till the 29 *Car.* 2. c. 3. have been bargained and ſold by Word only. 2 Inſt. 676. Yelv. 124. See *poſt* 278. Div. 2.

2 Inſt. 672. Cro. Jac. 210. Mo. 34. Cro. Eliz. 166. 1 Term Rep. 105.

It is not neceſſary to uſe the Words Bargain and Sale, but any Words equivalent are ſufficient, and whatever Words upon valuable Conſideration would have raiſed an Uſe of any Lands, *&c.* at Common Law, the ſame amount to a Bargain and Sale within this Act; as if a Man by Deed, *&c.* for a valuable Conſideration covenants to ſtand ſeiſed to the Uſe of another, *&c.*

2 Inſt. 373.

Though the Deed may be either in Parchment or Paper, yet the Inrolment muſt be in Parchment only, for that is implied when an Inrolment is to be in any of the Courts of Record at *Weſtminſter*; and in the Clauſe of Inrolment by the Clerk of the Peace, it is particularly provided, that he ſhall ſufficiently inrol and ingroſs it in Parchment.

2 Co. 35. *Hayward's* Caſe.

A Man demiſes, bargains and ſells a Manor, Part in Demeſne and Part in Tenants Hands for ſeventeen Years, the Party may chuſe either to take it by way of Leaſe at Common Law, and then the Tenants muſt attorn; or by way of Bargain and Sale without Attornment; and this agrees with the Policy of the Common Law, to take every Man's Grant, ſo as to paſs an Intereſt as ſhall be moſt advantageous for the Grantee; and ſince, in this Caſe, the Words allow a double Way of taking it, the Grantee ſhall be Judge which is moſt beneficial.

(D) Of the Conſideration.

1 Co. 176. Mo. 578.

IF a Man bargains and ſells Lands for divers good Cauſes and Conſiderations, it is void, unleſs Money be averred; for ſelling *ex vi termini* ſuppoſes a transferring a Right of ſomething for Money, the Common Medium of Commerce; but if there be no ſuch Conſideration it may be an Exchange, a Covenant to ſtand ſeiſed, Grant, *&c.* but it can be no Sale within the Statute.

Mo. 378.

If there be a Conſideration of Money expreſſed in the Deed, no Averment nor Evidence can be admitted againſt it, for the Affirmative is proved by the Deed, and it is impoſſible to prove the Negative.

If

* If the Deed ſays for a competent Sum of Money, it is ſufficient, without averring the Sum, for it is a Sale if there be any Money. *Page 277 Moor 378.

A Man in Conſideration of 70*l.* bargains and ſells to his Daughter and *J. S.* in Tail, who intermarry, it may be averred *tam in Conſideratione Maritagii quam in Conſid' de* 70*l.* for a Man may aver any Conſideration conſiſtent with that in the Deed. 1 Co. 176. 2 Co. 76. a.

If a Man in Conſideration that *J. S.* was bound in a Recognizance, and other Bonds for him, and for divers other good Cauſes and Conſiderations bargains and ſells his Land to him and his Heirs, it is not good. Cro. Eliz. 394. Gilb. on Uſes 29, 51, 84, 112, 253.

If a Man in Conſideration of ſo much Money to be paid at a Day to come bargains and ſells, the Uſe paſſes preſently, and after the Day the Party has an Action for the Money, for it is a Sale by the Money paid preſently or hereafter. Dyer 337. a.

(E) Of the Inrolment: And herein,

1. The Relation between the Inrolment and the Deed.

AT Common Law the Uſe paſſed from the Delivery or Date of the Deed, and by the Statute 27 *H.* 8. *cap.* 10, the Poſſeſſion paſſed as the Party had the Uſe at the Time of the Delivery of the Deed; but it was thought proper to add ſome further Circumſtances, which is done by *cap.* 16. and therefore if theſe Circumſtances are obſerved, it hath the ſame Effect it had before at Common Law, to wit, to raiſe the Uſes from the Delivery; for the Words of the Statute are only to add ſome Things, and not to aboliſh or ſet aſide the Force it had formerly. Dyer 218, Hob. 136. 2 Inſt. 674. Cro. Jac. 408. Rol. Abr. 627. Owen 149, 150.

If *A.* bargains and ſells Lands to *B.* and his Heirs, and before Inrolment *B.* reciting this Bargain and Sale to be by Indenture inrolled, bargains and ſells to *C.* and his Heirs, all the Eſtate which he had by the ſaid Indenture inrolled, and after the firſt, and then the ſecond Deed is inrolled; by *Daniel* and *Kingſmill*, the Lands are well conveyed to *C.* for when the firſt Indenture was inrolled, the Eſtate was in *B. ab initio* to bargain, ſell, *&c.* and the Words in the ſecond Deed are apt enough to paſs the Land, and the Recital of the Inrolment immaterial; but *Anderſon* and *Warberton cont'*; for a Man cannot paſs what he hath not, and till the Deed was inrolled *B.* had nothing, and he paſſed only what he had by Indenture inrolled: But *Walmſly* held, The Land paſſed not, by reaſon of the Miſrecitall but that otherways it would have paſſed; and it was adjudged for the Defendant, according to the Opinion of the three laſt Judges †. Cro. Jac. 52, *Bellingham* v. *Aſſop.* 2 Inſt. 675. Vent. 360. 1 Wilſ. 213. Shep. Touch. 223. Doug. 56, 188.

† The uſual Way now of paſſing Eſtates, is by Leaſe and Releaſe, whereby the Poſſeſſion and Freehold inſtantly veſt in the Purchaſer. In ſome few *particular* Caſes a Bargain and Sale inrolled may be more proper; a Bargain Sale and Leaſe, may be compriſed in one Deed, and being inrolled may anſwer both Purpoſes.

If a Man bargain and ſell his Manor, to which there is an Advowſon appendant, the Bargainee can make no Title to preſent before Inrolment. 2 Co. 56.

If a Man bargains and ſells his Land, and then ſuffers a Recovery, levies a Fine, or makes a Feoffment to the Bargainee, and then the Deed is inrolled, the Land paſſes by the Recovery, Fine or Feoffment; for ſince the Freehold and the Uſe is in the Bargainor till Inrolment, it muſt paſs by the Recovery, *&c.* and when it has paſſed by the Recovery the Uſe cannot riſe, nor Poſſeſſion be executed from the Date of the Deed. 4 Co. *Hind's* Caſe, Mo. 681. 2 And. 3. 162, 203. 4 Leon. 4. Popph. 49. Hob. 222.

If

2 Inſt. 674. Hob. 136. And. 229. 837. If the Bargainor or Bargainee die before Inrolment, it may notwithſtanding be inrolled, for here are Parties to give and take the Intereſt when it begins to veſt, for it veſts from the Date of the Deed; otherwiſe in the Caſe of an Attornment.

*Page 278 Vent. 361. * If a Man bargains and ſells his Land, the Bargainee may be Tenant to the *Præcipe* before Inrolment, and may receive a Releaſe before Inrolment.

1 Vent. 360. 2 Show. Rep. 156. S. C. 2 Jones 195. S. C. Carth. 178. S. P. adjudged on the Authority of this Caſe. But where the Commiſſioners of a Bankrupt had aſſigned the Bankrupt's Lands to the Leſſor of the Plaintiff, which Indenture was afterwards inrolled, but the Declaration was upon a Demiſe made after the Indenture, and before the Inrolment; it was adjudged, That this Declaration was not ſufficient †.

Show. 207. S. C. where it is ſaid, that *Holt* Ch. Juſt. held, That it was not amendable.

† The Bankrupt Statutes direct the Sale of Freehold Land under Commiſſion of Bankrupt, to be by Deed inrolled, therefore, till Inrolment, the Purchaſer hath not a compleat Title.

Owen 150. Godb. 209. Sid. 310. If a Man bargains and ſells a Reverſion, and the Rent is incurred, and afterwards the Deed is inrolled, the Bargainee ſhall have the Rent unpaid; but if the Rent be paid to the Bargainor, the Tenant is not only excuſed, but the Bargainor is not accountable, becauſe the Contract had not any Effect to paſs the Eſtate from the Bargainor before Inrolment; and the Relation of a Law cannot make void an Act that was lawful, for it cannot be ſet aſide but by an expreſs and poſitive Law.

Owen 69, 150. Godb. 156. Latch 157. Sid. 310. Cro. Car. 217. If a Man makes a Leaſe for Life, reſerving Rent, with Clauſe of Reentry, and then bargains and ſells the Reverſion, the Bargainee demands the Rent, and the Leſſee refuſes, and then the Deed is inrolled, the Bargainee cannot enter for the Forfeiture; for till Inrolment he is not Grantee of the Reverſion within the Statute capable of the Duty, and conſequently at the Day could make no legal Demand, which was precedently neceſſary to this Entry.

2 And. 160. Owen 69, 70. 2 Inſt. 674. Cro. Car. 217. If a Man ſeiſed in Fee is bound in a Recognizance, and then bargains and ſells all his Lands, and then the Recognizance is forfeited, and then a *Scire facias* is ſued out againſt the Land in the Hands of the Bargainor, and then the Deed is inrolled, this *Scire facias* is not maintainable.

Co. Lit. 147. b. If before Inrolment the Bargainor and Bargainee grant a Rent, &c. after Inrolment, by Operation of the Statute, it ſhall be the Grant of the Bargainee, and Confirmation of the Bargainor.

And. 161. Cro. Car. 569. But if Lands are bargained and ſold, and a Stranger enters, and then the Deed is inrolled, the Bargainee dies, his Wife ſhall be endowed; but for this *vide* Tit. *Dower*. If Lands are bargained and ſold, and then takes a Wife and dies, and after the Deed is inrolled, the Wife ſhall not be endowed.

2. What Eſtates are to be inrolled; and herein of the Exception as to Lands in Cities, Boroughs, &c.

2 Inſt. 671. All Eſtates of Freehold and Inheritance muſt be inrolled; but if a Man bargains and ſells his Lands for any Number of Years, the Deed need not be inrolled.

7 Co. *Bedel's* Caſe. If a Man bargain and ſell Land to his Son in Conſideration of Money, the Deed muſt be inrolled; but if the Father, in Conſideration of Natural Love and Affection, and alſo for Money, grants Land to his Son, this need not be inrolled; for Covenants to ſtand ſeiſed are not within the Words of the Statute, and where the Conſideration of Blood is expreſſed, it may

enure

enure as a Covenant to ſtand ſeiſed, but it is only a Sale when the Conſideration of Money is alone expreſſed, for that excludes all other tacit Conſiderations.

Lands in Cities, Boroughs, *&c.* that have the Privilege of Inrolments, are not within the Act; for though the Intent of the Statute be, to have excepted them from Inrolments in the Courts of *Weſtminſter* only, yet the Statute is ſo worded that they are diſcharged from any Inrolment at all; and therefore the Poſſeſſion of ſuch Lands is executed from the Date of the Deed. † 2 Inſt. 676. Dyer 229. Daliſ. 63. Yelv. 124. *Page 279 † See *ante* 276. C.

3. The Time of Inrolment.

It muſt be inrolled within ſix Months from the Date, which ſhall be accounted according to the Computation of twenty-eight Days *per* Month; for Month in its proper and original Signification, is the Space of Time meaſured by the compleat Courſe of the Moon; as the Year is the Time meaſured by the Complement of the Sun's Courſe. 2 Inſt. 674. 6 Co. 62.

From the Date, and from the Day of the Date, in this Caſe, is taken as all one, as it is in all other Caſes of Computation, and therefore the Inrolment may be on the Day of the Date, or on the laſt Day of the ſixth Month after the Day of the Date; for though when an Intereſt paſſes from the Day of the Date, the Day itſelf is excluded; yet when a Time is ſtinted, in which an Act ought to be done, it is in order to haſten the doing of that Act; and therefore the doing of it on the Day from whence the Period is firſt reckoned, is within the Time appointed, and the laſt Day of the ſixth Month, is within the Words of the Time given. Hob. 140. Mo. 40, 42. 2 Inſt. 674. 5 Co. 1. b. Dyer 282. 3 Lev. 438. 2 Salk. 413. pl. 1. 6 Mod. 260.

If the Deed has no Date, the ſix Months are to be reckoned from the Delivery, but not otherwiſe. Hob. 140. 2 Inſt. 674. Mo. 42.

(F) The Manner of Pleading Bargains and Sales.

A Bargain and Sale is a Deed inrolled, ‡ and as ſuch muſt be pleaded, and the Deed itſelf, whereby the Uſe originally paſſes, being a Matter *in pais*, muſt be produced, and not the Tenor of the Deed, which is on the Roll of *Record*; for though the Inrolment being on Record is of undoubted Veracity, being the Tranſaction of the Court, yet the private Deed has not the Sanction of a Record, though publickly acknowledged and inrolled; for it might have been falſly and fraudulently dated, or ill executed. Co. Lit. 225. b. 251. b. 2 Inſt. 673. 4 Co. 71. 5 Co. 53. 2 Rol. Rep. 119. ‡ That is, It is directed by the Statute to be, and ſhould be inrolled, within Six Months. See 27 *H.* 8. c. 16.

The Party that claims by any Bargain and Sale, muſt ſhew in what Court the Deed is inrolled, becauſe he muſt ſhew all Things in certain that make out his Title; otherwiſe his Adverſary would be put to an infinite Search before he could Traverſe with Security. Yelv. 213. *Worly* and *Purly*. Cro. Jac. 391. S. C.

In Debt for Rent, the Plaintiff declared upon a Leaſe made by a Stranger who after bargained and ſold the Reverſion to the Plaintiff *per Indenturam debito modo irrotulat' in Curia Cancellariæ*; and after Verdict for the Plaintiff Judgment was arreſted, becauſe it was not alledged that the Inrolment was within ſix Months, nor *ſecundum formam Statuti*, and *debito modo* will not help it, for it might be ſo at Common Law. Ld. Raym. 111. Allen 19. *King* and *Somerland*. Carter 221. Stile 34. S. C. and Judgment arreſted accordingly; for *debito modo* may be an Inrolment at Common Law.

If

If a Man makes a Leaſe for Years the 10th of *May*, and afterwards bargains and ſells his Lands, and antedates the Deed by making it the 10th of *April*, and the Inrolment is alſo as of that Time, the Leſſee is without Remedy, for he cannot aver againſt the Record. *

For this *vide* Owen 138. Leon, 183. 2 Leon. 121. 3 Leon. 175, 176. Savil 91. *cont'*, and Head of *Fleas and Pleadings*.

* But *qu.* If he may not maintain an Action of Covenant againſt the Leſſor, if he is ouſted by the Grantee?

*Page 280 * In pleading a Bargain and Sale the Party ought regularly to aver Payment of the Money.

Leon. 170. *Vide* Moor 504. But the Want thereof is helped after Verdict, upon *Nan conceſſit*; for it muſt be intended proved at the Trial Lev. 308. 2 Stra. 1269. Ld. Raym. 111. Vent. 108. T. Raym. 200. 10 *Ann.* c. 18. ſ. 3. A Copy of the Inrolment ſhall maintain a Plea of the Deed, with a *Profert*.

BARRATRY.

(A) Who ſhall be ſaid to be a Barrator. 280.
(B) Of the Form of the Proceedings againſt ſuch an Offender. 281.
(C) How puniſhed. 281.

(A) Who ſhall be ſaid to be a Barrator.

Co. Lit. 368. a. b. 8 Co. 36. b. Hawk. P. C. 243. Dan. 725. 3 Inſt. 175.

A Barrator is deſcribed a Perſon who is a common Mover, Exciter or Maintainer of Suits or Quarrels, either in Courts or in the Country; and this Offence conſiſting in all Kinds of Diſturbances of the Peace, and the ſpreading of falſe Rumours and Calumnies, whereby Diſcord and Diſquiet may grow among Neighbours, it is not material whether the Suits commenced be in a Court of Record or not, or whether thoſe Quarrels relate to a diſputed Title of Poſſeſſions or not.

Rol. Abr. 335. But by Hawk. P. C. 243. if ſuch

But if a Man proſecutes an infinite Number of Suits, which are his own proper Suits againſt others, yet he ſhall not be a Barrator by this; for if they are falſe and groundleſs, the Defendants ſhall have Coſts againſt him.

Suits are merely groundleſs, and brought only with a Deſign to oppreſs the Defendants, ſuch a Man may as properly be called a Barrator, as if he had ſtirred up others to bring them. *Vide* 3 Mod. 98. 8 Co. 36. b.

Hawk. P. C. 243.

An Attorney cannot be deemed a Barrator in reſpect of his maintaining another in a groundleſs Action, to the commencing whereof he was no way privy.

Alſo

Alſo it ſeems clear that no Man can be a Barrator in reſpect to (*a*) one Act only; for every Indictment for ſuch Crime muſt charge the Defendant with being *Communis Barractator*. Hawk. P. C. 343.

A Feme Covert (*b*) cannot be indicted as a common Barrator.

(*a*) In reſpect to one or two Acts only.

2 Rol. Abr. 39. (*b*) But this Opinion Serjeant *Hawkins* ſays is juſtly queſtionable; for ſince a Feme Covert is as capable of exciting Quarrels, in frequent Repetition whereof the Notion of Barratry ſeems to conſiſt, as if ſhe were Sole, why ſhould ſhe not as properly be indictable for it? Hawk. P. C. 243.

*(B) Of the Form of the Proceedings againſt ſuch an Offender. *Page 281

NO general Indictment, charging the Defendant with being a common Oppreſſor and Diſturber of the Peace, and Stirrer up of Strife among Neighbours, is good, without adding the Words *Communis Barractator* *, which is a Term of Art appropriated by the Law to this Purpoſe. Mod. 288. Sid. 282. Cro. Jac. 526.

* Now Proceedings are in *Engliſh*, the Perſon indicted muſt be charged to be a *common Barrator*.

An Indictment of Barratry concluding *cont' formam Statuti* is good, tho' no Statute be made directly againſt it, but only for the Puniſhment of it, ſuppoſing it an Offence at Common Law. 2 Rol. Abr. 79. Cro. Jac. 527. Cro. Car. 340. 2 Keb. 409, 410. Cro. Eliz. 148. Hawk. P. C. 244. Stra. 181. 2 Hales's P. C. 191.

Alſo it hath been holden, that an Indictment of this Kind may be good, without alledging the Offence at any certain Place; becauſe from the Nature of the Thing, conſiſting in the Repetition of ſeveral Acts, it muſt be intended to have happened in ſeveral Places *; for which Cauſe it is ſaid, that a Trial ought to be by a Jury from the Body of the County. 2 Keb. 410. Cro. El. 195. Latch. 194. Palm. 450. and Rol. Rep. 295. *Cont.* 1 Term Rep. 748.

* *Qu.* If it is not better to alledge ſome certain Place?

It hath been reſolved, that ſuch an Indictment is not good, without concluding *cont' pacem*, &c. for this is an eſſential Part of it. Cro. Jac. 527.

It ſeemeth to be the ſettled Practice at this Day, not to ſuffer the Proſecutor to go on in the Trial of an Indictment of this Kind, without giving the Defendant a Note of the particular Matters which he intends to prove againſt him; for otherwiſe it will be impoſſible to prepare a Defence againſt ſo general and uncertain a Charge, which may be proved by ſuch a Multiplicity of different Inſtances. 5 Mod. 18. Hawk. P. C. 244.

(C) How puniſhed.

IF they are common Perſons, the uſual Puniſhment is by Fine and Impriſonment, and alſo by binding them to their good Behaviour; but if they are of any Profeſſion relating to the Law, they may be further puniſhed by being diſabled to practice for the future. Hut. 104. Hawk. P. C. 244. Whether Juſtices of the Peace, as ſuch, have Cogniſance of Barratry, without any other Commiſſion, by Virtue of the 34 *Ed.* 3. 1. *Quære*; and *vide* Hawk. P. C. 243, 244. Yelv. 46. 2 Rol. Rep. 151. and 2 Hawk. P. C. 40.

Baron

* Baron and Feme.

(A) Who are esteemed Husband and Wife; and herein of the Legality of the Marriage, and Marriage Contracts. 283.

(B) Of the Power given the Husband by Law over the Person of his Wife; and herein of her Remedy for any Injury done her by him. 285.

(C) Of his Interest in her Estate and Property. 286.

And herein,

1. Of the Real Estate in her Right. 286.
2. Of her Chattels Real or Leasehold Interests. 286.
3. Of her Personal Estate in Possession, and *Choses in Action*. 289.

(D) Of the Husband's Right to Things accruing to the Wife during Coverture. 290.

(E) Of the Wife's Acts and Agreements before Marriage, in what Cases revoked and made void by the Marriage. 291.

(F) Where the Husband shall be liable to the Wife's Debts contracted before Marriage; and herein of a Wife that is Executrix or Administratrix. 292.

(G) Where she alone shall be punished for a Criminal Offence, and where the Husband shall be answerable for what she does in a Civil Action. 294.

(H) Of her Contracts for Necessaries; and how far the Husband is bound by such Contracts. 295.

(I) What Acts done by the Husband or Wife alone, or Jointly with the Wife, will bind the Wife; and herein of her Agreement or Disagreement to such Acts after the Death of the Husband. 300.

(K) Where the Husband and Wife must join in bringing Actions. 304.

(L) Where they must be jointly sued. 307.

(M) Where a Wife shall be considered as a Feme Sole. 308.

What Right accrues to the Representatives of either of them, on the Dissolution of the Marriage, *vide* Head of *Executors* and *Administrators*.

(A) Who

*(A) Who are esteemed Husband and Wife; and herein of the Legality of the Marriage and Marriage Contracts.

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MARRIAGE is a Compact between a Man and a Woman for the Procreation and Education of Children, which is to continue during both their Lives: it may be celebrated in a private House as well as in a Church; for it being an Exchange of mutual Vows in the Presence of GOD, if all other Circumstances are complied with, it cannot be supposed that GOD is less present at these Marriages than those made in the Church.

Rol. Abr. 341, 359. Sid. 64. Perk. 306. F. N. B. 150.

Before the Time of Pope *Innocent* the Third, there was no Solemnization of Marriage in the Church; but the Man came to the House where the Woman inhabited, and led her home to his own House, which was all the Ceremony then used. Moor 170. *per Goldingham*, Doctor of the Civil Law, *arguendo*.

The Age of Consent to a Marriage in an Infant Male is *(a)* Fourteen, and in a Female Twelve; but they may marry before; and if they agree to it when they attain these Ages, the Marriage is good; but they cannot disagree before then; also if one of them be above the Age of Consent, and the other under such Age, the Party so above the Age may as well disagree as the other; for both must be bound or neither.

Co. Lit. 33, 78, 79. 2 Inst. 434. 3 Inst. 18, 89. 6 Co. 22. 7 Co. 43. Rol. Abr. 340. 2 And. 208.

(a) Before this Age the Husband may have Trespass *de muliere abducta*. Moor 741. 6 Co. 22. But if a Wife hath a Child before the Husband attains the Age of Fourteen, it is a Bastard. Godolph. 484. * What shall amount to a Disagreement, *vide* Rol. Abr. 340, 341. *Vide* Head of *Infants*.

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* Who cites 7 Co. 42, 43. *Kenn*'s Case, which *vide*. According to *Blackstone*, the Canon Law pays a greater Regard to the Constitution, than the Age of the Parties; for if they are *habiles ad matrimonium*, it is a good Marriage, whatever their Age may be. See his Com. 1 V. 436.

By the Statute 32 *H.* 8. *cap.* 38. it is enacted, "That no Reservation "or Prohibition (GOD's Law except) shall trouble or impeach any Mar- "riage without the Levitical Degrees; and that no Person, of what "Estate, Degree or Condition soever he be, shall be admitted to any of "the Spiritual Courts within the King's Realm, or any of his Grace's "other Lands and Dominions, to any Process, Plea or Allegation con- "trary to the Statute."

For the Exposition of this Statute, *vide* Co. Lit. 24. *a*. 2 Inst. 684. *Vide* 25 H. 8. c. 22. 28 H. 8. c. 7. 28 H. 8. c. 16. Before which the Ecclesiastical Courts had the sole Jurisdiction of Matrimonial Causes. *Vide* 13 *Ed.* 1. The Statute *Circumspecte agatis*. Hob. 181. Co. Lit. 235. 2 Inst. 683, 684. *Vide* Vaugh. 214. But if a Man marries his Cousin within the Degrees, or his Mother or Sister, they continue Husband and Wife till a Sentence of Divorce be pronounced. Rol. Abr. 340, 357.

In a Prohibition to the Consistory Court of *York*, for proceeding against a Person for Incest, who married the Relict and Widow of his Great Uncle, it was agreed by all the Judges at *Serjeants Inn*, that the Prohibition should stand; and the following Points were resolved: First, that by the Statute 32 *H.* 8. *cap.* 38. no Marriage without the Levitical Degrees are unlawful, upon the Account of Consanguinity nor Affinity, nor for that Reason can be proceeded against by the Ecclesiastical Court; and though the Words of the Statute are, *That no Prohibition (GOD's Law except) shall impeach such Marriages*, yet the Reservation for GOD's Law was not intended to leave

Harrison & Ux' versus Dr. *Burwell*, 2 Vent. 9. Vaugh. 206. S. C.

leave Marriages at large to the Determination of the Eccleſiaſtical Courts, as they were before; for then the Levitical Degrees need never have been ſpoken of, and then indeed the Statute would have been of no Signification; the proper Meaning therefore of theſe Words *(GOD's Law except)* muſt be this, that the Statute did not intend to reſtrain the Eccleſiaſtical Courts from Divorces upon other Accounts; as upon the Account of Inſufficiency, Adultery, Precontract, *&c.* ſo that the Lawfulneſs of Marriage is hereby determined, but not as to other Cauſes. Secondly, That this
*Page 284 * Marriage with the Great Uncle's Wife was a Marriage without the Levitical Degrees, and therefore lawful.

Rol. Abr. 357. Moor 169. 2 Salk. 437. pl. 2. Salk. 119. pl. 14. *Heylon* and *Gould.* Vide 2 Salk. 438. pl. 3. ſeet. *cont.*

Marriage is to be ſolemnized *in Facie Eccleſiæ*, and therefore a private Contract, without the Prieſt's Bleſſing, will make no Marriage.

A. and *B.* being Sabbatarians, were married by one in their own Way, who uſed the Form of the Common Prayer, except the Ring, but was a mere Layman; the Wife dying, the Huſband took out Adminiſtration to her; but upon the Application of her Siſter, the Letters af Adminiſtration were repealed, and the Sentence of Repeal affirmed by the Delegates; for the Huſband demanding a Right due to him as Huſband, muſt bring himſelf within the Rules preſcribed by that Juriſdiction to whom he applies: alſo the conſtant Form of Pleading Marriage is, that it was *per Preſbyterum ſacris ordinibus conſtitutum*, and an Act of Parliament was made confirming the Marriages contracted during the Uſurpation.

Moor 169. 4 Co. 29. S. C. Sid. 13. S. C. cited and denied by *Twiſden.*

If *A.* contracts himſelf to *B.* and after marries *C.* and *B.* ſues *A.* upon this Contract in the Spiritual Court, and there Sentence is given that *A.* ſhall marry and cohabit with *B.* which he does accordingly, they are Baron and Feme, without any Divorce between *A.* and *C.* for the Marriage of *A.* and *C.* was a mere Nullity.

If a Woman maketh a Contract of Matrimony with *J. S.* and then marrieth with *J. D.* who is ſeiſed of Lands and dieth, ſhe ſhall have Dower of his Lands; becauſe ſuch Marriage was not void, but voidable only by Reaſon of the Precontract. Moor 226. Perk. 34.

But as to the Loyalty of Marriage to intitle a Woman to Dower, and how the Biſhop muſt certify upon an Iſſue

A. contracts *per verba de præſenti* with *B.* and hath Iſſue by her, and after marries *C. in Facie Eccleſiæ*, *B.* recovers *A.* for her Huſband, by Sentence of the Ordinary, and for not performing the Sentence *A.* is excommunicated, and after infeoffs *D.* and then marries *B. in Facie Eccleſiæ*, and dies, and ſhe brought Dower againſt *D.* and recovered, becauſe the Feoffment was *per Fraudem*, between the Sentence and ſolemn Marriage; but this was reverſed *coram Rege & concilio, quia prædict' a non fuit ſeiſitus*, during the Eſpouſals between him and *B.*

Ne unques accouple in loyal Matrimonie, vide Bro. 54. Co. Lit. 33. a. Dyer 313. 9 Co. 19. Cro. Car. 351. And note that neither the Contract nor the Sentence makes a complete Marriage.

Swinb. of Eſpouſals 74. 2 Salk. 438. pl. 3.

A Contract *per verba de præſenti*; as *I marry you, you and I are Man and Wife* &c. is by the Civil Law eſteemed *ipſum matrimonium*; for ſuch Contracts the (*a*) Spiritual Courts will compel them to celebrate *in Facie Eccleſiæ.*

(*a*) Alſo a Marriage in Fact or Reputation, is held good in the Temporal Courts; but when the Validity of the Marriage ſhall be tried in the Spiritual Courts, and not by Verdict, *vide* Tit. *Baſtardy.* In Debt on a Bond, the Defendant pleaded *Ne unques accouple* in loyal Matrimony; Plaintiff demurred, and had Judgment; for it alters the Trial; for inſtead of trying *per pais*, it puts the Trial on a Certificate from the Ordinary. Secondly, It admits a Marriage, but denies the Legality of it; whereas a Marriage *de facto* is ſufficient, and whether loyal or not loyal, is no Ways material. 2 Salk. 437. pl. 2. So in an Aſſault and Battery by Baron and Feme, the Defendant pleaded *Ne unques accouple* in loyal Matrimony; and on Demurrer, the Plea was held naught. Comb. 475. So in Treſpaſs for taking his Wife, and the like Plea, which was held naught. Comb. 131. ‡

‡ The Term *loyal* Marriage uſed in this Page, ſignifies *legal* Marriage.

A Con-

A Contract *in futuro*, as, *I will marry you*, &c. may be inforced in the Spiritual Court (*a*); but ſuch Contract either Party may releaſe; alſo if * either Party marry another Perſon, the Spiritual Court can give no Remedy; for ſuch ſecond Marriage diſſolves the Contract. *Page 285

For the Words which make a Contract *in Præſenti*, or *in Futuro*, *vide* Swinb. ſ. 10. and 11. But in theſe Caſes the Temporal Courts have given a Remedy by Action, for the Breach of Promiſe. Cro. Eliz. 79. Carter 273. In an Action againſt Huſband and Wife, the Plaintiff declared, that he promiſed to marry the Defendant's Wife whilſt Sole, and that ſhe the ſame Time promiſed to take him for her Huſband, and averred that he tendered himſelf, and that ſhe refuſed, &c. It was objected, that Marriage was no Advancement to a Man, though it was to a Woman; alſo that no Time was laid when this Agreement was to be executed; but the Court over-ruled both the Objections. Carth. 467. *Harriſon* ver. *Cage & Ux'*, Salk. 24. pl. 6. S. C. Ld. Raym. 386. 12 Mod. 214. 5 Mod. 411. 6 Mod. 155. *Vide* 2 Salk. 437. pl. 2. 438. pl. 3. If a Man, and an Infant at the Age of fifteen, promiſed to intermarry, and the Man refuſes, and after marries another, ſhe may, notwithſtanding her Infancy, maintain an Action; for this is a Contract which ſhe may at theſe Years enter into, being for her Advantage; and though it may be voidable as to her, yet it is good againſt the Man, who muſt be preſumed to have acted with as much Caution as if he had contracted with a Perſon of full Age. *Trin.* 3 *Geo.* 2. adjudged between *Holt* and *Ward*. 2 Stra. 850, 937. Barnard K. B. 209. Fitzgib. 175. *Note*; By the Statute of *Frauds and Perjuries*, theſe Contracts muſt be reduced into Writing. Not neceſſary. Ld. Raym. 387. Stra. 34. 2 Eq. Abr. 248. †

(*a*) This Remedy is taken away by 26 *Geo.* 2. c. 33. ſ. 13.

† It is every Day's Practice, to bring Actions, and recover Damages, on parol Promiſes to marry.

If a Man takes *A. S.* to Wife *per Dureſs*, though the Marriage be ſolemnized *in Facie Eccleſiæ*, yet it is merely void; and they are not Baron and Feme, becauſe there is not any Conſent; and it cannot be a Marriage without Conſent. Rol. Abr. 340. for this *vide* 11 *H.* 4. 14. Kelw. 52.

Dyer 13. Fitz. Abr. 86. Rol. Abr. 357. Sid. 65. Cro. Car. 488, 493.

(B) Of the Power given the Huſband by Law, over the Perſon of his Wife; and herein of her Remedy for any Injury done her by him.

THE Huſband hath by Law Power and Dominion over his Wife, and may keep her by Force within the Bounds of Duty, and may (*b*) beat her, but not in a violent or cruel Manner; for in ſuch Caſe, or if he but threaten to beat her outrageouſly, or uſe her barbarouſly, ſhe may (*c*) bind him to the Peace, by ſuing out a Writ of *Supplicavit* out of Chancery, or may apply to the Spiritual Court for a Divorce *propter ſævitiam*.

(*b*) Crom. 28, 136. F. N. B. 80. Hetl. 149. *cont'* * Sid. 113, 116.

(*c*) Dalt. c. 68. Lamb. 78. Crom. 133. See Stra. 478. 8 Mod. 22.

* The Huſband may give his Wife moderate Correction. Black. Com. 1 V. 444. But this Power is confined within reaſonable Bounds: He is prohibited from uſing any Violence. *Id.*

But a Wife cannot, either by herſelf or her *prochien Amy*, bring a *Homine Replegiando* againſt her Huſband; for he has by Law a Right to the Cuſtody of her, and may, if he think fit, confine her, but he muſt not impriſon her; if he does, it will be a good Cauſe for her to apply to the Spiritual Court for a Divorce *propter ſævitiam*; and the Nature and Proceedings in the Preced. in Chan. 494. *per Curiam*

the Writ *De homine Replegiando* ſhew that it cannot be maintained by the Wife againſt her Huſband.

Bur. Rep. 542. A Wife ſeparated by Articles, in Conſideration of Money received by the Huſband, with Covenants from him, cannot be ſeiſed by him, or forced to live with him. †

† In Caſes of unreaſonable or improper Confinement, the Courts will relieve the Wife, on *Habeas Corpus*. Ld. *Ferrer's* Caſe. 1 Bur. 634. *&c.*

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*Page 286 * (C) **Of his Intereſt in her Eſtate and Property: And herein,**

1. Of the real Eſtate in her Right.
2. Of her Chattels Real, or Leaſehold Intereſts.
3. Of her Perſonal Eſtate in Poſſeſſion, and Choſes in Action.

1. Of the Real Eſtate in her Right.

10 Co. 42. 2 Inſt. 510. Sid. 11. Rol. Abr. 347. FROM the Time of the Intermarriage, the Law looks upon the Huſband and Wife but as one Perſon, and therefore allows of but one Will between them, which is placed in the Huſband, as the fitteſt and ableſt to provide for, and govern the Family; and for this Reaſon the Law gives the Huſband an abſolute Power of diſpoſing of her Perſonal Property, no Act of hers being of any Force to affect or transfer that which by the Intermarriage ſhe hs reſigned to the Huſband; but the Freehold and Inheritance of the Wife is ſubject to other Rules and Regulations; for the Huſband by the Marriage does not become abſolute Proprietor of the inheritance, but as the Governor of the Family is ſo far Maſter of it as to receive the Profits of it during her Life, but has no Power to make an abſolute Sale of it without her Conſent.

Co. Lit. 351. a. If a Man marries a Woman ſeiſed in Fee, he gains a Freehold in Right of his Wife.

Where the Huſband or Wife are attainted, and the Lord by Eſcheat ſhall enter, or the King have the Pernancy of the Profits, and how far ſuch Freehold will work a *Remitter* to the Huſband, *vide* Title *Courteſy of England*.

2. Of her Chattels Real, or Leaſehold Intereſts.

7 H. 6. 1. b. Bro. 24. Co. Lit. 46, 351. The Marriage is a Gift in Law to the Huſband of all the Wife's Chattels Real, as a Term for Years in Right of the Wife; ſo of Eſtates by Statute-Merchant, Statute-Staple, Elegit, *&c.* and of theſe he may alone diſpoſe, forfeit, or they may be extended for his Debts; but if he makes no Diſpoſition of them in his Life-time, they *(a)* ſurvive to the Wife, and therefore he cannot deviſe them.

(a) The Huſband is only poſſeſſed of a Term in her Right, and the Term or legal Intereſt continues in her. 7 H. 6. 2. Rol. Abr. 342. Co. Lit. 351.

2 Rol. Abr. 495. If a Woman Leſſee for Years takes Huſband, and he after purchaſes a new Leaſe to them both for their Lives, of the ſame Lands, this is a Surrender in Law of the firſt Term, and ſhall bind the Wife, becauſe it amounts

amounts to an actual Diſpoſition thereof, which the Huſband had Power to make.

If the Huſband poſſeſſed of a Term for ſeventy Years in Right of his Wife, makes a Leaſe of thoſe Lands for twenty Years, to begin after his Death, this is good, and ſhall bind the Wife, becauſe the Term being but a Chattel, he had Power to diſpoſe of it wholly, and by Conſequence may diſpoſe of any leſſer Intereſt thereout as he thinks fit; and this being a * preſent Diſpoſition, which he cannot revoke, binds the Intereſt of the Lands immediately, though it takes not Effect in Poſſeſſion till after his Death; and therefore this differs from a Deviſe of ſuch Term, or any Part thereof, by the Huſband, by his Will; for that not taking Effect, nor binding the Intereſt at all till after his Death, comes too late to prevent the Operation of Law, which at the Inſtant of Death immediately caſts it upon the Wife ſurviving, and ſo defeats and deſtroys the Operation of the Deviſe; but as to the Reſidue of the Term, whereof the Huſband makes no Diſpoſition in his Life-Time, the Wife, if ſhe ſurvives, will be intitled to it; becauſe as to that the Law is left to take Place, as it would have done for the Whole, if he had not prevented it by ſuch his Diſpoſition of Part; but if the Huſband had granted away the whole Term upon Condition, and died, though the Condition were afterwards broken, and his Executors entered for Breach thereof, yet would the Wife be for ever barred to claim any Intereſt in the ſaid Term, becauſe there was a total Diſpoſition thereof by the Huſband in his Life time, and the Breach or Non-performance of the Condition was perfectly contingent and uncertain; beſides that, the Breach of the Condition happened not till after his Death, and ſo the Diſpoſition continued perfect and uninterrupted during his Life; for if the Condition had been broken during his Life, and he himſelf had entered for Breach thereof, it might be a great Queſtion if the Wife ſurviving ſhould not have the Term after his Death, becauſe by his Re-entry for the Condition broken, he is reſtored to the whole Term *in Statu quo*, and then being poſſeſſed of it in Right of his Wife, as he was before, it ſeems but reaſonable the Wife ſhould have it, if ſhe ſurvives the Huſband, as ſhe would have had if no ſuch Diſpoſition had been made, ſince that Diſpoſition is now defeated and gone: Alſo ſuch Term, whereof the Huſband is poſſeſſed in Right of his Wife, may be extended for the Debts, or forfeited for the Crimes of the Huſband, for theſe are legal Diſpoſitions thereof, which ſhall bind the Wife; but if the Huſband ſhould grant a Rent, Common, *&c.* out of ſuch Term, and die, this would not bind the Wife ſurviving, becauſe the Term of Poſſeſſion itſelf being left to come intire to the Wife, all intermediate Charges or Grants thereout by the Huſband determine with his Death; for the Title of the Wife to ſuch Term has Relation to the Time of their Intermarriage, and ſo is paramount to all collateral Charges or Grants made thereout by the Huſband after; but a Grant by the Huſband of the Herbage or Veſture of ſuch Land which he held in Right of his Wife for Years, will be void after his Death, becauſe they are Part of the Land itſelf, and not collateral to it.

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Poph. 5, 97, 145, Co. Lit. 46. b. 351. a. Cro. Car. 344. Plowd. 418. Cro. Eliz. 33, 279. Co. Lit. 300. a. Bro. Tit. Charge 111. 8 Co. 97. Rol. Abr. 851, 343, 344. Godb. 279. 3 Keb. 299. Vent. 259. 3 Wilſ. 278. 2 Bl. Rep. 801. Cowp. 201. Doug. 53. *Note*; It appears by all the above cited Books, that if the Huſband makes a Leaſe of Part of the Wife's Term, rendering Rent and dies, that his Executors ſhall have the Rent, and not the Wife; tho' ſhe hath the Reverſion, becauſe not Party or Privy to the Leaſe, and the Rent is not incident to the Reverſion.

If the Huſband and Wife be evicted of a Term which he hath in Right of his Wife, and the Huſband brings an Ejectment in his own Name, and hath Judgment to recover, this makes an Alteration in the Term, and veſts it in the Huſband; becauſe not making his Wife a Party to the Recovery, he takes the whole Wrong to be done to himſelf, and conſequently if he recovers, it muſt be by Virtue of that Right whereof he was diſpoſſeſſed.

Co. Lit. 46. b. Rol. Abr. 345.

If a Term for Years be granted to a Feme Covert and another, or if a Feme Sole and another are Jointenants of a Term for Years, and the Feme takes Huſband, yet in both Caſes the Jointenancy ſtill continues; for the Marriage makes no Severance or Alteration of it, but gives the Huſband

Plowd. 418. Co. Lit. 185.

the ſame Power his Wife had before, by an actual Diſpoſition of her Moiety to break the Jointenancy, and bind his Wife's Intereſt therein; but without ſuch Diſpoſition the Jointenancy continues; and if the Huſband dies, the Whole ſhall go accordingly; ſo if ſuch Jointenants are ouſted of the Term, the Wife ſhall join with the Huſband and the other Jointenant in Ejectment, and the Wife ſhall have Judgment to recover as well as the Huſband; and if in ſuch Caſe, before any actual Diſpoſition made by the *Page 288 Huſband, * his Wife die, the whole Term ſhall go to the ſurviving Jointenant, and no Part thereof to the Huſband; becauſe, though the Huſband, if he ſurvives, is by Law to have all Chattels Real and Perſonal of his Wife's, and this Term was a Chattel Real, yet the Title of the other Jointenant, to have the Whole by Survivorſhip, coming at the ſame Inſtant, and being the Elder Title, ſhall prevail againſt the Huſband.

Cro. Eliz. 912. *Downing* and *Seymour*. Q. In Caſe of the Bargain and Sale, or Fine, if the Term in this Caſe would not be ſurrendered becauſe the Leaſe being made after Marriage, when there are no Moieties between Huſband and Wife, the Huſband cannot be ſaid to be poſſeſſed thereof in her Right, more than in his own, but both are poſſeſſed by Intireties; therefore it ſhould ſeem in that Caſe likewiſe that the Term would be merged. *

A Leaſe was made to the Huſband and Wife for Years, they enter, and the Leſſor afterwards enfeoffs the Huſband, who dies ſeiſed, the Wife ſurvives and claims the Term; and betwixt her and the Heir of the Huſband the Diſpute was, Whether the Term was extinguiſhed; and *per totam Curiam*, by Acceptance of the Feoffment the Huſband hath ſurrendered the Term, and then it is extinguiſhed, and the Wife barred of any Title thereto; but they held that it would have been otherwiſe, if the Conveyance had been to the Huſband by Bargain and Sale inrolled, or by Fine; for theſe meddle not with the Poſſeſſion, but only carry ſuch Intereſt as the Reverſioner had in him, and then the Huſband might have the Term in Right of his Wife, and the Inheritance in his own Right; but by the Feoffment he admits the Leſſor to have Power to come upon the Poſſeſſion to make Livery; which, if the Term ſhould ſtand in his Way, he could not do; and therefore ſuch Admittance amounts to a Surrender thereof.

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* See however the next Caſe.

Mo. pl. 504. A Huſband poſſeſſed for a Term for Years in Right of his Wife, with Remainder to himſelf in Fee, by Deed inrolled bargains and ſells the Land for Money, and dies, and his Wife enters, claiming the Reſidue of the Term; and the Opinion of the Book ſeems to be, that her Claim was good; for though a Feoffment, in ſuch Caſe, by the Huſband would have paſſed the Term which he had in Right of his Wife by Way of Union and Extinguiſhment, yet by Bargain and Sale nothing paſſes a Uſe, and by Creation and Grant of the Uſe, the Term which he had *in Jure Uxoris* ſhall not paſs; ſo that this being no Diſpoſition of the legal Intereſt of the Term, but only of a Uſe, (which, in reſpect of his Inheritance in Remainder, he might well create) this was good as to the Term during the Life of the Huſband only, and then the Wife after his Death ſhall have the Leaſe diſcharged of it; as if the Huſband had granted a Rent, &c. out of the Wife's Term; but if there had been the Words *grant*, *aſſign*, or any other Word which would have paſſed the legal Intereſt of the Term, this would have barred the Wife; but the Words *bargain and ſell*, by 27 *H.* 8. c. 16. could have no Operation to raiſe an Uſe, which ſhall be executed in Poſſeſſion, but only out of the Reverſion, whereof the Huſband was ſeiſed, as the Statute ſpeaks; and therefore this being a Term in Groſs, whereof the Huſband was not ſeiſed, but only poſſeſſed, the Bargain and Sale paſſed only an Uſe thereof at Common Law, and not by Virtue of that Statute, and then not being executed in Poſſeſſion, the Uſe at Common Law, which was collateral to the Land, fell off with the Death of the Huſband, who created it, as other collateral Charges of his would do, and by Conſequence the Wife's

Plowd. 423.

Title

Title to the Reſidue of the Term continues good: but if the Huſband had been poſſeſſed of ſuch Term in Groſs in his own Right, without an Inheritance in him, and had made a Bargain and Sale thereof, though this would not have been executed by the Statute in Poſſeſſion, for the Reaſon before mentioned, yet it would have paſſed a Uſe at Common Law, which would have made him Truſtee in Equity for the Bargainee.

* If a Man marries a Woman who has a Term for Years ſettled on her in Truſt, the Huſband may as well diſpoſe of this Truſt, as if the legal Intereſt was in her. *Page 289

For this *vide* Rol. Abr. 343. Lane 54, 55. Chan. Ca. 225. Vern. 7, 18. 2 Vern. 270. Abr. Eq. 58.

3. Of her Perſonal Eſtate in Poſſeſſion, and Choſes in Action.

All the Perſonal Eſtate, as Money, Goods, Cattle, Houſhold Furniture, &c. that were the (*a*) Property, and in the Poſſeſſion of the Wife at the Time of the Marriage, are actually veſted in the Huſband; ſo that of theſe he may make any Diſpoſition in his Life-time, without her Conſent, or may by Will deviſe them, and they ſhall without any ſuch Diſpoſition go to the Executors or Adminiſtrators of the Huſband, and not to the Wife, though ſhe ſurvive him. Doct. & Stud. Dia. 1. c. 7. Co. Lit. 351. (*a*) And therefore Chattels perſonal which ſhe has in *Auter Droit* as Executrix, or Guardian in Socage, &c. ſhall not go to the Huſband. Co. Lit. 351. Alſo a bare Poſſeſſion of perſonal Goods is not by the Marriage given to the Huſband; for if Goods are bailed to a Feme Sole, or if ſhe finds Goods, and after marries, the Action of Detinue muſt be brought againſt both Huſband and Wife. Co. Lit. 351. The Civil, or ſcarce any Law, gives ſo great a Power to the Huſband over the Eſtate of the Wife, as the Common Law does. Sid. 111. by three Judges *arguendo*.

But Choſes in Action, as Debts due to the Wife by Obligation, &c. which are to be demanded by Action, though they are likewiſe ſo far veſted in the Huſband, that he may reduce them into Poſſeſſion; yet if he dies before any Alteration made by him, they ſhall go to his Wife, nor ſhall they, without ſuch Alteration, ſurvive to the Huſband upon the Death of the Wife, or he have any Right to them, but as he is intitled as (*b*) Adminiſtrator to his Wife. Co. Lit. 351. 3 Mod. 186. But where the Goods of a Feme Sole are in the Poſſeſſion of another by Trover or Bailment, and ſhe marries, the Property which continued in the Wife is veſted in the Huſband, and he alone, without his Wife, may bring Detinue for them. Sid. 172. Keb. 641. Moor 25. pl. 85. Vent. 261. 2 Lev. 107. (*b*) Adminiſtration of Right is to be granted to the Huſband. 1 Rol. Abr. 910. And by the Statute 29 *Car.* 2. c. 3. ſ. 25. it is enacted, *That the Statute of Diſtributions ſhall not extend to the Eſtates of Feme Coverts.*

If a Feme Sole Obligee marries, and the Huſband makes a Letter of Attorney to *J. S.* to receive the Money, who receives it accordingly, and the Feme dies, the Huſband ſhall have an Action of Account for the Money; for by the Receipt this was become a Thing in Poſſeſſion. Rol. Abr. 342. Moor 45. Goldſ. 160.

If a Legacy be deviſed to a Feme who takes Huſband, and the Baron makes a Letter of Attorney to *J. S.* to receive the Legacy, and he receives it accordingly, this, by his Receipt, is become the Chattel of the Huſband. Goldſ. 160. Rol. Abr. 342.

So if the Baron and Feme had made a Letter of Attorney to *J. S.* to receive the Legacy, and he had received it accordingly, by this Receipt this ceaſes to be a Thing in Action, and is become a Thing in Poſſeſſion; and the Huſband or his Executor, after the Death of the Feme, may have an Account upon this Receipt againſt *J. S.* * Moor 452. Rol. Abr. 342, 350. Goldſ. 159, 160.

* Or, an Action for Money had and received, which is more eligible.

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(D) Of the Husband's Right to Things accruing to the Wife during Coverture.

Co. Lit. 351. Salk. 115. Carth. 251. Wherethey cannot take by Moieties, *vide* Head of *Jointenants and Tenants in common.*

HUsband and Wife are considered as one Person in Law; and to have but one Will between them; which is seated in the Husband, as the Head and Governor of the Family; and therefore the Law gives him the same Right over any Real Estate accruing to the Wife during Coverture; as if she were seised of it before Marriage; so of Chattels Real accruing to the Wife, and an absolute Power over any Personal Estate or Interest accruing to the Wife by Gift, Devise, or her Labour.

Carth. 251. Salk. 114. pl. 2. S. C. 4 Mod. 156. S. C. *Buckley & Ux'* v. *Collier*

Indebitatus Assumpsit was brought by Husband and Wife against the Defendant, in which they declared, that he was indebted to them in such a Sum of Money for Periwig-makers Work done by the Wife; † *ad Damnum ipsorum*; and on Demurrer Judgment was given against the Plaintiffs; for this being a general *Indebitatus Assumpsit* implied by Law, the Law will not (*a*) imply any Promise made the Wife, for she is a Servant to the Husband, who is at all the Charges in furnishing Hair, &c. and therefore the Law implies that the Promise was made to him only, for Breach of which he alone ought to have sued.

(*a*) But if a special *Indebitatus Assumpsit* had been brought on an express Promise made the Wife, it seems it would be good, though they had both joined. *Vide* Cro. Eliz. 61, 96. Cro. Jac. 77. Cro. Car. 439. 2 Sid. 128. See *post* 305.

† This was Work done by the Wife, after Marriage, therefore, for the Reasons assigned, the Husband alone ought to have sued.

Salk. 115. pl. 4. Ld. Raym. 73. 12 Mod. 891. 5 Mod. 69. *Chamberlain* and the Wife of Colonel *Hewson.*

If a Feme Covert sues a Woman in the Spiritual Court for Adultery with her Husband, and obtains a Sentence against her, and Costs, the Husband may release these Costs; for the Marriage continues, and whatever accrues to the Wife during Coverture belongs to the Husband: *Per Holt* Ch. Just. on a Motion for a Prohibition.

Rol. Rep. 426. 3 Bulst. 264. Rol. Abr. 343. 2 Rol. Abr. 293.

But if the Husband and Wife be divorced *a mensa & thoro*, and the Wife has her Alimony, and sues for Defamation or other Injury, and there has Costs, and the Husband releases them; this shall not bar the Wife, for these Costs come in Lieu of what she hath spent out of her Alimony, which is a separate Maintenance, and not in the Power of her Husband.

Salk. 115, pl. 4. Vern. 261. Decreed in Chancery.

A Legacy was given to a Feme Covert, who lived (*b*) separate from her Husband, and the Executor paid it to the Feme, and took her Receipt for it; yet on a Bill brought by the Husband against the Executor, he was decreed to pay it over again, with Interest.

(*b*) Q. If such Separation had been by Agreement, and the Agreement and a separate Maintenance decreed in Chancery? If Husband and Wife are divorced *a mensa & thoro*, and a Legacy is left to her, the Husband may release it. Rol. Abr. 343. 2 Rol. Abr. 301. Moor 665. Cro. Eliz. 908. Noy 45. Rol. Rep. 426. 3 Bulst. 264. Moor 683. Salk. 115. pl. 4. But a Man may by Deed or Will give any Thing in Trust for the separate Use of a Feme Covert; and this shall be out of the Power of the Husband. 2 Vern. 659. ‡

‡ If Articles of Separation are executed between Husband and Wife, and it is intended she shall enjoy Legacies or Gifts, left, or given her, by her Friends, &c. a Trustee for the Wife, should be joined in the Articles. Power should be given him to receive and retain, for her Benefit, and a Covenant from the Husband should be inserted, that he will not release, or receive or impede the Trustee in the Receipt, and the Wife in the Enjoyment of such Legacies or Gifts, &c.

(E) Of the Wife's Acts and Agreements before Marriage, in what Cases revoked and made void by the Marriage. *Page 291

BY the Marriage the Husband and Wife become one Person in Law, and therefore such an Union works an Extinguishment or Revocation of several Acts done by her before the Marriage; and this not only for the Benefit of the Husband, but likewise of the Wife, who, if she were allowed at her Pleasure to rescind and break through, or confirm several Acts, might be so far influenced by her Husband, as to do Things greatly to her Disadvantage. 4 Co. 60. 5 Co. 10. Kelw. 162. Co. Lit. 55. Hetl. 32. Cro. Car. 304.

But in Things which would be manifestly to the Prejudice of both Husband and Wife, the Law does not make her Acts void; and therefore if a Feme Sole makes a Lease at Will, or is Lessee at Will, and afterwards marries, the Marriage is no Determination of her Will, so as to make the Lease void; nor can she herself without the Consent of her Husband determine the Lease in either Case. 5 Co. 19. *Henstead's* Case.

So where a Warrant of Attorney was given to confess a Judgment to a Feme Sole; and the Court gave Leave, notwithstanding the Marriage, to enter up Judgment, for that the Authority shall not be deemed to be revoked or countermanded, because it is for the Husband's Advantage; like a Grant of a Reversion to a Feme Sole, who marries before Attornment, yet the Tenant may attorn afterwards; otherwise if a Feme Sole gives a Warrant of Attorney, and marries, for that is to charge the Husband. Salk. 117. pl. 9.

But if a Feme Sole makes her Will, and devises her Land to *J. S.* and afterwards marries him, and then dies, yet *J. S.* takes nothing by the Will, because the Marriage was a Revocation of it; for as the Law will not allow a Woman under Coverture to make a Will, lest she should be influenced by her Husband in the Disposition of her Estate; so for the same Reason Wills made by a Feme Sole are revoked by the Marriage, lest she should be influenced by her Husband (if it continued after the Coverture) to revoke it, or let it stand, as it best answered his Interest. 4 Co. 60. *Forse* and *Hembling*.

If *A.* on the one Part, and *B.* and *C.* a Feme Sole on the other Part, submit themselves to the Award of *J. N.* and after *C.* takes *J. S.* to Husband, and after the Arbitrator, before any Notice of the Marriage, makes an Award that *B.* and *C.* shall pay 30*l.* to *A.* yet this shall not bind *J. S.* and *C.* his Wife, nor *B.* for the Submission by the Marriage of *C.* is revoked as to *B.* also, and this without any Notice. Rol. Abr. 332. Ruled on Demurrer between *White* and *Giffard*.

A. entered into a Bond with his intended Wife, conditioned to leave her at his Death 1000*l.* if she survived him, &c. *A.* died Intestate, and the Wife took out Administration to him; in an Action of Debt brought against her as Administratrix for Rent incurred due in the Life-time of her Husband, she pleaded this Bond, and that 250*l.* only came to her Hands, which she retains in Part of Satisfaction, and that she had not Assets *ultra*; on Demurrer the whole Court agreed, That Contracts and Debts *in* Salk. 325. *Gage* v. *Acton*. Comb. 242. Carth. 511. S. C. Holt 309. Freeman 512, 515.

Comyns 67. Ld. Raym. 515. Lil. Ent. 214. 2 Vern. 480. Chan. Pre. 237. Where it is said, That a Writ of Error was brought in the Exchequer Chamber, but the Plaintiff in Error, perceiving the Court inclined to affirm the Judgment, did not proceed. *Note*; By the Cases on this Head, in which there are Variety of Opinions, the better Opinion seems to be, that such a Bond is extinguished; but if the Husband had entered into a Bond with a Stranger, conditioned to leave the Wife so much it would be good; also a Promise or Covenant with the intended Wife is good, not being a Debt *in præsenti*. Jenk. Rep. 166, 221. Rol. Abr. 343. 2 Rol. Abr. 407. Hob. 216, 227. Hutt. 17, 18. Noy 26. Cro. Jac. 571. Palm. 99. 2 Rol. Rep. 162. 2 Sid. 58. Lit. Rep. 34. Hetl. 122. 1 Atk. 559. 2 Vez. 191, 665. Cowp. 371, 391.

præsenti,

præſenti, alſo ſuch as were contingent, and might happen during the Coverture, were extinguiſhed by the Marriage; but two judges in this Caſe, *Page 292 * againſt *Holt* Ch. Juſt. held, That this Bond with a Condition, was like a Promiſe or Covenant before Marriage, to leave the Wife ſo much (which were agreed to be good), and being to be paid *in futuro*, was not extinguiſhed by the Marriage, but was *in Cuſtodia Legis*, to preſerve a Right, and anſwer the Intention of the Parties; but *Holt* held, That the Bond and Condition were diſtinct, and that upon the Execution of the Bond there was a Debt *in præſenti*, which was extinguiſhed by the Marriage; but the Defendant had Judgment. *

* See the next Caſe.

2 Vern. 480. How far Equity will ſupport ſuch Contracts. *Vide* Chan. Ca. 21, 117. Vern. 408.

A Man enters into a Bond to his intended Wife, conditioned to leave her 1000*l.* the Huſband mortgages his Eſtate, and died, not leaving Perſonal Aſſets to diſcharge the Bond; and it was decreed in Equity, that though the Bond was void by Law, being extinguiſhed by the Marriage, yet it ſhould be made good in Equity; and that the Wife might redeem and hold the Land till ſhe was ſatisfied her Debt.

2 Vent. 343. 2 Vern. 290. Preced. in Chan. 237.

For this *vide* 2 Chan. Rep. 81, 79. 2 Vern. 17.

Alſo Equity will ſet aſide the intended Wife's Contracts, though legally executed, when they appear to have been entered into with an Intent to deceive and cheat the Huſband, and are in Derogation of the Rights of Marriage; as where a Widow made a Deed of Settlement of her Eſtate, and married a ſecond Huſband, who was not privy to ſuch Settlement; and it appearing to the Court that it was in Confidence of her having ſuch Eſtate that the Huſband married her, the Court ſet aſide the Deed as fraudulent; ſo where the intended Wife, the Day before her Marriage, entered privately into a Recognizance to her Brother, and it was decreed to be delivered up.

Vern. 408. *Hunt* and *Matthews*.

But where a Widow, before her Marriage with a ſecond Huſband, aſſigned over the greateſt Part of her Eſtate to Truſtees, in Truſt for Children by her former Huſband: and though it was inſiſted that this was without the Privity of the Huſband, and done with a Deſign to cheat him, yet the Court thought, that a Widow might thus provide for her Children before ſhe put herſelf under the Power of a Huſband; and it being proved that 8000*l.* was thus ſettled, and that the Huſband had ſuppreſſed the Deed, he was decreed to pay the whole Money, without directing any Account.

(F) Where the Husband ſhall be liable to the Wife's Debts contracted before Marriage; and herein of a Wife that is Executrix or Adminiſtratrix.

F. N. B. 265. 20 H. 6. 22. b. Moor 468. Rol. Abr. 352. 3 Mod. 186.

THE Huſband is liable to the Wife's Debts contracted before Marriage, whether he had any Portion with her or not; and this the Law preſumes reaſonable, becauſe by the Marriage the Huſband acquires an abſolute Intereſt in the Perſonal Eſtate of the Wife, and has the Receipt of the Rents and Profits of her real Eſtate during Coverture; alſo whatever accrues to her by her Labour, or otherwiſe during the Coverture, belongs to the Huſband; ſo that in Favour of Creditors, and that no Perſon's Act

ſhould

ſhould prejudice another, the Law makes the Huſband liable to thoſe Debts with which he took her attached.

* But if a Feme Sole indebted marries and dies, the Huſband ſhall not be charged, for they muſt be recovered in the Life-time of the Huſband. *Page 293 10 H. 6, 10, 12. 20 H. 6. 22. Rol. Abr. 351.

So though there be a Judgment in Debt againſt a Feme Sole, and ſhe marries and dies, the Baron ſhall not be charged therewith, for he is not liable to her Debts before Coverture, unleſs recovered in her Life-time. 3 Mod. 186. Agreed *per Curiam*; but where a Feme Sole bought Goods, but did not pay for them, and the Goods came to her Huſband's Hands, and the Creditors, after her Death, brought a Bill in Equity againſt the Huſband, to which he demurred; but the Demurrer was over-ruled; my Lord Chancellor with Earneſtneſs, ſaying, he would change the Law in that Point. 1 Chan. Ca. 295. But Q. For where a Man married a Woman Trader, who died, and at her Death was indebted to ſeveral Perſons for Wares which ſhe had bought of them, and which were by her in *Specie* at the Time of her Death, and came to the Hands of her Huſband; on a Bill brought againſt him, that he may either pay for thoſe Goods, or let the Perſon have them again; it was held, that he may plead that he is neither Executor nor Adminiſtrator to his Wife, and therefore not liable to her Debts, and that all her Goods belong to him by Law. Abr. Ca. Eq. 60. §.

§ *Sed qu.* As the Goods came to his Hands?

If Baron and Feme are ſued on the Wife's Bond, entered into by the Feme before Marriage, and Judgment is had thereupon, and the Wife dies before Execution, yet the Huſband is liable, for the Judgment has altered the Debt. Sid. 337. So if Huſband and Wife had recovered in Right of the Wife, and had Judgment, the Huſband might ſue out Execution after the Death of the Wife. Cro. Car. 208. Sid. 337. Salk. 116. pl. 7. Carth. 415. 2 Ld. Raym. 1050.

If there be Judgment in Debt upon a Bond againſt a Feme Sole, and ſhe marries, and after upon two *Sci. fa.* againſt the Baron and Feme, and *Nihils* returned, Judgment is thereupon had againſt the Baron and Feme, and ſo it reſts for a Year and a Day, and then the Wife dies, a *Scire facias* will lie againſt the Baron, to ſhew Cauſe why Execution ſhould not go againſt him upon the firſt Judgment, for the Award of Execution was abſolute againſt the Baron and Feme, and ſo it became his Debt, whereas before, it was only the Debt of the Wife. Carth. 30. *Obrian* and *Ram.* 3 Mod. 186. S. C. Ld. Raym. 1050. Vern. 396. 2 Vern. 118. 249. Ch. Pre. 63, 118, 225, 328, 502. 8 Mod. 200, 342. 10 Mod. 161, &c. 246. 10 Mod. 169. 12 Mod. 246, 346, 383. Gilb. Eq. Rep. 70, 98, 145. Fitzgib. 149, 205. Will. Rep. 249, 253, 466, 469. 2 Will. Rep. 496. 3 Will. Rep. 200, 409, 412. Comyns 31. pl. 21. 725. pl. 280. Caſ. Temp. Talb. 143, 168, 171. Stra. 229, 576. 2 Stra. 726, 1094. Andr. 242. 1 Stra. 1272. Salk. 116. pl. 7. Carth. 415. S. C. cited, and allowed to be Law.

If a Man marries an Adminiſtratrix to a former Huſband, who in her Widowhood waſted the Aſſets of her Inteſtate, the Huſband is liable to the Debts of the Inteſtate, during the Life of the Wife; and this ſhall be deemed a *Devaſtavit* in him. Cro. Car. 603. *King* v. *Hilton*. For this *vide* Head of *Executors* and *Adminiſtrators*, and Rol. Abr. 351. Moor 761. Cro. Car. 208, 227, 458. Sid. 337. *Note*, That in Equity the Creditors of the firſt Huſband may follow the Aſſets in the Hands of a ſecond Huſband, although the Wife be dead. Chan. Ca. 80. Vern. 309. 2 Vern. 61, 118. *A.* married an Adminiſtratrix to her former Huſband, to a Share of whoſe Perſonal Eſtate the Plaintiff was intitled; the Adminiſtratrix was likewiſe intitled to a third; and before her ſecond Marriage had waſted great Part of the Eſtate, and then died; and a Bill was brought againſt her Huſband, to have an Account of the Eſtate, and a Satisfaction for his Share; an Account was decreed to be taken of what Eſtate had come to the Hands of the Adminiſtratrix before her ſecond Marriage, and the Plaintiff to have Satisfaction againſt the Defendant abſolutely for ſo much as came to his, or his Wife's Hands after Marriage, and for what came to her Hands before her ſecond Marriage, to have Satisfaction againſt the Defendant, ſo far as he had any Eſtate of his Wife's. 1 Abr. Ca. Eq. 60, 61.

*Page 294 * (G) Where she alone shall be punished for a Criminal Offence, and where the Husband shall be answerable for what she does in a Civil Action.

Kelw. 31. S. P. C. 26, 142. H. P. C. 65. 27 Ass. 49.

A Feme Covert is so much favoured in Respect of that Power and Authority which her Husband has over her, that she shall not suffer any Punishment in committing a bare Theft in Company with or by Coercion of her Husband.

Hawk. P. C. 2. she shall not be deemed accessary to a Felony for receiving her Husband who has been guilty of it, as her Husband shall be for receiving her. 3 Inst. 108. H. P. C. 65. 2 Hawk. 326.

H. P. C. 65. Dalt. 104. 27 Ass. pl. 40. Fitz. Coron. 199.

But if she commits a Theft of her own (*a*) voluntary Act, or by the bare Command of her Husband, or be guilty of Treason, Murder or Robbery, in Company with, or by Coercion of her Husband, she is punishable as much as if she were Sole. *

(*a*) But she is not guilty of Felony in stealing her Husband's Goods, because a Husband and Wife are considered but as one Person in Law, and the Husband, by endowing his Wife at the Marriage with all his worldly Goods, gives her a Kind of Interest in them, for which Cause even a Stranger cannot commit Larceny in taking the Goods of the Husband by the Delivery of the Wife, as he may by taking away the Wife by Force against her Will. Hawk. P. C. 93.

* Her Obligation as a Subject to obey the Law, is, in such Cases, paramount her Obligation to obey her Husband.

9 Co. 71. Hawk. P. C. 3. *Vide* Moor 813. Hob. 93. Noy 103. Savil 25. Cro. Ja. 482. 11 Co. 61.

A Feme Covert generally shall answer as much as if she were Sole, for any (*b*) Offence not Capital against the Common Law or Statute; and if it be of such a Nature that it may be committed by her alone, without the Concurrence of the Husband, she may be punished for it without the Husband, by way of Indictment, which being a Proceeding grounded merely on the Breach of the Law, the Husband shall not be included in it for any Offence to which he is no way privy.

That the Husband is not liable to pay the Forfeiture recovered on an Indictment against the Wife; and therefore *Quære* whether a Conviction of a Feme Covert, upon an Indictment, can be pleaded to an Information against her and her Husband. Hawk. P. C. 18. (*b*) She cannot be indicted for Barratry. Rol. Rep. 39. ‡ Whether she may be indicted for Forestalling, *Quære* Sid. 410. 2 Keb. 634. may be indicted for a Scold, and Judgment against her to be ducked; but scolding once or twice is not sufficient to constitute this Offence, which lies in the frequent Repetition of it, to the Disturbance of the Neighbourhood. And the Indictment must set forth that she is *communis Rixatrix*, and not *Rixa*. 6 Mod. 213, 239. A Feme Covert may be guilty of a forcible Entry, by entering in Person, and may be imprisoned for it. Hawk. P. C. 147. Where the Husband may be proceeded against for the Recusancy of his Wife, *vide* Hawk. P. C. 17, 18. She may be indicted together with her Husband, for keeping a Bawdy-house. Hawk. P. C. 2. ‖ If a Woman bring a malicious Appeal for the Death of her Husband, known by her to be alive, she may be imprisoned for her false Appeal, till she make Fine to the King, and her Husband shall go at large. 8 H. 4. 17. Fitz. Coron. 73. Bro. Imprisonment 100.

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‡ But see *ante* 280. A. and Hawk. P. C. 243. ‖ *Qu.* If the Husband does not live with her and she keeps a Bawdy-house, if she may not be indicted alone.

Skin. 348. pl. 17. *Barnet* and *Tompkins*.

A Feme Covert lent 20*l.* to be paid at 20*s.* by the Week, and 1*s.* 6*d.* Interest, the Borrower paid the Interest, which amounted to 30*s.* which the Wife exacted and received; and this appearing on Evidence, in an Action brought by the Husband for the Money, *Holt* Ch. Just. ruled it to be

be an uſurious Contract by the Huſband, ſufficient to diſcharge and avoid the Obligation *civiliter*, though not ſufficient to charge the Huſband *criminaliter*.

If the Wife incur the Forfeiture of a Penal Statute, the Huſband may be made a Party to an Action or Information for the ſame as he may be generally to any Suit for a Cauſe of Action given by his Wife, and ſhall be liable to anſwer what ſhall be recovered thereon. *Vide* Hawk. P. C. 3. and the Authorities there cited.

* If a Feme Covert pretending herſelf to be Sole, marries a ſecond Huſband, he ſhall have no Action againſt the firſt, becauſe this Action is founded upon the Communication and (*a*) Contract of the Wife, which will not bind the Huſband; beſides this is Felony. *Page 295 Sid. 375. Lev. 247. Shall be anſwerable

for a Treſpaſs done by her, or for ſlanderous Words ſpoken by her. *Vide* 2 H. 6. 22. Kelw. 61. Rol. Abr. 251. Leon. 122. Cro. Car. 376. * (*a*) Where the Huſband ſhall be bound by ſome of her Acts, as in ſelling of Goods receiving Money for him, *vide* the next Head and 2 Inſt. 713. Sid. 114. Cro. Eliz. 245. 3 Leon. 267. Chan. Ca. 38. 6 Mod. 162. Comb. 450. Jenk. Rep. 4. 23 Ld. Raym. 224.

* And many modern Caſes, the Law being well ſettled, in ſuch Caſes.

Several Goods were deviſed to *A.*'s Wife for Life, and after her Deceaſe to *J. S.* in this Caſe, though *A.* and his Wife were parted, and there had been great Suits for Alimony, and ſhe, during the Separation, had waſted the Goods, yet the Lord Keeper thought it reaſonable, that the Huſband ſhould be charged for this Converſion of the Wife's, *A.*'s Title being paramount to the Feme's. Vern. 123.

(H) Of her Contracts for Neceſſaries; and how far the Huſband is bound by ſuch Contracts.

IT is clear that a Huſband is obliged to maintain his Wife, and may by Law be compelled to find her Neceſſaries, as Meat, Drink, Clothes, Phyſick, &c. ſuitable to the Huſband's Degree, Eſtate or Circumſtances; it ſeems alſo ſettled that the Wife is not to be her own Carver, and that ſhe hath not an innate or abſolute Power of binding the Huſband by any Contract, of hers, though for Neceſſaries, without his Aſſent, precedent or ſubſequent; the Law therefore in theſe Caſes, which ſeems eſtabliſhed by Uſage and Practice, is to leave it to the Jury to find whether the Huſband conſented or not; and though no expreſs Conſent or Agreement of his be proved, yet if it appears that ſhe cohabited with her Huſband, and bought Neceſſaries for herſelf, Children or Family, the Huſband ſhall be chargeable, and the Jury may find, on their Oaths, that they came to the Huſband's Uſe, he being by Law obliged to provide for them; alſo if ſhe cohabits with her Huſband, and is ever ſo lewd, he ſhall be liable to her Neceſſaries, for he took her for better for worſe; ſo if he runs away from her, or turns her away, or forces her by Cruelty, or ill Uſage to go away from him; but if he allows her a ſeparate Maintenance, or prohibits particular Perſons from truſting her, he ſhall not be liable during the Time that he pays ſuch ſeparate Maintenance, nor for Neceſſaries taken up of thoſe Perſons particularly prohibited; for in theſe Caſes no Conſent, but rather the contrary appears; but a general Warning or Notice in the *Gazette*, or other News-paper, not to truſt her, is not a ſufficient Prohibition. Alſo the Jury are to determine as to the Wife's Neceſſity, the Huſband's Degree and Circumſtances, and the

11 H. 6. 30. Fitz. Debt 41. Brownl. 47. All. 61. LitRep. 307. Hutt. 105. Jenk. Rep. 4. Rol. Abr. 350, 351. Sid. 109, 110, &c. Mod. 128. 2 Vent. 155. Keb. 69, 80, 87. 2 Vent. 42. Lev. 4, 5. Salk. 116, 118. pl. 10. 2 Ld. Raym. 1006. 6 Mod. 171. 2 Show. 283. Skin. 348. pl. 17. See Stra. 647, 786. 2 Stra. 875.

the Value of the Things ſold and delivered, and give a Verdict, and aſſeſs Damages accordingly.

But the Learning on this Head will be beſt explained by inſerting the celebrated Caſe of *Scot* and *Manby*, with my Lord Chief Baron *Hale*'s Argument at length.

A Woman departs from her Huſband without his Conſent, and during her Abſence the Huſband prohibits ſeveral Perſons, and among the Reſt
*Page 296 * *J. S.* to truſt her, and after ſhe makes a Requeſt to cohabit again with her Huſband, and he refuſes to receive her, and yet *J. S.* ſells to her Silk and Velvet to the Value of 40*l.* which is found ſuitable to the Degree of her Huſband, the Huſband ſhall not be charged.

Manby and *Scot*, adjudged in the Exchequer-Chamber on a ſpecial Verdict, by eight Judges againſt three; but *Atkins* one of the eight, agreed with the three, if there had been no ſpecial Prohibition; and *Eridgman* Ch. Juſt. one of the eight, held that admitting otherwiſe, *viz.* that the Huſband was liable, yet he might make ſuch ſpecial Prohibition to a particular Perſon, and it would excuſe him. Sid. 109, 110, &c. and Mod. 128. Lev. 4, 5. Keb. 69, 80, &c. 8. C.

Lord Chief Baron *Hale*'s Argument in the Exchequer-Chamber, in the Caſe of *Manby* ver. *Scott*. 1 Mod. 6. 33, 70, 163, 205, 224. 1 Mod. 241. pl. 15. Gilb. Eq. Rep. 1, 145, 149. 9 Mod. 6, 7. 31, 42, 43, 104. Eq. Abr. 61. Ld. Raym. 444, 445. Salk. 116. pl. 6. 119. pl. 13. Sid. 124. 6 Mod. 171. 2 Ld. Raym. 1006. Stra. 187. 2 Stra. 1122, 1214. Will. Rep. 432. pl. 138, 483. 3 Wil. Rep. 269. pl. 67. 278, 339, 409. pl. 114, 412. 12 Mod. 224, 245.

1. I will ſay ſomething of the Nature of Contracts.

2. I will apply it to our Caſe, in Conſideration of the Verdict, as it is found.

3. I will ſhew in what Particulars we all agree, and where we differ, and ſo ſtate the Queſtion.

4. I will ſpeak to the Queſtion as it ſhall be ſo ſtated.

1. A Contract is the Conſent of two or more, whereby to bring in an Obligation of one to the other; and the Parts requiſite to ſuch a Contract, are 1ſt, Parties; 2dly, Conſent; 3dly, An Obligation.

1ſt, It is requiſite that the Parties be not diſabled to contract; and as to that, in Law ſome are diſabled to contract *quoad hoc* and *ex parte*, as an Infant, *Non Compos*, &c. and ſome have an abſolute Diſability; as a Feme Covert, who can no way in our Law contract.

2dly, As to the Conſent, that muſt be either expreſs, or implied; expreſs muſt be either Precedent, Concomitant or Subſequent; implied is raiſed by Law; as where a Man is made Bailiff, Steward or Houſe-keeper, a general Authority is given him; when Goods come to a Man's Uſe, he having had Notice of the Contract, it is an Aſſent the Law will imply, and make the Contract oblige him; and if either of theſe had been found in this ſpecial Verdict, it had been well; for then there had been Fact enough for the Law to have made Conſtruction upon. There is, beſides all this, Evidence of a Conſent in Fact, which muſt induce a Jury, if there be no Circumſtances againſt it. As if I ſend a Servant always with ready Money, and he buys upon Truſt, here is no Evidence; but if I uſually ſend him upon Truſt, and where he takes up Goods I ſtand to his Bargain, and pay for them, this is Evidence that I would have all the World truſt him; and this a Jury may apply to make a Conſent to any particular Contract; but then they muſt find the Aſſent in Fact; for that which is the Evidence to them we cannot judge upon.

3dly, As to the Obligation, it is neceſſary that this be upon the Party conſenting. I know that in ſome Caſes the Obligation of a Contract may be transferred by way of Concomitancy; as to the Huſband, it is carried with the Chattels and Perſon of the Wife; and it lies upon the Heir and Executor when they have Aſſets; but for a Man to be originally bound by a Contract, it is neceſſary that there be his Conſent; and the Conſent of no other Perſon will ſerve.

2. To

2. To conſider what is in the Verdict, and apply what has been ſaid to it: I find in it no Aſſent of the Huſband's found, nor any Authority he gave his Wife, but only Matter of Evidence. I confeſs that when a Wife, though not particularly appointed, contracts for Neceſſaries for herſelf, her Family, her Huſband or her Children, this is great Evidence to a Jury to make them find the Aſſent of the Huſband; for it cannot be reaſonably thought that any Man would be ſo barbarous as to deny his Aſſent to have the Neceſſities of his Family ſupplied; and ſo it may be believed and found he did Aſſent; but this only in Caſe of Cohabitation; for it may be well imagined, that when a Wife leaves her Huſband, that he may refuſe to ſupply her; and ſo in the Verdict, this Matter of Evidence is anſwered by finding that ſhe departed from him; but then there is an Anſwer on the other Side, that ſhe afterwards, and * before this Contract, *Page 297
deſired to cohabit with him; to this it is replied again with a flat Bar to any Evidence than can be given of an Aſſent, *viz.* that the Huſband did expreſsly prohibit thoſe Tradeſmen to truſt her; the Judges in their Directions to a Jury, direct them to be guided by ſuch Evidence of an Aſſent, when nothing appears to the contrary; becauſe it would be very hard in Point of Proof to ſhew expreſs Evidence of Aſſent to every Particular; but when there is an expreſs Prohibition or Denial of Aſſent, this takes off all the Circumſtances of Evidence on the other Side.

3. I am to ſhew in what Points we all agree, and where we differ.

1ſt, We all agree that it is not the Contract of the Wife's to bind her; for in our Law, ſhe has no Will, nor Power to bind herſelf; the Civil Law, as it allows her a Property diſtinct from the Huſband's, ſo it gives her Power to bind herſelf by Contract.

2dly, It is agreed on all Hands, the Wife ought to be maintained; the Civil Law, though it allows the Wife a ſeparate Property, yet the Huſband ought to maintain her out of her Dower; it is more neceſſary for the Common Law, that takes away all Property from her, to make Proviſion for her Subſiſtence, elſe that which we pretend to be the moſt reaſonable and provident Law in the World, would be the moſt barbarous; but in this we differ. It is ſaid, by thoſe who argue that the Huſband ſhould be charged, that ſhe may be maintained by a Power the Law gives her to charge her Huſband by Way of Contract; which is altogether denied by us.

3dly, We all agree, that when the Wife contracts for the Neceſſaries of her Huſband, Children, or Family, that this ſhall not charge him by any inherent Power in the Wife, but by a reaſonable and implicit Aſſent, which muſt be found by a Jury; but we differ in the charging him; when ſhe contracts for the Supply of her own Neceſſities, we ſay it is not by a Power ſhe has, but there muſt be his Conſent, either expreſs or implied. Secondly, we confeſs, that in Caſe of Cohabitation, there is great Evidence of his Aſſent, till the contrary appears; but it is not ſo binding as will amount to a Preſumption. Thirdly, Therefore we ſay it muſt be found by the Jury. Fourthly, That it is countermandable by Prohibition, where it is ſaid on the other Side, and muſt be maintained, elſe they can make nothing of the Caſe, that there is in the Wife, upon the Intermarriage, an original, inherent Primogenial, and uncountermandable Power to charge the Huſband for her Neceſſities, which the Huſband can no Ways repeal, though there be no Cohabitation or Conſent, but an expreſs Prohibition; and this is the true State of the Queſtion betwixt us; if there be ſuch a Power in the Wife or no, independent upon any Conſent of the Huſband's; I ſhall conſider,

1ſt, If there be ſuch a Power during Cohabitation; 2dly, If for Neceſſaries; and here I ſhall make a ſecond Queſtion, If there be ſuch a finding of Neceſſaries as is requiſite in a Verdict; 3dly, If the Departure makes

nothing

nothing in the Caſe; 4thly, Admitting all this, whether it be countermandable *quoad* one Man.

1ſt, I ſhall hold there is no ſuch Power in the Wife; my Reaſons are,

1ſt, By the Law of GOD, of Nature, of Reaſon, and by the Common Law, the Will of the Wife is ſubject to the Will of the Huſband; and therefore an Indictment for being a Joint-Receiver with her Huſband was held ill; but if the Law were with thoſe who argue on the other Side, this would be inverted, and the Will of the Huſband would be ſubject to the Will of the Wife.

2dly, Becauſe no Man can be originally bound in a Contract, but by his own Conſent.

*Page 298. * 3dly, To prove the Law on their Side lies upon them, which they have not, nor no Ways can do, there being but one Semblance of an Authority they can alledge, which is 11 *H.* 6. which is the Opinion of Judge *Martin*, and muſt be intended by Way of Evidence, but they ſay, they prove it by Reaſon and Inconvenience.

1. I anſwer, *Argumentum ab inconvenienti* will not change or alter the Law when it appears to be ſo; but it is only to prove and interpret the Law when we are in Doubt whether it be ſo or no.

2dly, I anſwer, The Inconvenience of the other Side outweighs, and is far greater, for it will bring into the Law a manifold Incertainty.

1. What Things are neceſſary, what Kind of Neceſſity, and when, and how often, this Neceſſity may happen; as if the Huſband ſhould give the Wife Clothes, and ſhe give them away the next Day, ſhe is in as much Neceſſity the next Day as ſhe was before, and *Quicquid neceſſitas cogit debetur.*

2dly, There would be great Uncertainty which Way ſhe ſhould ſupply her Neceſſities; as this Way, 1. Of taking up Goods, and if ſhe can find no Credit with the Mercer, but has the Uſurer for her Friend, then the Law ſure that provides againſt her Neceſſities, will give her Leave to take up Money; and if that fails, it is reaſonable that ſhe ſhould ſell Goods; for the two other Ways failing, the Law will not let her periſh; if there were no Goods, then it were as reaſonable ſhe might receive Rents, which would be againſt Sir *Paul Tracey* and *Dutton*'s Caſe, *Cro. Jac.* 621. and if there were none ſuch, ſhe might raiſe Money upon the Demiſe of the Land; if the Law will give Way to her Neceſſities in the firſt Caſe, it muſt yield in all the Reſt, for the Caſe may elſe be ſo that the Proviſion of Law would be deſective; but I hold, that in none of theſe Caſes the Wife can provide for herſelf; but ſay, there muſt be a Truſt ſomewhere; as a Father is bound by the Law of Nature to provide for his Son, and the Son is bound to provide for the Father, but the Law will not give the one Leave to oblige the other by Way of Contract; becauſe the Law ſuppoſes that they will not be ſo unnatural, and entruſts them with it, *viz.* before the 43 *Eliz.* for the Poor. If this Truſt muſt be ſomewhere, the Huſband knows beſt how to manage Affairs, and ſo is fitter to be entruſted by the Law, than any Body elſe: I add, that although the Law will not preſume ſo much Ill, as that a Huſband ſhould not provide for his Wife's Neceſſities, yet there is a ſevere Obligation on him, not only to ſupply her in Caſe of Exigencies and extreme Neceſſity, but according to Conveniency; but the Law has not made her her own Judge, but provided her a Judicature ſufficient to reform the Cloſe-Handedneſs of her Huſband; where ſhe is driven to an extreme Neceſſity and Want of Subſiſtence, the Law has appointed a Judge to compel the Huſband to ſupply her, I mean the Chancellor; for upon a *Supplicavit* he may be bound to the Peace, and *bene & honeſte tractari*; which I hold not to be underſtood only, that he muſt uſe her gently, and forbear beating of her, but that he muſt ſupply her Exigencies. Then for her Conveniencies, the Law has appointed the Biſhops Courts. And

Whereas it is ſaid, that this is not the Common Law, I anſwer, that they are Juriſdictions appointed by the Common Law; and though their Coercion and Proceedings are after another Law; yet their Derivation, as to their Uſe here, was from the Common Law; and concerning the Amplitude of their Power, which is ſaid not to be able to adminiſter a Remedy ſufficient for this Diſeaſe; I ſay, as it is aided by the *Brachium Seculare*, the Power of it falls as ſeverely upon them that diſobey it, as the Common Law can uſe when Men will not pay their Debts; for they may excommunicate, and upon that follows Impriſonment, and a Diſability to ſue any Action.

The ſecond Objection made on the other Side, by comparing the Caſe of a Feme Covert with the Caſe of an Infant; but I anſwer, an Infant is diſabled only *Quoad hoc*, and may oblige himſelf for Neceſſaries; but here the Wife would bind her Huſband alſo; in the Caſe of an Infant *Page 289
there is no Body intruſted by the Law to provide for him (for Guardian in Socage is only where there is Land) immediately, and therefore he muſt do it himſelf, whereas the Huſband is intruſted for the Wife; ſo the Caſes are not parallel.

3dly, It is objected, that it comes to the Uſe of the Huſband; I anſwer, it would then bind the Huſband in Superfluities, which may ſo come to his Uſe; which how inconvenient, I leave any Man to judge.

4thly, It is objected, that the Huſband is bound by the Wrongs of his Wife, and may be charged in Trover and Converſion upon her Act; I ſay, that in Caſe of a Wrong ſhe binds herſelf, for ſhe muſt be joined in the Action, and ſo ſhe will be more careful not to ſubject herſelf, than when the Huſband is charged alone; but I hold, that in this Caſe no Trover and Converſion lies; for the Delivery of the Party, knowing the Fact, and intending a Sale and Contract, tranſlates the Property at the Peril of him that delivers them. If a Man knows one to be an Infant, and ſells him Goods, it is at his Peril, for if they be not Neceſſaries, he ſhall never charge the Infant for the Converſion; and ſo of a Feme Covert, if there be no Conſent of the Huſband; for it has been held, that what the Wife eats or wears comes to the Uſe of the Huſband, and will maintain a Converſion; and if the Law ſhould not be taken thus, we ſhould let in a Flood of inconveniencies, which would make all thoſe Diſabilities the Law has raiſed for the Protection of Infants and Feme Coverts, mere Words, and of no Effect.

2dly, I ſhall lay no Streſs upon the imperfect finding of the Verdict, leſt it might be ſaid that that was the Reaſon of the Judgment; but only name ſome Particulars, wherein it ſeems to be imperfect. 1. They ſhould have found what the Stuffs were; for it has been adjudged that Velvets were not neceſſary for an Infant; they ought to have found the Circumſtances of the Neceſſity; as where Manſlaughter is committed *ſe defendendo*, or in Execution of an Office; they ſhould have ſet forth of what Kind the Neceſſity was, as there is a Neceſſity of Clothes, of Meat, of Medicine, and of Habitation; they have found that theſe Goods were neceſſary and convenient for his Degree, they ſhould have ſaid alſo for his Eſtate; for a high Degree may have a low Eſtate, and then the Wife cannot expect to be maintained according to the Height of her Huſband's Degree; but I lay no Hold on theſe Defects in the Verdict.

3dly, Upon her Departure all Evidence of any Obligation of the Huſband to maintain her ceaſes; it would elſe be very unreaſonable, for whilſt they are both in one Houſe, the ſame Proviſion will ſerve for both. In Caſe of a Bailiff, if he goes away, no Contract of his will bind the Maſter, though he had no expreſs Diſcharge; and here we muſt preſume ſome unreaſonable Cauſe of her Departure, for a Wife in no Caſe ought to do it, and ſhe might have had Alimony without any Separation. *Moor* 874.

4thly,

4thly, Admitting all this, I hold that the Prohibition here takes away all Presumption of any Consent of the Husband to the Contract, either express or implied; and though the Wife should be allowed such a Power to charge her Husband, as is affirmed on the other Side, yet it may be discharged as to one particular Man, by the Prohibition and Countermand of the Husband; it would be a very hard Case else, for she may make him liable to the greatest Enemy he had in the World. 12. *E.* 4. 18. The King may grant to *J. S.* to be exempt of Juries; but if he grants it to a whole County, Hundred, or Township the Grant is void; and by this Prohibition of the Husband here is no Discharge of the whole Power, but only it is taken of those particular Persons. If a Man enters into an Obligation not to use his Trade, it is against Law, and void; but if it be, not to set up his Trade in such a Street or Town, it is good.

Page 300 * *Note*; He added, that as to the charging the Husband by way of Evidence, which he had restrained to Cohabitation, he said, the Law is the same where the Husband departs from the Wife; as upon going beyond Sea, *&c.*

But if a Woman takes up Goods and pawns them before they are made into Clothes, the Husband shall not pay for them, because they never came to his Use; *secus* if made up and worn and then pawned. Salk. 118. pl. 10. If she pawns her Clothes and borrows Money to redeem them, Husband not liable. 2 Show. 283. If Husband and Wife by Agreement live separate, and she has a separate Maintenance, it will be presumed that those who deal with her trust her on her own Credit. Salk. 116. pl. 6. Ld. Raym. 444. Sid. 124. 12 Mod 245. 6 Mod. 171. *Vide* Skin. 348. pl. 18. Warning a Tradesman's Servant not to trust her, sufficient Warning to the Master. Salk. 118. pl. 10. 2 Ld. Raym. 1006. A Tradesman who sold Lace and Silver Fringes for a Petticoat and Side Saddle, which amounted to 94l. and all within four Months to the Wife of a Serjeant at Law, afterwards a Judge; recovered against him. Skin. 349.

Since this Resolution there have been several Cases in which Tradesmen have recovered in Actions brought against the Husband for Goods delivered the Wife; and in all these Cases the Judges have laid down the Distinction of an implied Promise, and directed it as a sufficient Foundation to charge the Husband; and in their Directions have shewn as much Favour as possible to such Tradesmen as intrusted her on the Credit of her Husband, and were in no Combination with the Wife to charge him. *

* We should observe that the Law is well settled in the Case of *Manby* and *Scott*, and has never been called in Question.

Salk. 118. pl. 11. Ruled on Evidence.

An ordinary working Man married a Woman of the like Condition, and after Cohabitation for some Time, the Husband left her, and during his Absence, the Wife worked; and this Action being brought for her Diet, it was held, that the Money she earned should go to keep her.

Vern. 71. Where a Person who lent a Feme Covert Money which was actually laid out in Necessaries, was allowed to stand in the Place of the Tradesmen, and to have Satisfaction, as far as they could, if they had been Plaintiffs. Preced. in Chan. 502, 503. Where Equity will decree a Wife a separate Maintenance, *vide* Abr. Eq. 68.

If the Wife, whilst she lives separate from her Husband, and has a separate Maintenance, buys Goods of Tradesmen, who know of the Separation and Maintenance, they cannot sue the Executors of the Husband in Chancery for these Goods; neither will Equity give the Executors any Relief, because they have a very good Defence at Law.

(I) What Acts done by the Husband or Wife alone, or Jointly with the Wife, shall bind the Wife; and herein of her Agreement or Disagreement to such Acts after the Death of her Husband.

THE Husband, as Head and Governor of the Family, has an abſolute Power over the Chattels Real and Perſonal which he is poſſeſſed of in Right of his Wife, to diſpoſe of them as he thinks proper, and no Act or Concurrence of hers is of any Avail, either in confirming or controuling ſuch Diſpoſition; but the Real Eſtate is under a different Regulation, and not under the Power of the Huſband, longer than during the Coverture; and therefore any Diſpoſition of it made by him alone may be defeated; alſo all Charges laid on it by him, fall off with his Death. *

Rol. Abr. 346, 347. 2 Inſt. 510. 10 Co. 42. Sid. 11.

* See *poſt.* 301, *&c.* how the Eſtate of the Wife may be diſpoſed of during Coverture. As to Leaſes by the Huſband, of the Lands of the Wife, ſee *poſt.* 302, *&c.*

* At Common Law, any Alienation made by the Huſband of the Wife's Land, whether by Feoffment, (*a*) Fine, or (*b*) Recovery, was a Diſcontinuance, and after his Death ſhe was put to her *Cui in vita*, to reinſtate herſelf; but now by the Statute of 32 *H.* 8. *cap.* 28. it is provided, *That no Fine levied by the Huſband alone, of Lands, being the Freehold and Inheritance of the Wife, ſhall in any wiſe be or make a Diſcontinuance, or be otherwiſe prejudicial to her or her Heirs, but that the Wife and her Heirs ſhall and may lawfully enter into the ſaid Lands, according to their Rights and Titles therein.*

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2 Inſt. 681.

(*a*) If ſhe neglects to enter within five Years after the Death of her Huſband, and the Fine was with Proclamation, her Entry is taken away, and her Right for ever extinguiſhed; for this *vide* Co. Lit. 326. Dyer 72, 163. Plowd. 373. 8 Co. 72. 2 Inſt. 681. 9 Co. 140. If Lands be given to Huſband and Wife and the Heirs of their Bodies, and the Huſband alone levies a Fine thereof, the Wife, may enter after his Death by Force of this Statute. 9 Co. 138. 2 Inſt. 681. Cro. Car. 477. (*b*) That a Recovery ſuffered by the Huſband alone is void, *vide* F. N. B. 468. Booth 185. 2 Inſt. 343. Plowd. 57.

If a Feme Covert levies a Fine of her own Inheritance, without her Huſband, this ſhall bind her and her Heirs, becauſe they are eſtopped to claim any Thing in the Land, and cannot be admitted to ſay ſhe was Covert againſt the Record; but the Huſband may enter and defeat it, either during the Coverture, to reſtore him to the Freehold he held *Jure Uxoris*, or after her Death to reſtore himſelf to his Tenancy by the Courteſy; becauſe no Act of a Feme Covert can tranſfer that Intereſt which the Intermarriage has veſted in the Huſband; and if the Huſband avoids it during the Coverture, the Wife or her Heirs ſhall never after be bound by it.

Bro. Tit. *Fines* 33. 10 Co. 43. Hob. 225. 7 Co. 8. Co. Lit. 46. If a Feme Covert, as Sole, levies a Fine Executory, and Execution of hers can be ſued againſt the Huſband and Wife, he may ſtop the Execution, becauſe no Act of hers can prejudice him; and if in this Caſe the Huſband makes Default, and ſhe be received, ſhe may for the Benefit of her Huſband diſturb the Execution of her own Fine; but after the Death of her Huſband ſhe cannot avoid it. Bro. Tit. *Fine* 79. Co. Reading 9.

If a Huſband and Wife join in a Fine to convey her own Inheritance, it ought to be received, if upon her (*c*) Examination it appears to be voluntary, and free from Conſtraint; and if ſhe be of full Age, the Fine ſhall bind her as if ſhe had been Sole.

18 E. 4. 14. Rol. Abr. 347. 2 Rol. Abr. 20. 2 Inſt. 515.

(*c*) *Note*; The Books which ſay, that a Fine ſhall not bind a Woman under Coverture, unleſs ſhe be examined, muſt not be conſtrued as if it were in her Power to reverſe the Fine for want of her Examination; but they are to be underſtood in this Senſe, that the Judge ought not to receive the Fine without examining her. 2 Inſt. 515

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2 Inſt. 515. The Examination of a Feme Covert is not always neceſſary in levying of Fines, becauſe that being provided that ſhe may not at the Inſtance of her Huſband make any unwary Diſpoſition of her Property, it follows, that when the Huſband and Wife do take an Eſtate by the Fine, and part with nothing, the Feme need not be examined; but where ſhe is to convey or paſs any Eſtate or Intereſt, either by herſelf or jointly with her Huſband, there ſhe ought to be examined; therefore if *A.* levies a Fine *come ceo* to Baron and Feme, and they render to the Conuzor, the Feme ſhall be examined; ſo it is where ſhe takes an Eſtate by the Fine, rendering Rent.

2 Rol. Abr. 17.

F. N. B. 21. Leon. 15. 3 Lev. 36. If Huſband and Wife levy a Fine, and the Wife is within Age, they may join in a Writ of Error to reverſe it during the Minority of the Wife, not by any Privilege of Coverture, but becauſe, during her State of Infancy, no Act of hers can be ſo obligatory as not to be cancelled, if ſhe thinks it prejudicial to her.

But for this *vide* Head of *Fines and Recoveries.*

Co. Lit. 36. Dyer 358. If a Man makes a Jointure on his Wife, either before or after Marriage, and they both join in a Fine, ſhe is bound thereby; and if the Jointure was made before Marriage, ſhe is barred to claim Dower in any other Lands of the Huſband's; but if the Jointure was made during Coverture, ſhe may claim Dower in the other Lands.

For this *vide* Tit. *Jointure.*

*Page 302 * If Baron and Feme by Fine *ſur conceſſit* grant Land to *J. S.* for 99 Years, and warrant the ſaid Land to *J. S.* during the ſaid Term, and the Baron dies, and *J. S.* is evicted by one that hath a prior Title, he may thereupon bring Covenant againſt the Feme, notwithſtanding ſhe was covert at the Time when the Fine was levied.

2 Sand. 177. Sid. 466. S. C. Mod. 290. 2 Keb. 684. 703. *Wotton* and *Hale.*

10 Co. 43. 2 Rol. Abr. 395. A Recovery, as well as a Fine by a Feme Covert, is good to bar her, becauſe the *Præcipe* in the Recovery anſwers the Writ of Covenant in the Fine, to bring her into Court, where the Examination of the Judges deſtroys the Preſumption of Law, that this is done by the Coercion of her Huſband, for then it is to be preſumed they would have refuſed her.

2 Inſt. 673. Hob. 225. But if a Wife alone, or with her Huſband, bargain and ſell her Lands by Deed indented and inrolled, yet it ſhall not bind her; for a Wife cannot be examined by any Court without Writ, and there is no Writ allowed in this Caſe.

But where the Money ſhall be paid out of the Perſonal Eſtate of the Huſband, *vide* 2 Vern. 436. 689. Vern. 41, 213. But for this *vide* Head of *Mortgage*; where ſhe ſhall be bound to a Specific Performance of her Agreements in Equity, *vide* Title *Agreements*, and 2 Vern. 61. If a Feme Covert joins with her Huſband in levying a Fine to raiſe a Sum of Money by way of Mortgage, this ſhall bind her.

Rol. Abr. 660. Bro. Diſſeiſin 67. If a Huſband diſſeiſe another to the Uſe of his Wife, this does not make her a Diſſeiſoreſs, ſhe having no Will of her own, nor will any Agreement of hers to the Diſſeiſin during the Coverture, make her guilty of the Diſſeiſin, for the ſame Reaſon; but her Agreement after her Huſband's Death will make her a Diſſeiſoreſs, becauſe then ſhe is capable of giving her Conſent, and that makes her Tenant of the Freehold, and ſo ſubject to the Remedy of the Diſſeiſee.

Rol. Abr. 660. Bro. Diſſeiſin 67. So if a Man diſſeiſes another to the Uſe of a Feme Covert, her Agreement to it ſignifies nothing, though the Huſband's Agreement to it ſettles the Eſtate in the Wife, yet it makes her no Sharer in the Guilt of the Diſſeiſin.

Co. Lit. 357. Rol Abr. 660. But if a Feme Covert actually enters and commits a Diſſeiſin, either ſolely or together with her Huſband, then ſhe is a Diſſeiſoreſs, becauſe ſhe thereby gains

gains a wrongful Poſſeſſion; but yet ſuch actual Entry cannot be to the Uſe of her Huſband or a Stranger, ſo as to make them Diſſeiſors, becauſe though by ſuch Entry ſhe gains an Eſtate, yet ſhe has no Power of transferring it to another. Bry. Diſſeiſin 15, 67. *Vide* 8 H. 6. 14 *cont'*.

If the Huſband ſeized of Lands in Right of his Wife, makes a Leaſe thereof for Years by Indenture or Deed Poll, reſerving Rent, all the Books agree this to be a good Leaſe for the whole Term, unleſs the Wife, by ſome Act after the Huſband's Death, ſhews her Diſſent thereto; for if ſhe accepts Rent which becomes due after his Death, the Leaſe is thereby become abſolute and unavoidable; the Reaſon whereof is, that the Wife after her Inter-marriage being by Law diſabled to contract for, or make any Diſpoſition of her own Poſſeſſions, as having ſubjected herſelf and her whole Will to the Will and Power of her Huſband; the Law thereupon transfers the Power of Dealing and Contracting for her Poſſeſſions to the Huſband, becauſe no other can then intermeddle therewith; and without ſuch Power in the Huſband they would be obliged to keep them in their own Manurance or Occupation, which might be greatly to the Prejudice of both; but to prevent the Huſband's abuſing ſuch Power, and leſt he ſhould make Leaſes to the Prejudice of the Wife's Inheritance, the Law has left her at Liberty after his Death, either to affirm and make good ſuch Leaſe, or to defeat and avoid it, as ſhe finds it ſubſervient to her own Intereſt; and this ſhe may do, though ſhe joined in ſuch Leaſe, unleſs made purſuant to the Statute 32 *H.* 8. *cap.* 28. Bro. Acceptance 10. Bro. Leaſes 24. Cro. Jac 332. 2 And. 42. Co. Lit. 45. Plowd. 137. Cro. Jac 563. Yelv. 1. Cro. Eliz. 769. Shep. Touch. 179. Cowp. 201. Doug. 452. As to Leaſes made by Huſband and Wife, either at Common Law, or by Virtue of 32 H. 8. *vide* Head of *Leaſes and Terms for Years.*

* Huſband and Wife made a Leaſe for Years, by Indenture, of the Wife's Lands, reſerving Rent; the Leſſee enters, the Huſband before any Day of Payment dies, the Wife takes a ſecond Huſband, and he at the Day accepts the Rent and dies; and it was held, that the Wife could not now avoid the Leaſe, for by her ſecond Marriage ſhe transferred her Power of avoiding it to her Huſband, and his Acceptance of the Rent binds her, as her own Act before ſuch Marriage would have done, for he by the Marriage ſucceeded into the Power and Place of the Wife; and what ſhe might have done, either as to affirming or avoiding ſuch Leaſe before Marriage, the ſame may the Huſband do after the Marriage. *Page 303 Dyer 159. Rol. Abr. 475. Rol. Rep. 132.

The Huſband being ſeiſed of Copyhold Lands in Right of his Wife in Fee, makes a Leaſe thereof for Years, not warranted by the Cuſtom, which is a Forfeiture of her Eſtate, yet this ſhall not bind the Wife or her Heirs after the Huſband's Death, but that they may enter and avoid the Leaſe, and thereby purge the Forfeiture; and the Diverſity ſeems between this Act, which is at an End when the Leaſe is expired or defeated by the Entry of the Lord, or the Wife after the Huſband's Death, and ſuch Acts as are a continuing Detriment to the Inheritance, as wilful Waſte by the Huſband, which tends to the Deſtruction of the Manor; ſo of Non-payment of Rent, Denial of Suit or Service; for ſuch Forfeitures as theſe bind the Inheritance of the Wife after the Huſband's Death; but in the other Caſe, the Huſband cannot forfeit by this Leaſe more than he can grant, which is but for his own Life. 2 Rol. Rep. 344, 361, 372. Cro. Car. 7. Cro. El. 149. 4 Co. 29. 2 Com. Dig. 525.

A Woman Guardian in Socage marries, and joins with her Huſband by Indenture in making a Leaſe for Years of the Ward's Lands, yet after her Huſband's Death ſhe may avoid the ſame; for though the Huſband has abſolute Power to diſpoſe of all Chattels, either Real or Perſonal, whereof he is poſſeſſed in Right of his Wife, and the Wardſhip of the Body, and Land in this Caſe is but a Chattel; yet the Wife being poſſeſſed of it in Right of the Infant, and accountable to him for the Profits when he comes of Age, the Huſband's Diſpoſition ſhall not bind her after his Death, but that ſhe may avoid it in Right of the Infant, whoſe Guardian ſhe ſtill continues to be; and her own Joining in the Leaſe was not material, becauſe ſhe was then under Coverture. Plow. 293. Co. Lit. 351. Rol. Abr. 345.

Co. Lit. 3. a. A Feme Covert is capable of Purchaſing, for ſuch an Act does not make the Property of the Huſband liable to any Diſadvantage, and the Huſband is ſuppoſed to aſſent to this, as being for his Advantage; but the Huſband may diſagree; and it ſhall avoid the Purchaſe; but if he neither agrees nor diſagrees, the Purchaſe is good, for his Conduct ſhall be eſteemed a tacit Conſent, ſince it is to turn to his Advantage; but in this Caſe, though the Huſband ſhould agree to the Purchaſe, yet after his Death ſhe may wave it; for having no Will of her own at the Time of the Purchaſe, ſhe is not indiſpenſably bound by the Contract; therefore if ſhe does not, when under her own Management and Will, by ſome Act expreſs her Agreement to ſuch Purchaſe, her Heirs ſhall have the Privilege of departing from it.

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*Page 304 * (K) **Where the Husband and Wife muſt join in bringing Actions.**

Rol. Abr. 347. Moor 432. That a Feme Covert can in no Caſe ſue without her Huſband, *vide* Letter (M.) *poſt* 308. Stra. 229.

IN thoſe Caſes where the Debt or Cauſe of Action will ſurvive to the Wife, the Huſband and Wife are regularly to join in the Action; as in recovering Debts due to the Wife before Marriage, in Actions relating to her Freehold or Inheritance, or Injuries done to the Perſon of the Wife.

Cro. Eliz. 439. Owen 82. S. P. Moor 584. S. C.

But if a Feme Sole hath a Rent-charge, and Rent is Arrear, and ſhe marries, and the Baron diſtrains for this Rent, and thereupon a Reſcous is made, this is a Tort to the Baron himſelf, and he may have an Action (*a*) alone.

(*a*) Or may join his Wife therein, becauſe it ariſes upon a Duty due unto her before Coverture. Cro. Eliz. 459. *per Cur.*

2 Bulſt. 14. adjudged. (*b*) The Baron ſeiſed of a Houſe for Life, and in the Right of his Feme, leaſed for Years to the Defendant, who burnt the Houſe, and the Baron alone brought an Action for this; and whether it lay *dubitatur*; becauſe the Damage was done to the Eſtate of the Feme; and if ſhe dies, the Baron is not chargeable over in Waſte, in regard of which only an Action lies: becauſe it was the Folly of the Plaintiff that he made no ſpecial Proviſion againſt Waſte. Cro. Eliz. 461. ‡ — If *A.* demiſes a Houſe to *B.* for Years, and *B.* covenants to repair the ſaid Houſe, during the Term, and after *A.* grants the Reverſion to Baron and Feme, *&c.* the Baron may have an Action alone upon this Covenant; for therein Damages only are to be recovered. Cro. Jac. 319. adjudged. 3 Bulſt. 163. Rol. Rep. 359. S. C. adjudged.

So if a Feme Sole hath Right to have Common for Life, and ſhe takes Huſband, and he is hindered in taking the Common, he may have an Action alone without his Wife (*b*) it being only to recover Damages.

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‡ *Sed qu.* As the Huſband is intereſted, during their joint Lives, if he could not maintain an Action alone, to recover proportionable Damages?

Bulſt. 21. They muſt join in *Detinue* for Charters concerning the Wife's Inheritance. 38 H. 6. 4. Rol. Abr. 347. So in Trover for a Deed by which a Rent-charge was granted to her *cum ſola*, though it came to the Hands of the Defendant after Coverture. Noy 70. For Rent due to her before Coverture as Tenant in Dower. Rol. Abr. 348, 349. *Vide* Bulſt. 138, 136. Cro. Jac. 283. and *Quære* if ſince 32 H. 8. c. 37. there is

But if Baron and Feme are diſſeiſed of the Land of the Feme, they muſt join in an Action for the Recovery of this Land.

If

If the Baron be poſſeſſed of a Rectory for Years, in Right of his Feme, he and his Feme may join in an Action upon the 2 & 3 *Ed.* 6. *c.* 13. for not ſetting forth of Tithes; for the Poſſeſſion of the Baron is in the Right of the Feme, and the Action is given by the Statute to the Proprietor. Cro. Eliz. 608. 13 Co. 47. S. C. Moor 912. S. C. 2 Inſt. 660. S. C. cited. 2 Mod. 276. S. C. cited. Jenk. Rep. 273. S. C. ſaid to be adjudged that the Baron might have the Action alone. *Vide* 1 Brownl. 9. 1 Jones 325.—If a Stranger cuts Trees upon the Land of the Feme, they may join. 15 E. 4. 9. b. Lit. Rep. 285. Yelv. 375. S. P. *cont. arguendo.* —So they may join in Treſpaſs *Quare Clauſum fregit.*

If a Feme Sole is poſſeſſed for Years of a Cloſe, to which Time out of Mind there hath been a Way through the Cloſe of *J. S.* next adjoining, and *J. S.* erects a Building *ex tranſverſo viæ prædict'*, ſo that ſhe cannot uſe the ſaid Way, and after ſhe marries, the Baron and Feme may join in an Action for the Stoppage during the Coverture, declaring that after the ſaid Marriage *(a)* they could not uſe the ſaid Way, *&c.* * becauſe the Wrong was done to the Feme, and the *(b)* Baron had the Cloſe in her Right. Bulſt. 110. 2 Vent. 197. 1 Stra. 61, 229. 2 Stra. 726, 977. Doug. 329. 3 Term Rep. 627. *Page 305 Cro. Car. 419. adjudged. 2 Mod. 217. S. C. cited *arguendo*, as if adjudged that ſhe muſt join. Jones 367. S. C. but S. P. does not appear. (*a*) For incloſing Twenty Acres of Waſte, in which the Feme had Common, *ita quod* they could not, as before, take the Profits with their Cattle, *&c.* and becauſe a Feme Covert cannot have Cattle, Lit. Rep. 284, 285. the Court inclined for the Defendant; but it does not appear what Judgment was given. (*b*) So in an Action for not grinding at the Wife's Mill. Hob. 189.——So where the Feme had Right to all the Lop of certain Trees during Life, and the Owner cut them down. Cro. Car. 437. adjudged, Jones 376. In which laſt Book it is ſaid the Exception was. That the Action was brought by the Baron alone, and yet adjudged for him.

If *A.* declares that he was ſeiſed, in Right of his Wife, of a Meſſuage, Bakehouſe, *&c.* and that the Defendant erected two Houſes of Office ſo near the ſaid Bakehouſe, which foundered the Walls thereof, and by which the Air was ſo unwholſome that he loſt his Cuſtom, *&c.* the Action lies for the Huſband alone. 2 Mod. 269. 8 Mod. 200, 341, 342. 10 Mod. 162, 264. Eq. Caſ. Abr. 64, 65. 12 Mod. 94, 346. Ld. Raym. 443. Stra. 61, 229. 2 Stra. 726, 977. 2 Barnard. *K. B.* 465. *Freſdick* and *Sterling* adjudged; and that the Caſes Cro. Car. 419. Jones 367. Lit. Rep. 284. Hob. 189 warrant no more than that the Wife might be joined, not that of Neceſſity ſhe muſt. *

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* It is a Damage to the Huſband, who is intereſted during the Life of his Wife.

If *A.* leaſes to *B.* for Years rendering Rent, and after grants his Reverſion to Baron and Feme, and *B.* attorns, and then Rent is Arrear, and the Term expires, the Baron may bring an Action alone for this Rent, becauſe this Action is grounded upon the Duty, and not upon the Nature of their Eſtate; and the Money muſt come to the Baron; and there is no Difference where Baron and Feme are *(c)* Joint-Leſſors, and where (*d*) Joint-Purchaſers. 2 Bulſt. 233. Rol. Rep. 52. S. C. adjudged. (*c*) And then it was never queſtioned but the Baron might bring the Action alone; but when brought by both, it hath been doubted Bulſt. 21. *per* Yelv. and *vide* Lit. Rep. 13. Palm. 207. (*d*) But in that Caſe, 2 Bulſt. 234. *per Dod.* he muſt bring the Action generally, and not ſhew himſelf to be Aſſignee; but yet Rol. Rep. 52. it appears the Action was ſo brought; and yet held *per Cur'* to be only *Surpluſage.*

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is any Difference where the Avowry is made for Rent due before, and where after Marriage. †—Whether the Huſband alone may bring a *Quare Impedit*, *vide* Co. Lit. 351. a. Owen 82. Lit. 13, 375. Winch. 73. 2 Bulſt. 14. Jenk. 2, 3. Bulſt. 110.

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† In Replevin the Huſband may avow generally, by Virtue of the Statute 11 *Geo.* 2. c. 19. ſ. 22. or, he may avow in his own Right and in Right of his Wife, by 4 *Ann.* c. 16. which gives Leave to plead ſeveral Matters.

Rol. Abr. 348. Cro. Car. 503, 505, Jones 406, 407. S. C. adjudged, *vide* 3 Bulſt. 164. Rol. Rep. 300. Cro. Jac. 319. Doug. 329. 3 Term Rep. 627.

But if *A.* conveys Lands to *B.* in Fee, and covenants with him, his Heirs and Aſſigns, to make further Aſſurance, and theſe Lands are aſſigned to *J. S.* and his Wife, and the Heirs of *J. S.* they muſt both join in an Action on the Covenant for further Aſſurance,

3 Lev. 403. adjudged upon a Demurrer to the Declaration; and a Caſe was cited by *Powel*, where upon a Judgment obtained by Baron and Feme, the Baron only ſued a *Scire facias* for the Damages and Coſts, and had Judgment. (*d*) If a Bond be entered into to Baron and Feme, the Baron may ſue it alone, and thereby he ſhews his Diſſent to his Wife's taking any Thing by it. *Vide* 2 Mod. 217. Ld. Raym. 224. Will. Rep. 378. pl. 99. 458. pl. 131, 461. 2 Will. Rep. 497. Vern. 396. 11 Mod. 169. pl. 6, 177. pl. 2, 264. pl. 3. 12 Mod. 207, 346. Ld. Raym. 368. Salk. 127. pl. 8, 306. Carth. 462. Stra. 229. 2 Stra. 726, 977. 2 Barnard. 465. Cro. Car. 285, 443. All. 37. Bro. Baron and Feme 53. Lit. Rep. 13. Stile 9. Comb. 450.

But if a Bond is made to a Feme Covert during Coverture, conditioned to pay Money to the Feme, the Baron (*a*) alone may bring an Action upon this Bond.

Cro. Jac. 77, 205. adjudged, and affirmed in *Camm. Scacc.* Sid. 25. S. C. cited to be adjudged that they ought to join. 2 Sid. 128. like Point; and *per Glyn* Ch. Juſt. it may be in the Name of both, or of the Huſband alone. (*b*) But whatever the Conſideration be, where there is an expreſs Promiſe made to the Wife, ſhe may join, Cro. Eliz. 61.*—But without an expreſs Promiſe the Action does not lie; for the Fruit and Labour of the Wife belongs to the Huſband, for which he only ſhall bring the Action. Salk. 114. 4 Mod. 156. S. C. and S. P. Carth. 251. All. 3, 6. Stile 9.

If *A.* in Conſideration that *B.* a Feme Covert, will cure a certain Wound, aſſumes and promiſes to *B.* to pay unto her 10*l.* if *B.* does not cure it accordingly; ſhe may join with her Huſband in an *Aſſumpſit* for this Money, (*b*) for this Promiſe ariſing upon a Matter of Skill and Performance of the Wife, ſhe is the Cauſe of the Action; and ſuch an Action will ſurvive to the Wife.

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* See *ante* 299.

*Page 306 (*c*) Or the Baron may bring the Action alone. All. 36.

* If *A.* in Conſideration that Baron and Feme had intermarried at his Requeſt, aſſumes and promiſes to them to pay unto the Feme 8*l.* *per Ann.* during the Covertu e, &c. notwithſtanding the whole Benefit redounds to the Huſband, yet in an Action thereupon they (*c*) may join *a fortiori*, becauſe it is an executory Promiſe, and hath Continuance, and is not to be done *unica vice* only.

Rob Abr. 347. Mo. 422. S. P. laid down as a Rule. Owen 82. Lit. Rep. 13. Keb. 440. The Huſband alone cannot bring an *Indebitat' aſſumpſit*, or an *Inſimul Computaſſet*, for a Debt due to the Wife herſelf before Coverture, much leſs when it is due to her as Executrix or Adminiſtratrix. Sid. 229. 2 Keb. 89. (*d*) In Conſideration that *A.* will marry his Daughter *B.* aſſumes to give her as much as he gives any other of his Daughters, &c. and becauſe this Promiſe was made before Marriage, whether the Baron and Feme muſt not join in an Action thereupon, *dubitatur*. Sid. 25. *

It ſeems clearly agreed, that for Debts (*d*) due to the Wife, and all Cauſes of Action before Coverture, the Huſband muſt join in the Action.

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* Why is the Wife to join in this Action, ſince the Promiſe was to *A.* and the Money to be paid to him?

Sid. 172. Keb. 641. S. C. Vent. 261. 2 Lev. 107. S. P. and that he may join the Wife at his Election.

In an Action upon a *Trover* before Marriage, and a *Converſion* after, the Baron and Feme ought to join, for this Action, as a Treſpaſs, diſaffirms the Property; but the Baron alone ought to bring a *Replevin*, *Detinue*, &c. for theſe Actions admit and affirm a Property in the Feme at the Time of the Marriage, which by Conſequence muſt have veſted in the Baron.

But

But if *A.* declares that the Defendant being indebted to him and his Wife as Executrix to one *J. S.* in Conſideration that *A.* would forbear to ſue him for three Months, aſſumed, &c. and avers that he forbore, and that his Wife is ſtill alive, the Action is well maintainable by the Huſband alone, for this is on a new Contract, to which the Wife is a Stranger. Carth. 463. *Ward* and *Ellard* adjudged. Salk. 117. pl. 8.

Ld. Raym. 368. S. C. adjudged. Yelv. 84. Cro. Jac. 110. S. P. adjudged. Whether ſuch a Recovery will be direct Aſſets, or a *Devaſtavit* for ſo much, *vide* Head of *Executors and Adminiſtrators*.

For a Battery or other Perſonal *Tort* done to the Wife, they (*c*) muſt join, and if the Wife dies, the Action dies with her. Rol. Rep. 360. LitRep. 385.

Brownl. 205. Noy 18. See Vent. 328. 3 Vent. 23. Not for Perſonal or other Wrongs done to them both, unleſs where they have a joint Intereſt, and they have Wrong in reſpect thereof. March 47. Cro Car. 553. Jones 440. 2 Rol. Rep. 51. Cro. Jac. 355. Rol. Rep. 108. 2 Mod. 66. 8 Mod. 3, 200, 226, 239, 341, 380. Fitzgib. 174, 275. 2 Ld. Raym. 1031, 1050, 1208. Salk. 119. pl. 12. 6 Mod. 127. 11 Mod. 265. 10 Mod. 145, 184, 210, 229, 300. 2 Stra. 1094. Andr. 242. Vent. 328. 2 Vent. 29. Hard. 166. Stile 128. Cro. Car. 175. Lev. 3. 2 Lev. 26. (*c*) And the Judgment muſt be that the Baron and Feme ſhall recover, notwithſtanding the Baron only is to have the Damages. Godb. 369.

But the Baron (*d*) may bring an Action alone for the Battery, Carrying away and detaining of his Wife, *per quod ſolamen & conſortium* of his ſaid Wife *amiſit*, becauſe the Action is founded upon the ſpecial Damage done to himſelf, and will be no Bar to another Action brought by Baron and Feme, or by the Feme after the Death of the Baron, for the ſame Battery †. Cro. Car. 89, 90. adjudged and affirmed *in Cam. Scacc.* Cro. Jac. 538. S. P. adjudged.

1 Rol. Abr. 556. Jones 440. Lit. Rep. 339. 2 Rol. Rep. 51. S. P. adjudged, (*d*) Where an Action is brought for Words ſpoke of, or other Tort done to the Wife, and founded upon the ſpecial Damage of the Huſband, ſhe muſt not join. Sid. 346. Lev. 140. Keb. Rep. 791. pl. 43. 3 Keb. Rep. 387. pl. 63. *

† The Huſband and Wife may alſo join in another Action, for the perſonal Injury to the Wife: But, if the Huſband by the Loſs of her Service or Aſſiſtance of his Family, &c. or by any Expence, has ſuſtained a Damage, it is uſual to ſue in the Name of the Huſband, only, and a Jury will generally aſſeſs adequate Damages, and it is more eligible, the Courts not approving Multiplicity of Suits, where one Action will anſwer the Purpoſe.

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* But for Words ſpoken of the Wife, where no Special Damage is done to the Huſband, the Wife muſt join in the Action, ſo in Caſe of an Aſſault on the Wife, where the Huſband has not ſuſtained any Special Damage.

In Treſpaſs by Baron and Feme, they declared for a Battery of the Feme, & *quod* the Defendant *alia enormia eis intulit*; and though objected, the Feme cannot join for a Wrong done to the Baron, yet becauſe the *alia enormia*, &c. was but Form, and only in Aggravation of Damages, and altered not the Subſtance of the Declaration, it was adjudged for the Plaintiffs. Bull. N. P. 20. Cro. Jac. 664. Adjudged after Verdict, and affirmed in *Error*. *Vide* Stile 236. Sid. 225. Stile 302.

* So in Treſpaſs and Falſe Impriſonment by Baron and Feme, *per quod negotia domeſtica* of the Huſband *remanſerunt infecta ad grave damnum ipſorum*; and it was objected that this being laid as a ſpecial Damage to the Huſband, the Action ought to have been brought by him alone; but adjudged for the Plaintiffs after Verdict, being only Matter in Aggravation of Damages. Salk. 119. pl. 12. *Ruſſel* and *Carne*. *Page 307

(*a*) In

(a) In (b) Treſpaſs by Baron and Feme for (c) beating the Feme, they may declare that it was (d) *ad damnum ipſorum*, (e) notwithſtanding a Feme Covert can have no Damages, for this Action will ſurvive.

(a) Sid. 387. adjudged; and ſaid *per Cur'* it could not be otherwiſe. 2 Keb. 434. S. C. Palm. 339. 3 Mod. 120. So in Debt upon a Bond made to the Feme *dum ſola*; for the Non-payment to her *dum ſola* was to her Damage, as the Non-payment ſince is to the Damage of the Baron. Stile 134. adjudged, and ſaid it is the uſual Way of declaring in ſuch Caſe. (b) So for Words ſpoke of the Feme. March 212. (c) *Vide* Cro. Jac. 473. 644. Stile 155. 2 Keb. 387. (d) But where ſhe joins with her Baron, they both ſhall have Judgment to recover. Jenk. 28. (e) See 2 Stra. 1094. Andr. 242. 8 Mod. 341. 2 Ld. Raym. 1209. †

† It ought to be *ad damnum ipſorum*.

Salk. 114. pl. 1. *Nelthorp & Ux'* ver. *Anderſon*, ſhall join in an Action for the Eſcape of one in Execution for a Debt of the Wife. 2 Stra. 726.

But if in *Trover* by Baron and Feme, they declare *quod cum poſſeſſionat fuerunt*, &c. and that the Defendant converted, *ad damnum ipſorum*, this is naught after Verdict; for the Poſſeſſion of the Wife is the Poſſeſſion of her Huſband, and ſo is the Property; ſo that the Converſion cannot be to the Damage of the Wife, but of the Huſband only.

(L) Where they muſt be jointly ſued.

Co. Lit. 133. Dr. Plit. 3. 2 H. 6. 4. *Vide infra* Letter (M) 308.

THE Huſband is by Law anſwerable for all Actions for which his Wife ſtood attached at the Time of the Coverture; and alſo for all her Torts and Treſpaſſes during Coverture, in which Caſes the Action muſt be joint againſt them both; (f) for if ſhe alone were ſued, it might be a Means of making the Huſband's Property liable, without giving him an Opportunity of defending himſelf.

(f) And therefore if a Man recovers againſt a Feme Covert as Sole, the Huſband may avoid it by Writ of *Error*, and may come in at any Time and plead it; but for this *vide* 17 Aſſ. pl. 17. Stile 254, 280. 2 Rol. Rep. 53. 22 H. 6. 31. and Tit. *Error* and *Abatement*.

For this *vide* Co. Lit. 531. Rol. Abr. 6. pl. 7. Yelv. 166. Noy 79. Leon. 312.

If Goods come to a Feme Covert by *Trover*, the Action may be brought againſt the Huſband and Wife, but the Converſion muſt be laid only in the Huſband, becauſe the Wife cannot convert Goods to her own Uſe; and the Action is brought againſt both, becauſe both were concerned in the Treſpaſs of taking them,

Cro. Car. 494, 254. Rol. Abr. 348. where it was laid *quod ad uſum proprium*, or *ad uſum ſuum converterunt*; for this muſt be intended to the Uſe of both, and not of the Huſband only. Vent. 33. In Debt upon a *Devaſtavit* againſt Baron and Feme Executrix, it ſhall not be laid *quod devaſtaverunt*; for a Feme Covert cannot waſte. 2 Lev. 145. 1 Vez. 24.

2 Lev. 63. And note, by the Reporter no Notice was taken that a Feme Covert may not make a Retainer or Contract; but perhaps the receiving and keeping the Servant without any Contract is a Treſpaſs of which a Feme Covert may be guilty. *

An Action on the Caſe was brought againſt Baron and Feme, for retaining and keeping the Servant of the Plaintiff, and Judgment accordingly.

* The Action was in Caſe, and it was alledged the Defendants, *Machinantes* to deprive the Plaintiff *retinuerant*, &c. yet *Qu.* If there is any other Caſe ſimilar to this in the Books, where it hath been adjudged the Action would lie againſt Huſband and Wife?

If

If a Leaſe for Life or Years be made to Baron and Feme, reſerving Rent, an Action of Debt for Rent Arrear may be brought againſt both, for this is for the Advantage of the Wife. 17 E. 4. 7. 2 H. 4. 19. b. 3 H. 4. 1. Rol. Abr.

348. (*a*) But an *Aſſumpſit* lies not againſt Baron and Feme on a Promiſe made by the Wife during Coverture; for *quoad* the Wife, it is void. Palm. 313. But if a Feme Covert takes up Goods from a Tradeſman, affirming herſelf to be a Feme Sole, *Quære* if this be not ſuch an injurious taking as will ſubject the Huſband and Wife to an Action, though neither can be charged on the Contract. †

† It would be a difficult Thing to frame the Action. If ſuch an Action would lie it muſt be in Nature of a Deceipt.

* If an Action be brought againſt the Huſband and Wife, and the Wife be arreſted, ſhe ſhall be diſcharged upon common Bail; for no Body can be ſuppoſed to undertake for a Wife who hath no Property of her own. *Page 308

For this *vide* Salk. 114. pl. 3. Comb. 355. 6 Mod. 17, 105. Barnes 59. 2 Barnes 74, 80, 167. 7 Mod. 10. 12 Mod. 444. 2 Stra. 1167, 1237, 1272, and Title *Bail*. How ſhe may reverſe an Outlawry *vide* Tit. *Outlawry*.

(M) Where a Wife ſhall be conſidered as a Feme Sole.

A Huſband who has adjured the Realm, or who is baniſhed, is thereby *civiliter mortuus*; and being diſabled to ſue or be ſued in Right of his Wife, ſhe muſt be conſidered as a Feme Sole; for it would be unreaſonable that ſhe ſhould be Remedileſs on her Part, and equally (*b*) hard on thoſe who had any Demands on her, that not being able to have any Redreſs from the Huſband, they ſhould not have any againſt her. Bro. Baron and Feme 66. Co. Lit. 133. a. Rol. Rep. 400. Moor 851. 3 Bulſt. 188.

Bulſt. 140. 2 Vern. 104. (*b*) In *Aſſumpſit* the Defendant proved that ſhe was married, and her Huſband alive in *France*; the Plaintiff had Judgment, upon which as a Verdict againſt Evidence ſhe moved for a new Trial, but it was denied; for it ſhall be intended that ſhe was divorced; beſides, the Huſband is an Alien *Enemy*; and in that Caſe, why is not his Wife chargeable as a Feme Sole? Salk. 116. pl. 15. *Doerly* v. *Dutcheſs of Mazarine*, Comb. 402. Salk. 116. pl. 5. 2 Salk. 646. pl. 11. Ld. Raym. 147. S. C. and *Quære* whether a Wife, who by Agreement lives ſeparate ‡ from her Huſband, and who has a ſeparate Maintenance; and alſo a Woman divorced *a menſa & thoro*, may not be ſued without the Huſband; and *vide* Vern. 326. how far Equity will interpoſe in Behalf of ſuch Creditors.

‡ It was determined in *C. P.* in the Caſe of *Hatchett and another* and Mrs. *Baddeley*, *H.* or *E. T.* 1776, that a Feme Covert, under ſuch Circumſtances cannot be ſued on a Contract.

By the Cuſtom of *London*, if a Feme Covert trades by herſelf in a Trade with which her Huſband does not intermeddle, ſhe may ſue and be ſued as a Feme Sole. 10 Mod. 6. But for this *vide* Title *Cuſtoms of London*, and Leon. 131. Lit. Rep. 31. Hetl. 9. 2 Brownl. 218. Mod. 26. 10 Mod. 33, 70. 11 Mod. 253. pl. 3. 12 Mod. 603. Gilb. Eq. Rep. 83. Pre. Chan. 24, 328. 2 Vern. 104. 3 Will. Rep. 144. pl. 31. 371 pl. 110, 451, 496. pl. 158. Show. 183.

A Woman, whoſe Huſband had left her about twelve Years before, had carried on a Trade in her own Name as a Widow, and gave Receipts in her own Name; being ſued for Debt contracted in the Courſe of her Trade, gave Coverture in Evidence, and gave Evidence of her Huſband's having been 12 Mod. 603.

been lately alive in *Ireland*; and Lord Ch. Juſt. *Holt* directed the Jury to find for the Defendant; and ſo they did †.

†In caſe the Husband is tranſported, the Wife may be ſued as a Feme Sole, for any Debt contracted by her after the Tranſportation.

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* BASTARDY.

In antient Days Baſtardy was ſo diſgraceful, that to retain a Baſtard in a Man's Houſe was a Reflection, and the Stain and Reproach of the Parents Crime dwelt always upon the Iſſue, ſo that he could not be admitted to a Feudal Service; and therefore when the Biſhops requeſted that our Law ſhould be changed in the Particular of Baſtard *Eignes*, the Statute ſays that all the Barons and Earls anſwered *una voce noluimus leges Angliæ mutare.* Merton 9. 2 Inſt. 93. *(a)* He is *quaſi nullius filius*, and can be Heir to no Man. *Doct. & Stud. Dial.* 1. c. 7. Inſt. 143. But though he cannot inherit any Anceſtor, yet when he hath gotten a Name of Reputation, he may purchaſe by it; for all Surnames were originally acquired by Reputation. *George Shelly* conveyed Lands to the Uſe of himſelf, the Remainder to *George Shelly* his Son; whereas in Truth *George* was born of one *B.* in Matrimony of one *C.* yet was reputed the Son of *George*, and educated by him; though the Boy was but ſix Years old, it was ruled that he ſhould take the Remainder; for having got by Reputation the Name of *George Shelly*, theſe Words are a certain Deſignation of the Perſon to take the Remainder. But if a Remainder be limited to the eldeſt Iſſue of *J. S.* whether Legitimate or Illegitimate, *J. S.* hath Iſſue a Baſtard, he ſhall not take this Remainder: for it is not veſted in *J. S.* as it was in the other Caſe, but is in Contingency, and the certain Time is not defined when this Contingency ſhall happen; for the Baſtard, at his Birth does not acquire the Reputation of being the Iſſue of *J. S.* and ſince the Baſtard, when firſt in Being, cannot take by Virtue of this Limitation, he can never take it; for he cannot be underſtood to be the Perſon deſigned and marked out by theſe Words, if after his Birth it depends on the Uncertainty of popular Reputation, whether he ſhould take the Remainder or not, and ſuch a Deſignation of the Perſon as contains no Certainty in itſelf, or no Relation to any other certain Matter that may reduce it to Certainty, is a void Limitation. Co. Lit. 3. b. 6 Co. 65. But where a Remainder is limited to the eldeſt Son of *Jane S.* whether Legitimate ot Illegitimate, and ſhe hath Iſſue a Baſtard, he ſhall take this Remainder, becauſe he acquires the Denomination of her Iſſue, by being born of her Body; and ſo it was never uncertain who was deſigned by this Remainder. Noy 33. If Parents are married, and afterwards divorced, this gives the Iſſue the Reputation of Children; and ſo doth a ſubſequent Marriage of the Parents. 6 Co. 65. Hughes's Abr. 363. If the Mother diſpoſe of all her Lands holden in Chivalry, to her Baſtard Son, ſhe is not within the 32 *H.* 8. c. 1. which forbids the Owners to diſpoſe of above two Thirds of ſuch Land for Preferment of Children; for Children in any Law muſt be intended ſuch as are lawfully begotten. Dyer 345. Co. Lit. 123. b. 2 Rol. Abr. 785. If a Man, in Conſideration of natural Affection and Love, covenants to ſtand ſeiſed to the Uſe of a Baſtard, this is not good; for he is not *de ſanguine patris*; but it is ſaid that a Woman may give Lands in Frank-marriage with her Baſtard, becauſe he is of the Blood of the Mother; but he hath no Father, but from Reputation only. Dyer 374. And. 79. 6 Co. 77. Noy 35. A Court of Equity will not ſupply the want of a Surrender of a Copynold Eſtate in Favour of a Baſtard, as it will for a Legitimate Child. Preced. Chan. 475.

ALL well regulated Governments have laid down and ſettled certain Rules of Propagation, as neceſſary to the very being of human Society. Hence the Solemnity of Marriage was eſtabliſhed, not only as it prevents Lewdneſs, but as a Regulation without which there could be no Diſtinction of Families, and conſequently no Encouragement for Induſtry, or Foundation for acquiring Riches; the Children therefore that are born in theſe Societies, and are to enjoy any Privileges by the Laws, muſt be ſuch as are born according to their Rules of Copulation; for it is abſurd that the Laws ſhould give Sanction and Privilege to Things done contrary to the Law, ſince that would take away the Diſtinction of Right and Wrong, Lawful and Unlawful; and therefore Baſtards by our Law lie under ſeveral *(a)* Diſabilities.

Under

BASTARDY.

Under this Head we ſhall conſider,

(A) Who are Baſtards. 310.
(B) Where Baſtardy is to be tried, and the Rules concerning ſuch Trial; and herein of general and ſpecial Baſtardy. 312.
* (C) Of Baſtard Eigne and Mulier Puiſne. 315. *Page 310
(D) How Baſtards are to be provided for; and herein of the Duty and Power of Juſtices of the Peace. 317.
(E) Murdering Baſtards. 320.

(A) Who are Baſtards.

ALL Perſons born out of lawful Matrimony are Baſtards by the Common Law, but by the Civil Law, thoſe that are born before Marriage are Legitimated by a ſubſequent Marriage; for by the Civil Law, all Perſons adopted into a Man's Family were inheritable; and the Canoniſts have allowed of this Notion, becauſe the ſubſequent Marriage, they ſay, takes away the preceding Guilt, and ſhews a Conſent from the Beginning. This Difference between the Civil Law may likewiſe be aſcribed to the Power which the Father, by the Roman Law, had over his Children, becauſe he was the Author of their Being, and had the Care of their Education; if therefore a Child ſhould not be Legitimated, by a ſubſequent Marriage, the Parent would not have had him under his Power; for no Man had a Power over the *Vulgo Quæſiti*; and conſequently the Father would not have commanded that to which he gave Being; nor would the Child have had the Benefit of the Parent's Education; which would have cut a Member from the Commonwealth. 47 E. 3. 14. b. 11 H. 4. 81. Bract. lib. 5. fol. 416. Rol. Abr. 624.

All Perſons born within Marriage are Legitimate, unleſs there is an apparent Impoſſibility that they ſhould be generated by the Huſband; for there is the ſtrongeſt Preſumption that can be, that they are Legitimate, becauſe the Huſband hath the Power and Dominion over his Wife, and therefore may by the Law keep her by Force within the Bounds of Duty; to which the Canoniſts have added a fanciful Reaſon, to wit, the Huſband, having the Ownerſhip of his Wife, hath the Property of the Fruit of her Body, though planted by another; *Quicunque ſemen appoſuit mariti acquiritur quia eſt Dominus ventris.* Now the Preſumption thus being that it is the Huſband's Child, it muſt be deſtroyed by contrary Proof; * and this Negative, that it is not the Huſband's Child, is capable of no other Proof than this only, that it muſt be ſhewn impoſſible it ſhould be the Huſband's Child; if therefore the Huſband be proved Caſtrate, the Iſſue are Baſtards * See *poſt* 311. Caſe 1. Rol. Abr. 358.

If the Huſband be under the Age of fourteen, the Iſſue are Baſtards; for before the Age of Puberty, Generation is naturally impoſſible. 18 H. 6. 31, 34. 29 Aſſ. 54.

Bro. Baſtardy 36. Co. Lit. 244. Rol. Abr. 359.

If the Huſband be not within the Four Seas during the Time that paſſes between the Conception and Birth of the Child, it is a Baſtard. This was ſettled Rol. Abr. 358. Co. Lit. 244.

Bract. 239. If the Husband be in *Ireland* during the Time the Wife goes with Child,

settled when the King's Dominions extended to the four Seas only, for to pass and repass in the King's Dominions was possible, without any Knowledge or Proof; but to pass out of another's Dominions into the King's without some Knowledge or Proof of the Matter, was supposed by the Law not possible; for there is no such Passage in a Realm well governed without Examination.

the Issue is no Bastard, because the Husband was within the King's Dominions. Rol. Abr. 358. *Quære.* But see Ld. Raym. 395, 396. Salk. 122. pl. 5. 2 Salk. 483. pl. 38. 2 Stra. 925, 940. 1076. 2 Sess. Cas. 175. Andr. 8, 9. *

* See the Note on the next Case.

*Page 311 Carth. 469. Salk. 122. pl. 5. 5 Mod. 419. S. C. *Note*; In Trials of Bastardy at this Day, if the Jury find that the Husband

* An Order of two Justices, which was affirmed on Appeal, adjudged *Z. S.* the reputed Father of a Bastard Child; the Order recited specially, That *Mary*, the Wife of *Jonathan Spence*, Mariner, was delivered of a Male Bastard Child, and that it appeared to them upon Oath of, &c. that *Jonathan Spence*, her Husband, was in the King's Service at *Cadiz* in *Spain*, and not within the King of *England*'s Dominions at the Time when the said Child was begotten or born; and because it did not appear that the Husband was absent all the Time, as well as at the Time of Conception and the Child's being born, the Order was quashed.

had not Access, though the Husband and Wife lived in *England*, the Child is a Bastard; but this Proof must be clear, otherways Access will be presumed in Favour of Legitimation. *Vide* Salk. 123. pl. 7.

Rol. Abr. 358, 359, 360.

If the Marriage is made null by Divorce, the Issue is illegitimate; as if the Parties be divorced for Pre-contract, Consanguinity, Affinity or Frigidity; for where the Marriage is nullified, it is a Copulation without Marriage, and consequently the Issue are Bastards; and it is the same by our Law, whether they have Notice or not of the Consanguinity, because we look no further than the Dissolution.

Rol. Abr. 357.

If a Man marry his Cousin within the Degrees, or his Sister, the Issue got between them is not a Bastard till there be a Divorce; for though such a Marriage be unlawful, yet it remains good till Sentence of Divorce be pronounced, and consequently the Issue must be esteemed legitimate till such a Dissolution.

5 Co. 98. b. *Burie*'s Case. 2 Leon. 169. S. C. Jenk. Rep. 268. Noy 72.

If a Man be divorced from one Woman *propter perpetuam generandi impotentiam*, and then marry another, and have Issue by the second Marriage, which continues without Divorce, the Issue are lawful; for a Man may be *habilis & inhabilis diversis Temporibus*, and the second Marriage is not avoided by any Divorce, and therefore stands good in Law.

Moor 225. pl. 366. S. C. by the Name of *Morris* and *Webber*.

2 Rol. Abr. 358. *Foxcroft*'s Case.

A Bed-rid Person marries a Woman that is pregnant in his Chamber, the Woman is delivered twelve Weeks after; the Child adjudged a Bastard, for the apparent Impossibility of his being the Father of it.

Rol. Abr. 358.

If a Woman marry *grossement ensient* it is the Child of the Husband, for when they testify their Consent by a publick Marriage before the Birth of the Child, it is a publick Acknowledgment that the Child is his, for at that Time the Child is one with the Mother, and therefore in taking the Mother he takes the Child with her.

7 Co. 41. *Kenn*'s Case. Rol. Abr. 361. Cro. Jac. 186 4 Co. 29.

If a Man be married within the Age of Consent, and when he comes to that Age he is divorced by reason of his Dissent from the Marriage, and then he marries again, and hath Issue, and dies; it cannot be averred that he cohabited with his first Wife to avoid the Divorce and disannul the second Marriage, and bastardize the Issue, for the Ecclesiastical Courts are proper Judges

Judges in this Caſe; and when by Sentence they have declared the Marriage void, it cannot belong to the Temporal Courts to inquire into and ſet aſide their Sentence, for that is to take away their Jurisdiction; the ſame Law if the firſt Wife had been divorced *cauſa Præcontractus*. Godolph. 484.

If there be a Separation for Adultery *a menſa & thoro*, the Iſſue born afterwards are preſumed *prima facie* not to be the Huſband's, unleſs it appear upon Proof that the Huſband after ſuch Separation did cohabit with his Wife. 11 H. 7. 27. a. Rol. Abr. 359. 7 Co. 42. Salk. 123. pl. 7.

If *A.* takes *B.* to Wife, and has Iſſue by her, and they are afterwards divorced, becauſe they were within the Age of Conſent at the Time of Marriage, and afterwards diſagreed; and then *A.* takes *D.* to Wife, by whom he hath Iſſue and dies; upon the Suit of the Iſſue of *B.* the Eccleſiaſtical Commiſſioners, upon a Commiſſion directed to them, cannot inquire into the Marriage between *A.* and *D.* becauſe they are dead; for * though a Sentence of Divorce may be repealed after the Death of the Parties by Suit in the Spiritual Courts, yet no Sentence of Divorce can paſs there after the Death of the Parties; for a Divorce in the Eccleſiaſtical Courts, after the Death of the Parties, can be only made to baſtardize the Iſſue of that Marriage, which being a Thing that concerns the Inheritance, is properly cognizable in the Temporal Courts; therefore a Prohibition ſhall be granted to ſtop their Proceeding upon it. Rol. Abr. 360. 7 Co. 43. b. *Page 312

As to the Legitimation of Children born after the Death of the Huſband, it is agreed, That the uſual Time of Birth is nine Solar Months and ten Days; but it may be haſtened or prolonged by Accident; as by hard Uſage, want of Suſtenance, &c. becauſe the Nouriſhment of the Child in the Womb depends on that of the Mother; ſo that a Child hath been allowed legitimate nine Months and twenty Days after the Death of the Father; but when the Child was born eleven Months after the Death of the Huſband, and it was proved the Father could not enjoy his Wife within a Month before his Death, it was adjudged a Baſtard. Palm. 9. Rol. Abr. 356. Godolph. 281. Stile 277.

A lewd Woman after her Huſband's Death, married her Adulterer, and within ſix Months and a Day after her firſt Huſband's Death had a Child; it was adjudged the firſt Huſband's becauſe he had the Dominion of the Woman at the Time of her Conception. Palm. 9. Co. Lit. 8.

A Wife marries immediately after her Huſband's Death, and hath a Child nine Months and eleven Days after the Death of her firſt Huſband; it was adjudged the ſecond Huſband's, becauſe it was born one Day after the uſual Time, and the uſual Time is the only Meaſure to diſcern between them; but if it be born at the End of nine Months and ten Days, the Father is doubtful, and ſome have ſaid, that the Child might chuſe his Father. 21 E. 3. 39. Co. Lit. 8. a. Bro. 97. Rol. Abr. 357. But to prevent this doubtfulneſs in Heirs, and to hinder the Wife from putting falſe Children upon her deceaſed Huſband, the Law hath provided the Writ *de ventre inſpiciendo* for the Huſband's Heir, and if the Wife be found with Child, or ſuſpected to be ſo, ſhe muſt be removed to a Caſtle, and there ſafely kept till her Delivery; and by this Writ the Heir may take her away from her ſecond Huſband: but it lies not for the Heir apparent, who hath no Intereſt in the Eſtate in the Life of the Anceſtor. Co. Lit. 8. Rol. Abr. 357. This Power of removing the Reliſt of the Anceſtor to a Caſtle, in caſe ſhe really is, or is ſuſpected to be with Child, ſeems only to be uſed where the Woman continues unmarried; for if ſhe takes another Huſband, and the Sheriff returns that he cauſed her to be ſearched by ſuch Women, and found her to be *enſient*, the Courſe ſeems to be this, *viz.* for the Huſband to enter into Recognizance that ſhe ſhall not remove from the Houſe where they then inhabit; after which a Writ is to be awarded to the Sheriff, to cauſe her to be viewed every Day till her Delivery, by two at leaſt of the ſaid Women returned by him; and that three or more of them ſhould be preſent with her at her Delivery. Cro. Jac. 685. Mo. 523. Co. Lit. 8. Cro. Eliz. 566. Reg. 227.

(B) Where

(B) Where Baſtardy is to be tried, and the Rules concerning ſuch Trial; and herein of general and ſpecial Baſtardy.

Rol. Abr. 361. *Bro.* Tit. *Baſtardy* 97.

BAſtardy, in relation to the ſeveral Manners of its Trial, is diſtinguiſhed into general and ſpecial Baſtardy. General Baſtardy is the Baſtardy tried by the Biſhop, which in its Notion contains two Things, 1. It ſhould not be a Baſtard made legitimate by a ſubſequent Marriage, 2dly, That it ſhould be a Point collateral to the original Cauſe of Action.

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That where general Baſtardy is pleaded, the Court, though the Parties conclude to the Country, muſt direct a Writ to the Biſhop. Raſt. Ent. 105. The Iſſue on general Baſtardy runs in this Manner: *Prædict' J. R. dicit quod J. S. eſt Baſtardus & natus fuit apud C. in Com' præd' in Diœceſ. de W. & hoc paratus eſt verificare vis & modis quibus convenit ac prout curia Regis hic conſideraverit & prædict' J. S. dicit quod ipſe objectione prædict' præcludi non debet quia dicit quod ipſe eſt legitimus & non Baſtardus & hoc paratus eſt verificare ubi & quomodo & prout curia Regis hic conſiderabit & prædict' J. R. ſimiliter.* Raſt. Ent. 29, 279, 289.

Rol. Abr. 361.

Formerly Baſtards had a Way in ſuch Iſſues to trick themſelves into Legitimation, for they uſed to bring feigned Actions, and get ſuborned Witneſſes before the Biſhop to prove their Legitimation, and then got the Certificate returned of Record, and after that their Legitimation could never be conteſted; for being returned of Record, as a Point adjudged by its proper Judges, and remaining among the Memorials of the Court, all Perſons were concluded by it; but this created great Inconveniencies, as it is taken Notice of in the Preamble of the 9 *H.* 6. *cap.* 11. in the Caſe of ſeveral Perſons of Quality; for the Evidence of the contrary Parties concerned were never heard at the Trial, and yet their Intereſt was concluded; to remedy this Inconvenience without altering the Rule of Law, it was enacted, That before any Writ to the Biſhop there ſhould be a Proclamation made in the ſame Court, and after that the Iſſue ſhould be certified into Chancery, where Proclamation ſhould be made once in every Month for three Months, and then the Chancellor ſhould certify it to the Court where the Plea depends, and afterwards it ſhall be again proclaimed in the ſame Court, that all that are concerned may go to the Ordinary to make their Allegations; and without theſe Circumſtances, any Writ granted to the Ordinary, and all Proceedings thereupon, ſhall be utterly void.

Rol. Abr. 361.

If the Ordinary certify or try Baſtardy without a Writ from the King's Temporal Courts, it is void; for the Spiritual Juriſdiction within theſe Kingdoms is derived from the King, and therefore it muſt be exerciſed in the Manner the King hath appointed; for it would be injurious if they ſhould declare Legitimation where the Rights of Inheritance are ſo nearly concerned, without an apparent Neceſſity.

Rol. Abr. 362.

The Certificate muſt be under the Seal of the Ordinary, and not under the Seal of the Commiſſary only, for the Command is to the Biſhop himſelf to certify, and therefore the Execution of the Command muſt appear to be by the Biſhop in proper Perſon.

Rol. Abr. 362.

If a Man be certified Baſtard, this binds perpetually, though the Perſon ſo adjudged a Baſtard is not Party to the Action, for all Perſons are (*a*) eſtopped to ſpeak againſt the Memorial of any Judicatory; becauſe the Act of the Publick Judicatory under which any Perſon lives, is his own Act; and were they not thus bound, there might be Contradiction in Certificates.

(*a*) But in the Trial of Special Baſtardy no Perſon is bound by a Verdict, unleſs he was Party to the original Suit; for no Man can be bound by a Judicatory from whence there lies an Appeal, unleſs he be capable of that Appeal; for it would be a Contradiction, where there is an Appeal ſuppoſed, to conclude a Perſon that is incapable of bringing his Appeal; as all Perſons who are not Parties to the Suit are; and therefore on a Certificate, which is the higheſt Act of that Sort of Judgment, every Stranger is concluded, but not by Verdict, becauſe an Attaint lies for him that is Party to the original Action. Rol. Abr. 362.

If

If a Man be certified Baſtard, that doth not bind a Stranger till returned of Record, becauſe it is no Judicial Act till recorded in the Place appointed to record ſuch Tranſactions: nor doth it bind the Party to the Action till Judgment thereon: becauſe if he avoid the Action, he avoids all the Conſequences of the Action; and therefore if the Defendant be certified Baſtard by the Ordinary, yet if the Plaintiff be nonſuit, they cannot go on to Trial, and ſo the Biſhop's Certificate never appears of Record, and therefore is not binding. Rol. Abr. 362. If the Tenant be certified Baſtard, and die, though the Writ abate, yet the Certification ſtands in full Force.

If a Man be certified *Mulier*, ‡ no Man is eſtopped to Baſtardize him, for though he may be a *Mulier* by the Spiritual Law, yet he may be a Baſtard by our Law; and therefore any Man, notwithſtanding the Certificate, may plead the Iſſue of Special Baſtardy. Rol. Abr. 362.

‡ For a Definition of the Term, ſee *poſt* (C. 315.)

* When a Writ is awarded to the Biſhop to certify Baſtardy, Day is given in Court to attend ſuch Certification, otherwiſe the Parties would be without Day in Court, in waiting for the Biſhop's Certificate, and this would create a Diſcontinuance, and therefore the Parties muſt attend the Day, and not expect that the Proceedings ſhould be revived by Reſummons; though ſome have held the contrary, becauſe the Biſhop is Judge, and ſo not held to a certain Day. *Page 314 Bro. 76. 4 E. 3. 39. Raſt. 289.

Ne unques accouple in Loyal Matrimony is no Plea but in Dower; and in Appeal for to Baſtardize any Perſon, Baſtardy General or Special muſt be pleaded; for the Matrimony is there to be queſtioned, where there is a Claim under the Relation of Wife, but there is more than Marriage in Queſtion in the Point of Legitimation. 11 H. 4. 78. Bro. Baſtardy 97. a.

The Plea of Baſtardy may be tried by the Biſhop in Actions Perſonal, as well as in Real. Rol. Abr. 361.

If there be no Biſhop, the Certificate muſt be made by the Guardian of the Spiritualties, for he is to ſuſtain the Office in the mean Time. Bro. 97. Bro. 98.

In an Aſſize the Tenant makes Bar as Heir, the Plaintiff ſays the Tenant is a Baſtard; the Tenant ſays, he is a *Mulier*, born at *London*; and prays a Writ to the Biſhop of *London*; the Plaintiff ſays, that he was born at *L.* in *Surry* (the County alſo where the Land lies) and prays that it may be tried by Aſſize; but this could not be granted, becauſe here Baſtardy was particularly pleaded, and not left at large upon the Iſſue; but the Certificate in this Caſe was directed to the Biſhop of *Wincheſter*, within whoſe Juriſdiction *Surry* is, becauſe where the Place of Birth is in Diſpute, the Trial muſt be in the Place where the Land lies; for where the Place of Birth is controverted, it is uncertain, and ſo is the ſame as if not alledged. 28 E. 3. 27. Bro. 97. In *Mortdancestor* the Tenant pleads Baſtardy in the Demandant; this ſhall be certified by the Biſhop of the Dioceſe where the Writ is brought, though the Demandant ſays he is a *Mulier* born in another Dioceſe; for he may bring his Proofs and Evidence to the Dioceſe where the Writ is brought. Bro. Baſtardy 97.

In an Aſſize the Biſhop certified directly, that the Defendant was a Baſtard, and it was indorſed on the Certificate, that *A.* the Mother of the Defendant, left her Huſband for ſeven Years, in which Time the Defendant was begot by one *B.* a Prieſt, and ſo a Baſtard; but becauſe the Defendant was made a Baſtard in the Certificate, they gave no Heed to the Indorſement, as a Thing foreign and immaterial. Bro. Baſtardy 98.

Special Baſtardy, which is always tried by a Jury in the Temporal Courts, is twofold: 1ſt, Where the Baſtardy is the Giſt of the Action, and the material Part of the Iſſue. (*a*) 2dly, Where thoſe are Baſtards by the Common

(*a*) The Iſſue is in this Manner, *Et Prædict' P. dicit quod Prædict' W. actionem verſus eum habere non debet quia dicit quod ubi Prædict' W. per breve ſuum Prædict' præſupponit & aſſerit ſe fuiſſe filium & hæredem Prædict' T. idem W. natus fuit extra omnia ſponſalia*

mon Law that are *Muliers* by the Spiritual Law, and such are those that are born before Marriage, whose Parents afterwards intermarry.

Brownl. 1. Hob. 179. Godolp. Eccl. Law 479. Co. Ent. 29. *Page 315

If a Man receives any Temporal Damage by being called a Bastard, and brings his Action in the Temporal Courts, and the Defendant justifies that the Plaintiff is a Bastard, this must be tried at Common Law, and not by Writ to the Bishop; for otherwise you suppose an Action brought in a Court which hath not a Capacity to try the Cause of Action.

Bro. Bastardy 97.

* If it be found by an Assize taken at large that a Man is a Bastard the Temporal Courts are Judges of it, for the Jury cannot be estopped to speak Truth, which may fall within their own Knowledge; and what they find becomes the Record of the Temporal Courts, and so within their Conuzance.

Fitz. Abr 12. 2 Inst. 400.

In an Assize of *Mortdancester*, one of the three Points inquirable is, Whether the Demandant be Heir to *J. S.* the Ancestor, in which Case, if the Tenant pleads he is ready to hear the Recognizance of the Assise, (*& hoc paratus est per assisam inquirere*) he cannot give in Evidence that the Demandant is a Bastard, but he ought to have pleaded the same; for if this were given in Evidence, and not pleaded, the Spiritual Court would be ousted of their Jurisdiction.

(C) Of Bastard Eigne, and Mulier Puisne.

Lit Sect. 399. Co. Lit. 245. *Vide supra* Letter (B) 312, &c.

A Man who hath Issue a Son by a Woman before Marriage, and afterwards marries the same Woman, and hath Issue a second Son born after the Marriage; the first of these is termed in Law a *Bastard Eigne*, and the second a *Mulier*; by the Common Law, as hath been said, such *Bastard Eigne* is as incapable of inheriting, as if the Father and Mother had never married; but yet there is one Case in which his Issue was let into the Succession, and that was by the Consent of the Lord and Person legitimate: as if upon the Death of the Father the *Bastard Eigne* enters, and the *Mulier* during his whole Life never disturbs him, he cannot upon the Death of the *Bastard Eigne* enter upon his Issue.

7 Co. 44. Jenk. Rep. 268. Brownl. 42. Co. Lit. 33. a. Lit Sect. 399. Co. Lit. 245.

No Man can Bastardize another after his Death, that was a *Mulier* * by the Laws of Holy Church, and who carried the Reputation of Legitimate during his Life; for a Man must be Bastardized by the Rules of the Civil or Common Law; by the Rules of the Civil Law, this Person is by Supposition Legitimate; and if the Common Law be made the Judge, he cannot be Bastardized; for it is a Rule of Common Law, that a Personal

* The *Mulier* here mentioned is, a Bastard, whose Father and Mother marry after his Birth.

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sponsalia & hoc paratus est verificare unde Petit Judicium si Præd' W. ut filius & hæres Prædict' T. sit alterius cujuscunque, &c. versus eum habere debeat. Et Prædict' W. dicit quod Prædict' T. Patet suus habuit Quandam uxorem sibi desponsatam A. nomine de qua ipse natus fuit infra sponsalia inter ipsum T. & A. celebrat' & verificat' unde Petit Judicium. So that when the Party avers the Birth within Espousals by Way of Reply, he doth not offer an Issue, because that were to take an Issue too much at large; but it is necessary to set forth the Manner of the Birth, *viz.* Of whom he was born, that they may go to Issue upon a particular Matter; otherwise, he that takes this Plea would be put on the Proof of an universal Negative, which cannot be proved; and then the Party that objected the Defect must offer an Issue in this Manner: *Et Prædict' P. dicit ut prius quod Prædict' W. natus fuit extra omnia Sponsalia & non infra Sponsalia ut Prædict' W. superius allegavit & de hoc ponit se super Patriam & Prædict' W. similiter, ideo, &c.* Rast. Ent. 387. Dyer 97. pl. 51.

Defect

Deſcent dies with the Perſon, and cannot after his Death be (a) objected to his Succeſſor that repreſents him; and this Rule of Law was taken from the Humanity of the Antients, which would not allow the Calumny of the Dead; as alſo from an important Reaſon of Convenience, for Pedigrees are often derived through ſeveral Perſons, concerning whom there remains little Knowledge or Remembrance of any Thing, but only of their Being; and therefore it were an eaſy Matter to throw on them the Aſperſion of Baſtardy by any forged Evidence, which cannot be confronted by oppoſite Proof; and ſo it is fit to limit a Time in which all Proofs of Baſtardy are to be diſallowed.

(a) Though this ſeems to be the Doctrine of the old Books, yet there is this modern Caſe; An Ejectment was brought by one *Pride* againſt the Earls of *Bath* and *Montague*; *Pride* made Title as Heir to *George* Duke of *Albemarle*, proving himſelf the Son of one who was Brother to the Duke, and that the Duke died without Iſſue; the Defendant gave Evidence that Duke *George* had Iſſue Duke *Chriſtopher*, who conveyed to him; Plaintiff gave Evidence that Duke *Chriſtopher* was a Baſtard, begotten of ſuch a Woman, who at the Time of her Marriage with the ſaid *George* Duke of *Albemarle*, was married to another Man, who was then, and yet living: Upon which it was objected, That ſince Duke *George* and this Woman lived together as Man and Wife, and were now dead, the Plaintiff could not be admitted to Baſtardize the Iſſue, who was dead alſo; and who, during his whole Life, was reputed and taken to be the legitimate Son of the Duke, and ſo ſtyled by the Duke himſelf in his Deed of Settlement, and in his Will, his Son and Heir; *& quod juſtum non eſt aliquem poſt mortem facere Baſtardum.* The Court held this true of ſuch a Baſtard as is meant by *Littleton*, in his Caſe of *Baſtard Eigne*, and *Mulier Puiſne*, *i. e.* ſuch a Baſtard as is born before the Eſpouſals of a Father and Mother; who may afterwards marry; and ſaid, the Rule extended only to that Caſe, Salk. 120. *Pride v. Earls of Bath, &c. 7 W. & M.* 3 Lev. 410. S. C. who tells us, That though the Evidence was admitted by *Holt*, and *Gil. Eyre*, who were only in Court, the Jury were not ſatisfied with it, and gave a Verdict for the Earl of *Bath*.

* To exclude the *Mulier* from the Inheritance, there muſt not only be an uninterrupted Poſſeſſion of the *Baſtard Eigne* during his Life, but a Deſcent to his Iſſue. *Page 316 Co. Lit. 244. Rol. Abr. 624.

If the *Baſtard Eigne* die leaving Iſſue *in Ventra ſa Mere*, and the *Mulier* enter, and then the Son is born, the Son of the *Baſtard Eigne* is for ever excluded, becauſe there was no Deſcent; and ſo our Law in this diſagrees with the Civil Law, which, for the Benefit of the Infant, reputes a Child in its Mother's Womb in the ſame Condition as if it were born. Co. Lit. 244. Hughes 365.

If the *Baſtard Eigne* enter, and die without Iſſue, yet the Lord by Eſcheat cannot claim it againſt the *Mulier*; for there is no Deſcent caſt to extinguiſh his Right. Co. Lit. 244.

If the *Mulier* enters into the Land after the Deceaſe of the Baſtard, before the Heir of the *Baſtard Eigne*, yet he is barred; for the Land is caſt upon the Iſſue of the Baſtard immediately after his Death, and the Deſcent to him is made without any Entry, and conſequently he is within the Benefit of the Rule. Co. Lit. 244.

If the *Mulier* be an Infant during the Poſſeſſion of the *Baſtard Eigne*, yet he is barred by the Deſcent; for though no Laches can be imputed to an Infant, becauſe, not being of the Age of Conſent, his Permiſſion cannot be taken for a Conſent; yet in ſuch Caſes where Time is limited by the Law for Pleas and Actions, Infants are included, unleſs ſpecially excepted, for here their Permiſſion is taken for a Conſent, becauſe they are ſuppoſed to conſent to the eſtabliſhed Law, to which they are obliged for Protection during Minority; and the Law hath not thought fit to except, becauſe it is a public Miſchief in a very tender Point, for it might be any Man's Caſe, to ſuffer by the Baſtard of an Anceſtor, and the Law hath given the Infants Guardians to plead by; but it cannot revive the Evidence of Legitimation, which ſo eaſily periſhes with the Life of the Party. Co. Lit. 244. 8 Co. 101. Sir *Richard Pexhall's* Caſe. Plowd. 374.

If a Man hath Iſſue a Son *Baſtard Eigne*, and a Daughter, being *Mulier Puiſne*, and the Daughter is married, the Father dies, and the Son enters, and dies ſeiſed; this ſhall bar the *Mulier*, for ſhe might have claimed by her Huſband; the ſame Law if the *Baſtard Eigne* enters, and enjoys peaceably Co. Lit. 244. 8 Co. 101.

ably during his Life, while the *Mulier* is impriſoned, or beyond Sea, or of nonſane Memory; for the conſtant and quiet Poſſeſſion of the *Baſtard Eigne*, together with the Character he had, during Life, of being Legitimate, ſhall, in a Caſe of ſuch nice Conſequence, outweigh, at a Trial, any Evidence that can be brought to the contrary.

Co. Lit. 244. 8 Co. 101. The Deſcent of Services, Rents, or Reverſions expectant upon Eſtates-Tail, or for Life, whereon Rents are reſerved, ſhall bind the *Mulier*; for the Enjoyment of theſe do equally ſuppoſe the Character of Legitimate, as the Poſſeſſion of any Corporal Rights; but ſuch a Deſcent would not drive the Party that hath Right to an Action; for it is a Contradiction in Terms, that a Man ſhould be diſpoſſed of a mere Right.

Co. Lit. 244. 8 Co. 101. If the *Baſtard Eigne* die ſeiſed, and the Son endow the Wife, yet the Deſcent takes away the Right of the *Mulier*; the *Baſtard Eigne's* entering into Religion is ſuch a Deſcent as takes away the Right of the *Mulier*.

29 E. 3. 38. b. Hughes 366. Rol. Abr. 625. Tenant in Tail, the Remainder in Tail, the Remainder in Fee; Tenant in Tail hath Iſſue *Baſtard Eigne* and *Mulier Puiſne*, and dies; the Baſtard entereth, and continueth his Poſſeſſion, and hath Iſſue and dies; the Iſſue enters; the *Mulier* dies; he in Remainder ſhall have a *Formedon* againſt the Iſſue of the Baſtard, and the Continuance of the Poſſeſſion of the Baſtard ſhall not prejudice him; for the Statute *Weſtm.* 2. ſays, That the Will of the Donor manifeſtly expreſſed in his Gift muſt be obſerved; now the Baſtard cannot bring himſelf within the Intention of the Donor, for he is neither the Heir, nor a Perſon begotten by a Tenant in Tail, ſince, in Law, he is the Son of no Man, and conſequently the *Page 317 * expreſs Words of the Statute exclude him from the Inheritance, which ſets aſide the Rules of Common Law in this Caſe.

Co. Lit. 244. If a Man hath Iſſue *Baſtard Eigne* and *Mulier Puiſne*, the Baſtard in the Life of the Father dies, leaving Iſſue, and then the Father dies, and the Son of the Baſtard enters and dies ſeiſed, and it deſcends to his Iſſue, the Deſcent ſhall bind the *Mulier*, for if otherwiſe, it would be baſtardizing the Anceſtor after one Deſcent, which is contrary to the Rule.

Co. Lit. 244. If *Baſtard Eigne* and *Mulier Puiſne* Daughters enter and occupy in Coparceny, the Law will not ſuppoſe the Whole in the *Mulier*, but by a more eaſy Conſtruction preſume, that the *Mulier* admits the other into the Inheritance; ſo if there be *Baſtard Eigne* and *Mulier Puiſne*, and the *Mulier* enters to hunt or hawk, this doth not diſturb the Baſtard's Poſſeſſion, for a Man's Intention does always govern and denominate his Actions; and in this Caſe he did not enter to claim.

Co. Lit. 245. If the *Baſtard Eigne* enters after the Deceaſe of his Father, and the King ſeiſes the Land for a Contempt (whereby the Profits only are taken) without Cauſe, and the Baſtard dies, and the Iſſue petitions, and is reſtored, he ſhall hold it againſt the *Mulier*; for when the King ſeizes Land without Cauſe, he ſhall only hold it as a Subſtitute to the Poſſeſſor.

Co. Lit. 244. 20 E. 3. Voucher 129. Hughes 365. The Baſtard being impleaded ſhall have his Age, for the dilatory Plea muſt be determined before the Pleas in Chief can come on; ſo that the Plea of Infancy will ſtay the Suit before it can be inquired whether he is or is not a Baſtard; alſo he ſhall be vouched as Heir to the Father, for *qui ſentit Commodum ſentire debet & onus.*

(D) How Baſtards are to be provided for; and herein of the Duty and Power of Juſtices of the Peace.

BY the 18 *Eliz. cap.* 3. it is enacted, " That *(a)* two Juſtices of the " Peace, whereof one to be of the *(b) Quorum*, in or next unto the " Limits where the Pariſh Church is, within which Pariſh the Baſtard " ſhall be *(c)* born, upon *(d)* Examination of the Cauſe and Circum- " ſtance, ſhall and may by their Diſcretion take Order, as well for the " * Puniſhment of the Mother, and *(e)* reputed Father of ſuch Baſtard " Child, as alſo for the better Relief of every ſuch Pariſh, in Part or in " all; and ſhall and may likewiſe by like Diſcretion take *(f)* Order for

8 Mod. 4. Stra. 503. Seſ. Caſ. 294. 2 Salk. 474. pl. 12.

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Caſes of Settlem. 59. Stra. 437. 2 Ld. Raym. 1198. 2 Seſſ. Caſ. 161, 229. 2 Stra. 1050. 2 Ld. Raym. 1423. 2 Stra. 716. Seſſ. Caſ. 234. 2 Ld. Raym. 1157. *(a)* A ſingle Juſtice may bind to the good Behaviour of him that is charged or ſuſpected to have begotten a Baſtard Child. Lamb. 122. Crom. 196. Dalt. 44. But the two Juſtices cannot make any Order purſuant to this Statute, unleſs the Child has been a Charge to the Pariſh. Comb. 39. Vent. 37, 363. If the two Juſtices diſagree, ſo that they make no Order, the two Juſtices of the next Diviſion, being of the ſame County, may make the Order. *Dalt.* 45. If five Juſtices make the Order it is good, for the Statute is not reſtrictive, but requires two at leaſt. 2 Salk. 477. pl. 18. If *J. S.* is adjudged the Father of a Baſtard Child, and by the Order it appears that the Examination of the Woman was by one Juſtice only, though the Ordering Part thereof is ſaid to be made by two, the Court will quaſh it. *Rex* v. *Beard.* 2 Salk. 478. pl. 22. We the ſaid Juſtices *doth*, inſtead of *do*, an Order was quaſhed for this Fault. Salk. 122. pl. 6. 2 Ld. Raym. 1197. *(b)* One of the Juſtices muſt of the *Quorum*. Dalt. 47. An Order quaſhed becauſe it did not appear that one of the Juſtices was of the *Quorum*. 2 Salk. 477. pl. 18. Sid. 222. S. P. but Comb. 63. *cont'*, and there ſaid, That this Exception had been overruled ſeveral Times, and ſee now 26 *G.* 2. *c.* 27. whereby Orders of Juſtices are not to be vacated for not expreſſing one of them to be of the *Quorum*. *(c)* The Place of Birth muſt be ſet forth in the Order, becauſe it may be born in a Pariſh where the two Juſtices who made the Order had no Juriſdiction; and that it may appear that it was born in that Pariſh to which the Relief is ordered. Stile 368. Dalt. 47. *(d)* And therefore not only the Mother, but likewiſe the putative Father ſhould be ſummoned to appear, and both Parties examined before any Order is made; but this however agreeable it ſeems to natural Juſtice, is not always practiſed, the Juſtices being apprehenſive that ſuch Warning would tend to no other Uſe, but to make the Father keep out of the Way: However, it has been reſolved that ſuch Summons is neceſſary. Dalt. 52. An Order made by two Juſtices of the Peace was quaſhed, becauſe it was made on an Affidavit brought to them without Examination of any Witneſſes. Comb. 103. *(e)* They muſt adjudge him the Father of the Child. Sid. 363. Stile 154. Dalt. 52. *(f)* An Order that the reputed Father ſhould pay ſo much till further Order, was quaſhed; for that further Order might be forty Years hence. 2 Show. 129. An Order that the reputed Father ſhould give ſuch Security, as Overſeers or Churchwardens ſhall think fit, is naught; for by ſuch Order the Juſtices delegate their Authority to others. 2 Salk. 477. pl. 20. Dalt. 47. An Order to pay ſo much Money a Week till the Child is fourteen Years of Age, is naught; for the Juſtices have no Power but to indemnify the Pariſh; and that is done by obliging the Father to maintain the Child as long as it may be chargeable to the Pariſh. Salk. 121. pl. 2. Comb. 232. S. P. Seſ. Caſ. 296. pl. 233. 2 Str. 788. Barnard K. B. 31. Set. & Rem. 126. pl. 171. Fol. 410. all *contra*. An Order that the Father ſhould pay ſo much Money a Week to the Pariſh till the Child was twelve Years old, quaſhed; for the Father may take it away and maintain it himſelf. Vent. 48, 158. Sid. 222. S. P. Mod. 20. An Order that the Father ſhould pay ſo much weekly, without ſaying for how long, is naught; for it ſhould be ſo long as it is chargeable to the Pariſh. Stile 134. S. P. 2 Keb. 575. 2 Salk. 480. pl. 31. The Juſtices may order the Payment of a Sum in Groſs, for the Charges the Pariſh has been already at to Midwife, Nurſe, *&c.* Dalt. 47. Vent. 336. Salk. 124. pl. 1. But an Order that the Father ſhould pay 4s. to the Midwife, and 7s. a Week until the Child was able to get its Living by working, was quaſhed. 1ſt, Becauſe it did not appear that the Pariſh procured the Midwife, or were at any Charge with reſpect to her; and they have no Power to order any Money but for the Indemity of the Pariſh. 2dly, 7s. a Week is exceſſive, and uncertain as to the Time, for the Father may, if he pleaſes, maintain it cheaper; and the Order ſhould have been for ſo long Time as it ſhall be chargeable to the Pariſh. Vent. 210. An order that the Father ſhould pay 2d. a Week is too little and unreaſonable. Sid. 363. When they order a Sum in Groſs, they muſt ſhew for what, and the Charges the Pariſh had been at. Comb. 103. They cannot order a Sum in Groſs for putting out the Child Apprentice. Comb. 448. An Order to pay ſo much weekly to the Overſeers of the Poor for, *&c.* is good; for before the Inſtitution of theſe it might have been ordered to be paid to two or three of the Inhabitants. Salk. 122. pl. 6. 2 Ld. Raym. 1197. The Order directed that Security ſhould be given for the Performance of it, and becauſe the Statute directs, that the Security ſhould be either to perform Order, or appear at the next Seſſions, for this the Order was quaſhed. 2 Show. 258. 2 Bulſt. 242. S. P.

(g) If the Child is no Baſtard, and yet they judge him ſuch, an Action lies againſt them. Where the Huſband was ſeven Years abſent beyond Sea, and they adjudged the Child, which the Wife had in that Time, a Baſtard.

" the keeping of every *(g)* ſuch Baſtard Child, by charging ſuch Mother " or reputed Father with the Payment of the Money weekly, or other " Suſtentation for the Relief of ſuch Child, in ſuch wiſe as they ſhall think " meet and convenient; and if, after the ſame Order by them ſubſcribed under their Hands, any the ſaid Perſons, *viz.* Mother, or reputed Father, " upon Notice thereof, ſhall not for their Part obſerve and perform the " ſaid Order, that then every ſuch Party ſo making Default, in not performing the ſaid Order, to be committed to Ward to the common Gaol, " there to remain without Bail or Mainprize, except he, ſhe or they ſhall " put in ſufficient Surety to perform the ſaid Order, or elſe perſonally to " appear at the *(h)* next General Seſſions of the Peace to be held in that *(i)* " County where ſuch Order ſhall be taken, and alſo to *(k)* abide ſuch " Order as the ſaid Juſtices of the Peace, or the major Part of them, then " and there ſhall take in that Behalf, if they then and there ſhall take " any; and that if at the ſaid Seſſions the ſaid Juſtices ſhall take no other " Order, then to abide and perform the Order before made, as is above-" ſaid."

5 Mod. 419. Salk. 122. pl. 5, 123. pl. 7. *vide ſupra.* *(h)* Muſt be intended that the Order made by the two Juſtices muſt be confirmed or diſcharged at the next Quarter Seſſions of that Part of the County where it was made, and not at the Seſſions in the County, for that would be miſchievous in many Counties where there are ſeveral Seſſions in diſtinct Parts of the County. Dalt. 48. Sid. 149. Muſt be the next after Notice of the Order. Sid. 325. *(i)* Exception was taken to an Order, that it was made *ad Seſſionem Pacis in Com' præd'*, and did not ſay *pro Com'*, but over-ruled. Vent. 37. *(k)* It ſeems by the better Opinions, that the Juſtices in their Seſſions have no Power to make an original Order, and are only to reverſe or affirm the Order made by the two Juſtices; but for this *vide* 2 Bulſt. 342, 355. Dalt. 48, 49. Cro. Car. 337. 341. 2 Show. 132. pl. 110. Vent. 48, 59. But upon the Removal of the Cauſe by *Certiorari*, the Court of King's Bench may either reverſe the Order in Whole, or in Part; and though they reverſe the Order for Irregularity, yet will they oblige the Father to give Security to appear at the next Seſſions, to abide ſuch further Order as ſhall then be made. Comb. 264. 2 Salk. 477. pl. 20.

Carth. 397. *Boerham* and *Waltham*. Salk. 121. pl. 4. 5 Mod. 204. Comb. 360. *Vide* 2 Bulſt. 349, 350. Dalt. 94.

Baſtard Children gain a Settlement in the Pariſh where they are born; but if a Woman big with Child of a Baſtard, is by order of two Juſtices removed from the Pariſh of *A.* to *B.* as her laſt Place of Settlement, from which Order *B.* appeals, but before the next Seſſions ſhe is delivered of a Baſtard Child in *B.* and afterwards the Order of the two Juſtices is vacated, the Child muſt follow the Mother, and gains a Settlement in *A.*

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(a) The Woman muſt be delivered of ſuch Baſtard Child before ſhe can be ſent to the Houſe of Correction, and the Child is not to be ſent with her. Dalt. 48.

* By the 7 *Jac.* 1. *cap.* 4. it is enacted, " That every lewd Woman " which ſhall *(a)* have any Baſtard which may be *(b)* chargeable to the " Pariſh, the *(c)* Juſtices of the Peace ſhall commit ſuch lewd Woman to " the Houſe of Correction, there to be puniſhed and ſet to hard Work " during the Term of one whole Year; and if ſhe ſhall eſtſoons offend *(d)* " again, then to be committed to the ſaid Houſe of Correction as afore-" ſaid, and there to remain till ſhe can put in good Sureties for her good " Behaviour not to offend again."

(b) The Child muſt be chargeable to the Pariſh, therefore if the Father, or any other, maintains it, it ſeems ſhe is not to be puniſhed by this Statute. *Vide* Dalt. 46. *(c)* Muſt be by two Juſtices at leaſt. Dalt. 46. *(d)* But ſhe ſhall not be puniſhed upon this Part of the Statute, unleſs ſhe were before convicted and puniſhed on the firſt. Q. If ſhe were before proceeded againſt purſuant to the Statute 18 Eliz. c. 3. 2 Bulſt. 348, 349.

3 Salk. 66. pl. 2. 6 Mod. 180. 2 Ld. Raym. 868, 1157.

By the 13 & 14 *Car.* 2. *cap.* 12. *par.* 19. " Whereas the putative " Fathers and lewd Mothers of Baſtard Children run away out of the " Pariſh, and ſometimes out of the County, and leave the ſaid Baſtard " Children upon the Charge of the Pariſh where they are born, although

" ſuch

" ſuch putative Father and Mother have Eſtates ſufficient to diſcharge ſuch " Pariſh; it is therefore enacted, That it ſhall and may be lawful for the " Churchwardens and Overſeers for the Poor of ſuch Pariſh where any " Baſtard Child ſhall be born, to take and ſeize ſo much of the Goods " and Chattels, and to receive ſo much of the annual Rents or Profits of " the Lands of ſuch putative Fathers or lewd Mothers, as ſhall be ordered " by any two Juſtices of the Peace, for or towards the Diſcharge of the " Pariſh, to be confirmed at the Seſſions, for the bringing up and pro- " viding for ſuch Baſtard Child, and thereupon it ſhall be lawful for the " Seſſions to make an Order for the Churchwardens or Overſeers of the " Poor of ſuch Pariſh, to diſpoſe of the Goods by Sale or otherwiſe, or ſo " much of them for the Purpoſes aforeſaid, as the Court ſhall think fit, and " to receive the Rents and Profits, or ſo much of them as ſhall be ordered " by the Seſſions as aforeſaid, of his or her Lands." 1198, 1363, 1423. 2 Stra. 716.

By the 6 *Geo.* 2. *cap.* 31. it is enacted, " That if any ſingle Woman " ſhall be delivered of a Baſtard Child, which ſhall be chargeable, or " likely to become chargeable to any Pariſh or Extraparochial Place, or " ſhall declare * herſelf to be with Child, and that ſuch Child is likely to be " born a Baſtard, and to be chargeable to any Pariſh or Extraparochial " Place, and ſhall in either of ſuch Caſes, on an Examination to be taken " in Writing upon Oath, before any one or more Juſtice or Juſtices of the " Peace of any County, Riding, Diviſion, City, Liberty, or Town Cor- " porate, wherein ſuch Pariſh or Place ſhall lie, charge any Perſon with " having gotten her with Child, it ſhall and may be lawful to and for ſuch " Juſtice or Juſtices, upon Application made to him or them by the Over- " ſeers of the Poor of ſuch Pariſh, or by any one of them, or by any " ſubſtantial Houſholder of ſuch Extraparochial Place, to iſſue out his or " their Warrant or Warrants, for the immediate apprehending ſuch Perſon " ſo charged as aforeſaid, and for bringing him before ſuch Juſtice or " Juſtices, or before any other of his Majeſty's Juſtices of the Peace of " ſuch County, &c. and the Juſtice and Juſtices before whom ſuch Perſon " ſhall be brought, is and are hereby authorized and required to commit " the Perſon ſo charged as aforeſaid, to the common Gaol or Houſe of " Correction of ſuch County, &c. unleſs he ſhall give Security to indem- " nify ſuch Pariſh or Place, or ſhall enter into a Recognizance with ſuffi- " cient Surety, upon Condition to appear at the next General Quarter- " Seſſions, or General Seſſions of the Peace, to be held for ſuch County, " &c. and to abide and perform ſuch Order or Orders, as ſhall be made in " Purſuance of * an Act paſſed in the 18th Year of Queen *Elizabeth*, " concerning Baſtards begotten and born out of lawful Matrimony. * See the Proviſo *poſt* 320. *Page 320.

" Provided, That if the Woman ſo charging any Perſon as aforeſaid " ſhall happen to die, or be married, before ſhe ſhall be delivered, or if " ſhe ſhall miſcarry of ſuch Child, or ſhall appear not to have been with " Child at the Time of her Examination, then and in any of the ſaid " Caſes ſuch Perſon ſhall be diſcharged from his Recognizance at the next " General Quarter-Seſſions, or General-Seſſions of the Peace to be holden " for ſuch County, &c. or immediately releaſed out of Cuſtody, by War- " rant under the Hand and Seal, or Hands and Seals of any one or more " Juſtice or Juſtices of the Peace reſiding in or near the Limits where ſuch " Pariſh or Place ſhall lie.

" Provided alſo, That upon Application made by any Perſon who ſhall " be committed to any Gaol or Houſe of Correction by Virtue of this Act, " or by any Perſon on his Behalf, to any Juſtice or Juſtices reſiding in " or near the Limits where ſuch Pariſh or Place ſhall lie; ſuch Juſtice " or Juſtices is and are hereby authorized and required to ſummon the " Overſeer or Overſeers of the Poor of ſuch Pariſh, or one or more of the " ſubſtantial Houſholders of ſuch Extraparochial Place, to appear before

" him or them at a Time and Place to be mentioned in ſuch Summons, to " ſhew Cauſe why ſuch Perſon ſhould not be diſchargad; and if no Order " ſhall appear to have been made in Purſuance of the ſaid Act of the 18th " of *Elizabeth*, or within ſix Weeks after ſuch Woman ſhall have been " delivered, ſuch Juſtice or Juſtices ſhall and may diſcharge him from his " Impriſonment in ſuch Gaol or Houſe of Correction to which he ſhall " have been committed.

8 Rep. 336. Str. 612. 2 Ld. Raym. 1368. 2 Sef. Caſ. 5. pl. 8. This Proviſion ſhews the

" Provided always, That it ſhall not be lawful for any Juſtice or Juſtices " of the Peace, to ſend for any Woman whatſoever before ſhe ſhall be " delivered, and one Month after, in order to her being examined con- " cerning her Pregnancy, or ſuppoſed Pregnancy, or to compel any Wo- " man before ſhe ſhall be delivered, to anſwer to any Queſtions relating to " her Pregnancy."

Humanity of our Laws, but it proves very frequently an Hardſhip upon Pariſhes, by ſuffering the Parents to eſcape. 2 Black. Com. 458. Edit. 1766.

* (E) Murdering Baſtards.

BY the *ſtat.* 21 *Jac. c.* 27. If a Woman delivered of Iſſue, which being born alive would be a Baſtard, endeavour by burying, drowning, &c. by herſelf or others, ſo to conceal its Death, that it may not appear, whether born alive or not, it is *Murder*, unleſs ſhe prove by one Witneſs at leaſt, that it was born dead. See *Burn's Juſtice*, 8*vo.* 11*th ed. p.* 196, &c.

By the Common Law, if a Woman *privement enfient* by a Potion deſtroy the Child before it be born, it is not Murder. *H. P. C.* 53. 3 *Inſt.* 50.

Or, if another by a Stroke given to her deſtroy it. *H. P. C.* 53. 3 *Inſt.* 50. But in the preceding Caſe, and this, if maliciouſly done, it is an indictable Offence.

If the Child be born, and afterwards die by Means of the Potion, or Stroke, it is Murder, *H. P. C.* 53. 3 *Inſt.* 50.

And he, who adviſes the Deſtruction before the Birth, is acceſſary to the Murder. *H. P. C.* 53, 54. 3 *Inſt.* 51.

See **Evidence**, Vol. II. 312.

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* BIGAMY.

Cro. Eliz. 94. Hawk. P. C 110.

MAtrimonial Cauſes are properly cognizable in the Spiritual Courts, and Offences againſt the Rights of Marriage puniſhable by the Eccleſiaſtical Law; but this Offence of Bigamy, or marrying a ſecond Wife, the firſt being alive, is made Felony by Statute, but the Offender is not ouſted the Benefit of his Clergy.

By

By the 1 *Jac.* 1. *cap.* 11. it is enacted, "That if any Perſon or Perſons "within his Majeſty's Dominions of *England* and *Wales*, being married "do marry any Perſon or Perſons, the former Huſband or Wife being "alive, that then every ſuch Offence ſhall be Felony, and the Perſon or "Perſons ſo offending ſhall ſuffer Death, as in Caſes of Felony; and the "Party and Parties ſo offending ſhall receive ſuch and like Proceeding, Trial "and Execution, in ſuch County where ſuch Perſon or Perſons ſhall be ap-"prehended, as if the Offence had been *(a)* committed in ſuch County "where ſuch Perſon or Perſons ſhall be taken or apprehended." But it is provided, "That nothing in this Statute contained ſhall extend to any "Perſon or Perſons whoſe Huſband or Wife ſhall be continually remain-"ing beyond the Seas by the Space of ſeven Years together, or whoſe Huſ-"band or Wife ſhall abſent him or herſelf the one from the other by the "Space of ſeven Years together, in any Parts within his Majeſty's Domi-"nions, the one of them not knowing the other to be living within that "Time. Alſo provided, that the Statute ſhall not extend to any Perſon "or Perſons who ſhall be at the Time of ſuch Marriage *(b)* divorced by a "Sentence in the Eccleſiaſtical Court; or to any Perſon or Perſons where "the former Marriage ſhall be by Sentence in the Eccleſiaſtical Court de-"clared to be void and of no Effect; nor to any Perſon or Perſons, for or "by reaſon of any former Marriage had or made within *(c)* Age of Con-"ſent. Alſo provided, That no Attainder for this Offence ſhall make or "work any Corruption of Blood, Loſs of Dower, or Diſinheriſon of Heir "or Heirs."

See Obſervation on Stat. 436, 3d Edition, wherein you will find an ill grounded Obſervation of the King of *Pruſſia*'s on this Law, with the proper Anſwer.

(*a*) It is agreed, that if the firſt Marriage were beyond Sea, and the latter in *England*, the Party may be indicted here; but if the firſt were in *England*, and the latter beyond Sea, it is ſaid that the Party cannot be indicted, becauſe the ſecond Marriage, which made the Offence, was not within any County here. Sid. 171. But Hawk. P. C. 111. holds, That the Party may in the laſt Caſe be indicted, and relies on the expreſs Words of the Statute.

(*b*) Divorces *a menſa & thoro cauſa adulterii* and *ſævitiæ* are within the Exception in the Statute, though the Word *Separamus*, and not *Divortiamus*, be made uſe of in the Sentence; for the Statute being Penal, ſhall be conſtrued favourably; and ſuch Separations are taken for Divorces in common Underſtanding. Hawk. P. C. 111. 3 Inſt. 89. H. P. C. 122. Kelynge 37. Cro. Car. 461. &

(*c*) If one of the Parties only were under the Age of Conſent at the Time of ſuch Marriage, the Exception extends as well to the Party above the Age of Conſent, as to the other; becauſe the Power of diſagreeing was equal on both Sides. Rol. Abr. 340. 3 Inſt. 89. Co. Lit. 79. H. P. C. 121. Hawk. P. C. 111.

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* Bills of Sale.

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A BILL of Sale is a ſolemn Contract under Seal, whereby a Man paſſes the Right of Intereſt that he has in Goods and Chattels; for if a Man promiſes or gives any Chattels without valuable Conſideration, or without delivering Poſſeſſion, this alters no Property, becauſe it is *Nudum Pactum unde non oritur Actio*; but if a Man ſells Goods by Deed under Seal duly executed, this alters the Property between the Parties, though there be no Conſideration, or no Delivery of Poſſeſſion, becauſe a Man is eſtopped to deny his own Deed, or affirm any Thing contrary to the manifeſt Solemnity of Contracting.

Yelv. 196. Cro. Jac. 270. Brown 111. 6 Co. 18.

But

13 Eliz. c. 5. But what is chiefly to be conſidered, under this Head, is the Statute of 13 *Eliz. cap.* 5. by which it is enacted, "That all fraudulent Conveyances "of Lands, &c. Goods and Chattels, to avoid the Debt or Duty of ano- "ther, ſhall (as againſt the Party only whoſe Debt or Duty is ſo endeavour- "ed to be avoided) be utterly void, except Grants made *bona fide*, and on "a *good* (which is conſtrued, *a valuable*) *Conſideration*." And by the latter Clauſe of that Statute it is provided, "That all Parties to ſuch fraudulent "Conveyance, who being priy thereunto ſhall wittingly juſtify the ſame "to be done *bona fide* and on good Conſideration, or ſhall alien or aſſign "any Lands, Leaſe or Goods ſo to them conveyed as aforeſaid, ſhall for- "feit one Year's Value of the Lands, Leaſe, Rent, Common, or other "Profit out of the ſame, and the whole Value of the Goods; and being "thereof convicted ſhall ſuffer Half a Year's Impriſonment without Bail; "the Forfeiture to be divided between the Queen and the Party grieved."

Dyer 351. pl. 23. 2 Leon. 8.

For the Explanation of this Statute, I ſhall conſider the following Caſes.

3 Co. 80. Mo. 638. 2 Bulſt. 226. *Twine's* Caſe.

A. being indebted to *B.* in 400*l.* and to *C.* in 200*l.* *C.* brings Debt againſt him, and, pending the Writ, *A.* being poſſeſſed of Goods and Chattels to the Value of 300*l.* makes a ſecret Conveyance of them all, without Exception to *B.* in Satisfaction of his Debt, but, notwithſtanding continues in Poſſeſſion of them, and ſells ſome of them, and others of them, being Sheep, he ſets his Mark on; and reſolved, that it was a fraudulent Gift and Sale within the aforeſaid Statute, and ſhall not prevent *C.* of his Execution for his juſt Debt; for though ſuch Sale hath one of the Qualifications required by the Statute, being made to a Creditor for his juſt Debt, and conſequently on a valuable Conſideration; yet it wants the other; for the Owner's continuing in Poſſeſſion is a fixed and undoubted Character of a fraudulent Conveyance, becauſe the Poſſeſſion is the only *Indicium* of the Property of a Chattel, and therefore this Sale is not made *bona fide*.

8 Co. 81. Mo. 639.

Upon the ſame Reaſons the following Caſe turns: *A.* is indebted to five ſeveral Perſons in the Sum of 20*l.* each, and having Goods to the Value of 20*l.* makes a Gift of them to one of the five, in Satisfaction of his Debt, but upon this ſecret Truſt between them, That the Grantee, in Compaſſion to his Circumſtances, ſhould deal favourably with him, in permitting him, or ſome other for him, to uſe and poſſeſs the ſaid Goods, paying this Creditor, as he was able and could afford it, the ſaid Debt of 20*l.* and reſolved to be a fraudulent Conveyance and Deed of Sale.

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2 Rol. Abr. 779. 3 Co. 81. Palm. 214.

* So in this Caſe, if *A.* makes a Bill of Sale of all his Goods, in Conſideration of Blood and Natural Affection to his Son, or one of his Relations, it is a void Conveyance in reſpect of Creditors; for the Conſiderations of Blood, &c. which are made the Motives of this Gift, are eſteemed in their Nature inferior to valuable Conſiderations, which are neceſſarily required in ſuch Sales, by 13 *Eliz. cap.* 5. and this is a Conſtruction ſuitable to the ſtricteſt Rules of Equity; for if Conſiderations of Blood, or Natural Affection, were allowed to be of equal Dignity with, or to come under the Notion of, valuable Conſiderations required by this Statute, then it would be in the Power of any Debtor, by ſuch Conveyances of his Perſonal Eſtate to his Kindred, to build a Family upon a Conduct to his Creditors, which carries in it all the Strains of Injuſtice and colluſive Dealing; moreover, there is a ſtrong Preſumption that ſuch Sales to Relations are conſtantly attended with a ſecret Truſt and Perſonal Confidence, of reconveying Part of the Goods to the Vendor for his Subſiſtence; ſo that they are intirely inconſiſtent with the Scheme laid down by the Statute, and therefore void and illegal.

Cro. El. 810. *Bethell* v. *Stanhop.* Gilb. Uſes, 306. 2 Term Rep. 97.

A. poſſeſſed of divers Goods to the Value of 250*l.* by Covin to defraud his Creditors, made a Gift thereof to his Daughter, on Condition to be void on Payment of 20*s.* Adjudged that it was apparently a fraudulent Conveyance, and void.

As

As the Owner's continuing in Poſſeſſion of his Goods after his Bill of Sale of them, is an undoubted Badge of a fraudulent Conveyance, becauſe the Poſſeſſion is the only *Indicium* of the Property of a Chattel, which is a Thing unfixed and tranſitory; ſo there are other Marks and Characters of Fraud; as a general Conveyance of them all, without any Exception; for it is hardly to be preſumed, that a Man will ſtrip himſelf entirely of all his Perſonal Property, not excepting his Bedding and wearing Apparel, unleſs there was ſome ſecret Correſpondence and good Underſtanding ſettled between him and the Vendee, for a private Occupancy of all, or ſome Part of the Goods, for his Support; alſo a ſecret Manner of tranſacting ſuch Bill of Sale, and unuſual Clauſes in it, as that it is made honeſtly, truly, and *bona fide*, are Marks of Fraud and Colluſion; for ſuch an artful and forced Dreſs and Appearance give a Suſpicion and Jealouſy of ſome Defect varniſhed over with it. 3 Co. 81. Mo. 638.

If Goods continue in the Poſſeſſion of the Vendor after a Bill of Sale of them, though there is a Clauſe in the Bill that the Vendor ſhall account annually with the Vendee for them, yet it is a Fraud; ſince, if ſuch Colouring were admitted, it would be the eaſieſt Thing in the World to avoid the Proviſions and Caution of the aforeſaid Act. Mo. 638.

A Man takes a Wife, and afterwards marries another, his firſt Wife living, and by Deed gave Part of his Goods to his pretended ſecond Wife, it ſeems this is a fraudulent Gift within 13 *Eliz. c.* 5. and by the Common Law too, in reſpect of Creditors, becauſe made without any valuable Conſideration; for the ſecond pretended Marriage is ſo far from coming under the Notion of a Conſideration, that it is a Crime puniſhable by Law. 2 Leon. 223. *Stamford's* Caſe, *per Dyer.*

Where there is an abſolute Conveyance or Gift of a Leaſe for Years, and the Perſon who makes it continues in Poſſeſſion after ſuch Sale, the Gift is fraudulent, becauſe attended with that diſtinguiſhing Character of a Fraud; but if the Conveyance or Sale be conditional, as that upon Payment of ſo much Money the Leaſe ſhall go to the Vendee, there Continuance in Poſſeſſion after the Gift does not make it fraudulent, becauſe the Vendee is not to have the Leaſe in Poſſeſſion till he performs the Condition. 2 Bulſt. 226. *Stone* v. *Gratham.*

A. has a Leaſe of certain Lands for ſixty Years, if he ſo long live, and forges a Leaſe for ninety Years abſolutely, and, by Indenture reciting this forged Leaſe, bargains and ſells it for valuable Conſideration, together with all his Intereſt in the Land to *B.* in this Caſe *B.* is not a Purchaſer within 27 *Eliz. cap.* 4. for though there were general Words in the Sale to paſs the true Intereſt, yet it is plain that it was never contracted for, or originally included in the Bargain; ſo that the Bargain being made of an imaginary Intereſt, the Bargainee can never come under the Character of a real Purchaſer, to defeat the Purchaſer of the true Leaſe of ſixty Years, which *A.* was really poſſeſſed of. Co. Lit. 3. Sir *Richard Grobham's* Caſe. *Page 324

A. by Bill of Sale made over his Goods to a Truſtee for *B.* who lived with him as his Wife, and was ſo reputed; and he alſo purchaſed a Leaſe of the Houſe wherein he dwelt, in the Name of a Truſtee, and declared the Truſt thereof to himſelf for Life, then in Truſt for *B.* during the Reſidue of the Term; and this Bill of Sale was held fraudulent as to Creditors; but as to the Declaration of the Truſt of the Term, the Court held it good, and not liable to *A.*'s Debts, the Term being never in him, and being ſo ſettled at the Time it was purchaſed; and *A.* might have given the Money to *B.* who might have purchaſed it for herſelf, and in her own Name. 2 Vern. 490. decreed in Equity between *Fletcher* and Lady *Lidley.*

If *A.* makes a Bill of Sale to *B.* a Creditor, and afterwards to *C.* another Creditor, and delivers Poſſeſſion at the Time of the Sale to neither; after *C.* gets Poſſeſſion of them, and *B.* takes them out of his Poſſeſſion, *C.* cannot maintain Treſpaſs, becauſe the firſt Bill of Sale is fraudulent againſt Creditors, and ſo is the ſecond, yet they both bind *A.* and *B.*'s is the elder Title; and the naked Poſſeſſion of *C.* ought not to prevail againſt the Title of *B.* Abr. Eq. 148 *Baker* v. *Lloyd. Per Holt. Vide* the Caſes in 148 9.

that

that is prior, where both are equally Creditors, and Poſſeſſion at the Time of the Bill of Sale is delivered over to neither.

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2 Lev. 237. S. P. have a Writ grounded upon the Statute, commanding them to put their Seals, &c.

Vide Show. P. C. 116. where a Petition was exhibited to the Lords in Parliament, to oblige the Judges to ſign, and there ſaid, That the proper Remedy againſt them was an Action grounded on the Statute, which was to be tried by a Jury.

2 Inſt. 427. Although no Time be appointed by this Act when the Juſtices ſhall put their Seals, the Party muſt pray the ſame before Judgment; but if they deny it, then may they be commanded after Judgment to put their Seals, and then the putting of their Seals after Judgment ſhall be ſufficient.

Salk. 288. pl. 26. *Wright* v. *Sharp.* But where a Corporation-Book was offered in Evidence at the Aſſizes to prove a Member of the Corporation not in Poſſeſſion, and refuſed, and no Bill of Exceptions was then tendered, nor was the Exception then reduced to Writing, ſo the Trial proceeded, and a Verdict was given for the Plaintiff; the Court being the next Term moved for a Bill of Exceptions, it was urged for the Bill, that the Law requires *quod proponat exceptionem ſuam*, and no Time is appointed for the reducing it into Writing, and the Party is not grieved till a Verdict is given againſt him; and the ſame Memory that ſerves the Judges for a new Trial, will ſerve for a Bill of Exceptions. On the other Side it was ſaid, That this Practice would prove a great Difficulty to Judges, and Delay of Juſtice, that the Precedents and Entries ſuppoſe *Page 327 * the Exception to be written down upon its being diſallowed, and the Statute ought to be conſtrued ſo as to prevent Inconvenience; beſides, the Words of the Act are in the preſent Tenſe, and ſo is the Writ formed on the Act. *Holt* Ch. Juſt. If this Practice ſhould prevail, the Judge would be in a ſtrange Condition; he forgets the Exception, and refuſes to ſign the Bill, ſo an Action muſt be brought; you ſhould have inſiſted on your Exception at the Trial, you wave it if you acquieſce, and ſhall not reſort back to your Exception after Verdict againſt you, when perhaps, if you had ſtood upon your Exception, the Party had other Evidence, and need not have put the Cauſe on this Point; the Statute indeed appoints no Time; but the Nature and Reaſon of the Thing requires the Exception ſhould be reduced to Writing when taken and diſallowed, like a ſpecial Verdict, or a Demurrer to Evidence; not that they need be drawn up in Form, but the Subſtance muſt be reduced to Writing whilſt the Thing is tranſacting, becauſe it is become a Record; ſo the Motion was denied.

Vide Lutw. 905, 906. and 3 Bur. 1692, &c. the Caſe of *Muney & al'* v. *Leach.* When this Bill is ſigned, there goes out (*a*) a *Scire facias* to the (*b*) Judge who ſigned it, *ad Cognoſcendum Scriptum*, and the *Scire facias* to the Judge, and his Return with the Bill muſt be entered on the Iſſue-Roll, and made Part of the Record, and has a Retroſpect if done at the Trial; which is to be removed by Writ of Error.

(*a*) Where the Record is in the ſame Court, there is no Occaſion for a *Scire facias ad cognoſcend'*, 2 Jones 117. 2 Lev. 237. being preſent to confeſs or deny their Seal. (*b*) If the Judge dies, a *Scire facias* lies againſt his Executors to, &c. 2 Inſt. 428. If the Judge denies his Seal, the Party may prove it by Witneſſes. 2 Inſt. 428. Though the Party grieved be dead, his Heirs or Executors may have Error upon the Bill of Exceptions. 2 Inſt. 427.

Vent. 366, 367. 2 Lev. 237. 2 Jones 117. When a Bill of Exceptions is allowed, the Court will not ſuffer the Party to move any Thing in Arreſt of Judgment on the Point on which the Bill of Exceptions was allowed; having given their Opinion upon it before; for his proper Redreſs is by Writ of Error, and it is preſumed that the Court was ſatisfied in the Point when the Party tendered his Bill of Exceptions; though argued in *Lev.* that it ought to be uſed as well to *prevent* as to *reverſe* the Judgment.

12 Mod. 609. Bill of Exceptions no *Superſedeas* of a Judgment. ‡

‡ A Bill of Exceptions is only to be made uſe of upon a Writ of Error, and therefore where a Writ of Error will not lie, there cannot be any Bill of Exceptions. *Rex* v. *Inhabitants of Preſton* Hil. E. 9 G. 2. *Buller's Ni. Pri.* 2d Edit. 316.

Borough

* Borough Engliſh.

BOROUGH Engliſh is a Cuſtom which prevails in certain antient Boroughs, by Virtue of which the youngeſt Son ſhall inherit his Father, as to the Lands of which he is ſeiſed in Fee-ſimple or Fee-tail. The (*a*) Reaſon of this Cuſtom ſeems to be, that in theſe Boroughs People chiefly maintained and ſupported themſelves by Trade and Induſtry; and the elder Children being provided for out of their Father's Goods, and introduced into his Trade in his Life-time, were able to ſubſiſt of themſelves without any Land Proviſion, and therefore the Lands deſcended to the youngeſt Son, he being in moſt Danger of being left deſtitute. Lit. ſ. 165. Noy 106. It is called Borough Engliſh, becauſe as ſome hold, it firſt prevailed in *England*. Co. Lit. 110. b.

(*a*) Others have told us, that the Reaſon of this Inſtitution was, becauſe the Lord demanded the firſt Night with the Bride, ſo that they thought the eldeſt not legitimate. Preface to 3 Mod. Rep.

If Land in Borough Engliſh be given to *A.* and his Heirs for the Life of *B.* and *A.* dies in the Life of *B.* leaving two Sons, the youngeſt ſhall be the ſpecial Occupant, becauſe the Heir that is Repreſentative of the Father, as to Land of that Nature, muſt be the Occupant, ſince the Heir muſt take by Deſcent, and not by Purchaſe. Co. Lit. 110. b. 2 Lev. 138. 3 Keb. 475. Reſolved between *Baxter* and *Dodſwell*. Vaugh. 201.

By the Cuſtom of Borough Engliſh, the Widow ſhall have the whole of her Huſband's Lands in Dower, which is called her Free-Bench; and this is given to her the better to provide for the younger Children, with the Care of whom ſhe is intruſted. Co. Lit. 33. 111. F. N. B. 150. Cro. Eliz. 415. Mo. pl. 566.

She ſhall have Dower of Rent, Common out of Lands in Gavelkind, Borough Engliſh, *&c.* for theſe enſue the Nature of the Land. Bro. Cuſtom 44, 58. The Huſband ſhall be Tenant by Curteſy of Borough Engliſh Land. *Vide* Head of *Curteſy of England*.

For a Condition broken, the Heir at Common Law ſhall enter, becauſe the Condition is a Thing of new Creation, and collateral to the Land; but when the eldeſt Son enters, the youngeſt Son ſhall enjoy the Land; for by Breach of the Condition he is reſtored to the ancient Eſtate. Cro. El. 204. Plow. 28. *Vide* Head of *Gavelkind*.

Com. Rep. 72, 123. 4 Burr. 1933. Swinb. 113. Powell on Deviſes, 263. Cowp. 836.

The Benefit of a Warranty annexed to Lands in Borough Engliſh, ſhall go to the youngeſt Son. *Vide* Head of *Warranty*.

If a Man be ſeiſed of Land of the Nature of Borough Engliſh, and hath iſſue two Sons, and die, and the eldeſt Son before any Entry made by the youngeſt, enters into the Land by Abatement, and dies ſeiſed, this ſhall not take away the Entry of the youngeſt Brother, becauſe the eldeſt ſhall be preſumed to enter to preſerve the Eſtate in his Family, which he or his Heirs may ſome Time or other, upon Failure of his Brother's Line, happen to enjoy. Co. Lit. 242

If a Man ſeiſed of Borough Engliſh Lands, makes a Feoffment in Fee, to the Uſe of himſelf and the Heirs Male of his Body, *ſecundum curſum communis legis*) and dies, leaving Iſſue two Sons, the youngeſt, notwithſtanding the Feoffment and theſe Words, ſhall inherit thoſe Lands. N. Dyer 179. b. Jenk. Rep. 220.

The

*Page 329 * The Law takes notice of the (*a*) Customs of Gavelkind and Borough English; and therefore it is sufficient to alledge generally, that the Lands are of the Custom of Gavelkind or Borough English.

Co. Lit. 175. b.

(*a*) But as to such Customs as are no Part thereof, but merely collateral, they must be shewn in Pleading; as that the Lands are devisable, &c. but for this *vide* Cro. Car. 562. 2 Sid. 154. Sid. 77, 138. Lev. 80. Raym. 77. and Tit. *Gavelkind*.—For other Customs in the Nature of Borough English, *vide* Tit. *Descent*, and Co. Lit. 110. Dan. 548, 549.

Salk. 243. pl. 4. *Clemens* and *Scudamore*, adjudged, 6 Mod. 126. 6. C. adjudged. 2 Ld. Raym. 1024. S. C. S. P. Will. Rep. 64.

If *A.* hath Issue five Sons, and the youngest dies in the Life-time of the Father leaving Issue a Daughter, after which the Father purchases Lands in Borough English, and dies; the Daughter of the fifth Son shall, *jure repræsentationis*, inherit those Lands, and not the fourth Son.

BRIDGES.

10 E. 3. 28. Rol. Abr. 367. 2 Inst. 701. 13 Co. 33.

PUBLICK Bridges, which are of General Conveniency, are, of Common Right, to be repaired by the whole Inhabitants of that County in which they lie.

Hale P. C. 143. Cro. Car. 365.

Hale's P. C. 143. Dalt. c. 14.

But a Corporation Aggregate, (*b*) either in respect of a Special Tenure of certain Lands, or in respect of a Special Prescription; also any other Person, by Reason of such a Special Tenure, may be compelled to repair them.

(*b*) A Body Politick may be bound either *Ratione Tenuræ, sive Præscriptionis*, 2 Inst. 700. 13 Co. 33. But a private Person, though he may be bound *ratione Tenuræ*, is not bound *ratione Præscriptionis*. *Vide* Hawk. P. C. 203. Farefl. 54, 98. Salk. 358. pl. 5. 3 Salk. 77, 381. pl. 3. 6 Mod. 150, 191, 255. If a Bishop, &c. hath once or twice of Alms repaired a Bridge, this binds not; but yet it is Evidence against him, that he ought to repair, unless he proves the contrary. 2 Inst. 700.

Jones 173. Pop. 192. 6 Mod. 307. 12 Mod. 198, 409. Ld. Raym. 725. 2 Ld. Raym. 792, 804, 856, 858, 1169, 1175, 1249.

Any particular Inhabitant or Inhabitants of a County, or Tenant or Tenants of Land, chargeable with the Repairs of a Common Bridge, may be made Defendants to an Indictment for not repairing it, and be liable to pay the whole Fine assessed by the Court for the Default of such Repairs; and shall be put to their Remedy at Law for a (*c*) Contribution from those who are bound to bear a proportionable Share in the Charge; for Cases of this Nature require the utmost Expedition; and Bridges, being of absolute Necessity, are not to lie unrepaired till Law Suits are determined.

11 Mod. 56. pl. 33. Salk. 358. pl. 6. (*c*) Where the Party grieved may in such Case have a Writ to the Justices, *De oneranda pro rata portione*. F. N. B. 235. Reg. 268. 2 Inst. 700. Where he may bring his Bill in Equity. Hard. 131.

Salk. 358. pl. 5. *Per Cur'*, on a Trial at Bar.

If a Manor, held by the Service or Tenure of repairing a Common Bridge, comes, by the Alienation of the Lord, into the Hands of several Persons, every Alienee, being Tenant of any Parcel, either of the (*d*) Demesnes or Services, shall be liable to the whole Charges, and put to their Remedy for a Contribution from the Rest; and though the Lord, on such Alienation,

(*d*) If charged *ratione Tenuræ* of a Manor, the antient Freeholders and Copyholders are not liable to contribute, for nothing is Part of the Manor but the Demesnes and Services; but those who have any Part of the Demesne Land, by Purchase, must contribute. Hard. 131. *per Cur.* 2 Ld. Raym. 792, 804.

agreed

* agreed that the Purchaſers ſhould be exempt from the Charges, yet however binding ſuch Agreement might be among themſelves, it ſhall not work a general Injury, by making the Remedy the Public had, more difficult than it was before. *Page 338

So if a Manor ſubject to ſuch Charge comes into the Hands of the Crown, yet the Duty upon it continues; and any perſon claiming afterwards under the Crown, the whole Manor, or any Part thereof, ſhall be liable to an Indictment or Information, for Want of due Repairs. Salk. 358. pl. 5. *Per Cur'.*

If Part of a Bridge lie within a Franchiſe, thoſe of the Franchiſe may be charged with the Repairs for ſo much; alſo, by a ſpecial Tenure, a Man may be charged with the Repairs of one Part of a Bridge, and the Inhabitants of the County are to repair the Reſt. Hawk. P. C. 221. Raym. 384. 383.

It hath been reſolved, that it is not ſufficient for the Defendants to an Indictment for not repairing a Bridge, to excuſe themſelves by ſhewing that they are not bound either to repair the Whole, or any Part of the Bridge, without ſhewing what other Perſon is bound to repair the ſame; and it is ſaid, that in ſuch Caſe the whole Charge ſhall be laid upon ſuch Defendants, by Reaſon of their ill Plea. Hawk. P. C. 221. Pop. 192.

It is ſaid, that where ſuch Defendants plead that *A. B.* ought to repair the Bridge mentioned in the Indictment, and take a Traverſe to the Charge againſt themſelves; the Attorney General, in this Special Caſe, may take a Traverſe upon a Traverſe, and inſiſt that the Defendants are bound to the Repairs, and traverſe the Charge alledged againſt *A. B.* and that an Iſſue ought to be taken of ſuch ſecond Traverſe; and that the Attorney General may afterwards ſurmiſe that the Defendants are bound to repair it, and that the whole Matter ſhall be tried by an indifferent Jury. Hawk. P. C. 221. Sid. 140. 2 Lev. 112.

It ſeems clear that thoſe who who are bound to repair ſuch Bridges, muſt make them of ſuch Height and Strength as ſhall be anſwerable for the Courſe of the Water, whether it continues in the old Channel, or makes a new one; and that they are not puniſhable as Treſpaſſers for entering on any adjoining Land for ſuch Purpoſe, or for laying on the Materials requiſite for ſuch Repairs. 43 Aſſ. pl. 43. Dalt. c. 14. Hawk. P. C. 221.

No Inhabitant of a County ought to be a Juror for the Trial of an Iſſue, whether the County be bound to ſuch Repairs or not; but it is ſaid, that he may be a good Witneſs. 6 Mod. 307.

No Man can be compelled to build or contribute to the Charges of building of any new Bridge, without an Act of Parliament; nor can the Inhabitants of the whole County, by their own Authority, change a Bridge or High Way from one Place to another. 2 Inſt. 701. Carth. 193. 6 Mod. 307. By *Magna Charta*, c. 15.

no Town or Freeman ſhall be diſtrained to make Bridges *niſi ab antiquo & de jure facere conſueverunt*, which *vide* explained, 2 Inſt. 29.

If a Man makes a Bridge for the common Good of the King's Subjects, he is not bound to repair it. 2 Inſt. 701. Rol. Abr. 368. But

if it becomes a public Conveniency, the Inhabitants of the County are bound to repair it. Salk. 359. pl. 7. 6 Mod. 307.

By the 22 *H.* 8. *c.* 5. " The Juſtices of Peace in every Shire, Franchiſe, " or Borough, or (*a*) four of them, whereof one to be of the *Quorum*, may " inquire and determine, in their General Seſſions, of Annoyances of Bridges

(*a*) Unleſs the Juſtices of the Peace of a County or Town,

&c. be four in Number, and one of them of the *Quorum*, they have no Manner of Juriſdiction by Virtue of this Statute, 2 Inſt. 701, 702. But it is ſaid, that the Juſtices of the Peace of the County, in which ſuch Town, being not a County of itſelf, and wanting ſuch a Number of Juſtices, ſhall lie, may, by Virtue of this Clauſe of the Statute, determine all Annoyances of Bridges within ſuch Town, &c. if it be known what Perſons in certain are bound to repair the ſame: but if it be not known, it ſeems that ſuch Annoyances are left to the Remedy of the Common Law; becauſe the Clauſe, which in ſuch Caſe authorizes the Juſtices of the Peace to tax all the Inhabitants, ſeems expreſsly to confine the Power of taxing the Inhabitants of ſuch Town to their own Juſtices. 2 Inſt. 704. Hawk. P. C. 224. See that Clauſe of the Stat. *poſt* 331.

" broken

*Page 331 " * broken in the (a) Highways, and make ſuch Proceſs and Pains on every Preſentment, againſt the Perſons charged, &c. as the *King's Bench* " is uſed to do, or as it ſhall ſeem by their Diſcretions to be neceſſary and " convenient."

(a) This Statute extends to Bridges in the Highways only.

6 Mod. 255, 256. Salk. 359. pl. 8. 2 Ld. Raym. 1174. But Juſtices of Peace are ſaid to have Juriſdiction over Nuſances to other common Bridges, by Virtue of 1 Eliz. c. 3. and the general Words of the Statute of Ed. 3. c. 10. *Vide* 2. Hawk. P. C. 39.

(b) It hath been queſtioned, whether a Borough which hath no Bridge

" And where it cannot be known who ought to make ſuch Bridges decayed, they ſhall be made by the Inhabitants of the Shire, City, or Town " (b) Corporate wherein they ſhall be; and if Part ſhall be in one Shire, " &c. and Part in another, the Inhabitants of each ſhall repair and make " ſuch Part as lies within their reſpective Limits."

within its own Limits, be not liable to contribute to the Repairs of a County Bridge. Hawk. P. C. 223. *Vide* Skin. 254. pl. 2.

" And for ſpeedy Reformation of ſuch Bridges, the Juſtices of Peace of " ſuch Shire or Town, or four of them, whereof one to be of the *Quorum*, " may call before them either the Conſtables, or elſe two of the moſt ho- " neſt Inhabitants of every Town and Pariſh, and with the Aſſent of the " ſaid Conſtables or Inhabitants, may (c) tax every Inhabitant within their " Limits, in ſuch Sums as may be thought convenient; and ſhall cauſe " the Names and Sums of each Perſon to be written on a Roll indented, " and ſhall have Power to make two Collectors of every Hundred for the " Collection of ſuch Tax; which Collectors receiving one Part of the Roll " indented, under the Seals of the Juſtices, ſhall have Power to collect " all the Sums therein contained, and to diſtrain thoſe who ſhall refuſe " to pay; and the ſame Juſtices, or four of them, may alſo name two " Surveyors, who ſhall ſee every ſuch decayed Bridge repaired from Time " to Time, to whom the ſaid Collectors ſhall pay the ſaid Sums by them " received; and the Collectors and Surveyors, and their Executors, ſhall " from Time to Time make a true Account to the Juſtices, or four of " them, whereof one of the *Quorum*, of their Receipts, Payments and " Expences; and if any of them ſhall refuſe that to do, the ſame Juſtices, " or four of them, may make Proceſſes againſt them by Attachment, under " their Seals, returnable at the General Seſſions; and if they appear, may " compel them to account, or elſe, on their Refuſal, may commit them " *quouſque*."

(c) *Viz.* ſhall make a diſtinct Tax on each Houſholder living in the County, and each Occupier of Land lying in the County, whether he dwell in it or not; and whether ſuch Houſholder or Occupier be a Body Politick or Natural; and though he claim an Exception by a prior Act of Parliament.

2 Inſt. 703, 704. Keb. 91. *Note*; This Method of taxing and and raiſing Money taxed, ſeems altered by 1 Ann. Stat. 1. c. 18. *quod vide.*

" And it is further enacted, That where the Bridge is in one Shire, and " the Perſon bound to amend it in another; or where the Bridge is in a " Town Corporate, and the Perſon bound to repair it, out of it, the Juſ- " tices of ſuch Shire or Town Corporate may enquire and determine all " ſuch Annoyances within their Limits; and on a Preſentment may make

*Page 332 " * Proceſs againſt ſuch Perſons; and do further in every behalf, in every " ſuch Caſe, as they might do by the ſaid Act, in caſe that ſuch Perſons " were in the ſame Shire, &c. and all Sheriffs and Bailiffs of Liberties " ſhall ſerve ſuch Proceſs, on Pain to make ſuch Fine as ſhall be ſet by " the ſaid Juſtices."

No Money to be expended in the Repair of Bridges without the Preſentment of the Grand Jury.

2 Ld. Raym. 1175. 2 Stra. 900, Seſſ. Caſ. 415. Barnard K. B. 445. 14 Geo. 2. c. 33. Juſtices of the Peace may purchaſe adjoining Grounds for enlarging Bridges. As to Statutes relative to particular Bridges, ſee the Tables to the Statutes, Title *Bridges*.

" Pro-

"Provided that nothing in this Act shall be prejudicial to the Liberties "of the Five Ports; but that the Warden, Mayors, Bailiffs and *Jurats* of "the same Ports, may enquire and determine all Annoyances of Bridges "therein, and make such Process, *&c.* as the Justices of Peace may do in "other Places, by Virtue of the said Act."

"And it is further enacted, That the said Justices, *&c.* may allow such "reasonable Costs and Charges to the said Surveyors and Collectors, as by "their Discretion shall be thought convenient."

"And it is further enacted, That such Parts of Highways as lie next ad-"joining to the Ends of Bridges, by the Space of 300 Feet, shall be "amended as often as Need shall require; and that the Justices, or four "of them, whereof one of the *Quorum*, within their several Limits, may "enquire and determine in their General Sessions all Annoyances therein, "and do in every Thing concerning the same, in as ample a Manner as "they may do for making and repairing Bridges."

BURGLARY.

BURGLARY is a Felony at the Common Law, in Breaking and entering the Mansion-House of another, or a Church, or the Walls or Gates of a walled Town, in the Night, with an Intent to commit some Felony, whether such felonious Intention be executed or not.

H. P. C. 80. 3 Inst. 63. S. P. C. 30. a. Dalt. c. 99. Crom. 31. 22 Ass. 95. Hawk. P. C. 101.

In this Definition it will be necessary to consider,

(A) What Breaking is sufficient to constitute this Offence. 333.
(B) What Entry. 334.
(C) Whether both be necessary. 334.
(D) What shall be accounted Right-time for that Purpose. 334.
(E) In what Place this Offence may be committed. 335.
(F) Of the Intention to commit some Felony. 336.
(G) How this Offence is punished, and the Offender excluded his Clergy. 336.

(A) What

*Page 333 * (A) What Breaking is ſufficient to conſtitute this Offence.

H. P. C. 80. 3 Inſt. 64. Hawk. P. C. 102. ONE who comes down by a Chimney, who opens a Window, or breaks the Glaſs thereof, unlocks a Door, or draws the Latch of a Door, is guilty of Breaking the Houſe, as much as if he had actually forced open the Door, or had broken a Hole in the Wall, &c.

Crom. 32. And. 115. *cont'*. Hawk. P. C. 102. leaves this a *Quære*. Yet ſee the next Clauſe. Alſo, if one aſſault a Houſe with an Intent to rob it, and the Owner of the Houſe, in order to drive him away, opens the Door, and he thereupon enters, he is guilty of Breaking the Houſe.

Kelynge 42, 65. Crom. 32. Dalt. c. 99. H. P. C. 81. Hawk. P. C. 102. If Perſons coming to an Houſe with an Intent to rob it, are let in under a Pretence of Buſineſs with the Owner, and then rifle the Houſe; or if Perſons, having ſuch a felonious Intent, take Lodgings in a Houſe, and then fall on the Landlord and rob him; or if Perſons, having ſuch Intent, raiſe an Hue and Cry, and prevail on the Conſtable to ſearch the Houſe, and being let in by that Means bind the Conſtable and rob; in theſe Caſes the Offenders have been adjudged guilty of Burglary.

Kelynge 30, 67. H. P. C. 81, 82. Hawk. P. C. 83, 102. It is Burglary for one who enters by an open Door, or lies in a Houſe by the Owner's Conſent, to unlatch a Chamber-Door, with a felonious Intent. So if a Servant draws the Latch of the Chamber-Door in which his Maſter lies, with an Intent to murder him.

Stra. 481. H. H. P. C. 562. Hutt. 20, 33.

2 Stra. 881. H. H. P. C. 553. By the 12 *Ann. ſtat.* 1. *cap.* 7. it is recited, "That there had been ſome "Doubt, whether the Entering into a Manſion-houſe without breaking the "ſame, with an Intent to commit ſome Felony, and breaking the ſaid "Houſe in the Night-time to get out, were Burglary; and thereupon it is "declared and enacted, that if any Perſon ſhall enter into the Manſion or "Dwelling-houſe of another by Day or by Night, without breaking the "ſame, with an Intent to commit Felony, or being in ſuch a Houſe ſhall "commit any Felony, and ſhall in the Night-time break the ſaid Houſe "to get out of the ſame, ſuch Perſon is and ſhall be taken to be guilty of "Burglary, and ouſted of the Benefit of the Clergy, in the ſame Manner "as if ſuch Perſon had broken and entered the ſaid Houſe in the Night-"time, with an Intent to commit Felony there."

3 Inſt. 64. H. P. C. 80. Hawk. P. C. 102. But if one enter into a Houſe by a Door which he finds open, or through a Hole which was made there before, and ſteal Goods, &c. or draw any Thing out of a Houſe through a Door or Window which was open before, or enter into a Houſe by the Doors open in the Day-time, and lie there till Night, and then rob and go away, without breaking any Part of the Houſe, he is not guilty of Burglary; and therefore ſuch Breaking, as is implied by Law in every unlawful Entry on the Poſſeſſion of another, whether it lie open or be incloſed, though it will maintain a common Indictment, or Action of Treſpaſs *Quare clauſum fregit*, will not ſatisfy the Words *Felonice & Burglariter fregit*.

See Foſt. Cr. Law 108, 109. Cupboards, Preſſes, Lockers, and other Fixtures of the like Kind, which merely ſupply the Place of Cheſts and other ordinary Utenſils of Houſhold, ſhould be conſidered in no other Light than as mere Moveables, partaking of the Nature of theſe Utenſils and adapted to the ſame Uſe; and therefore the breaking open a Cheſt in the Houſe, or the Door of a Cupboard let into the Wall of an Houſe is not Burglary.

(B) What

* (B) What Entry.

*Page 334

ANY the leaſt Entry, either with the Whole or but with Part of the Body, or with any Inſtrument or Weapon will ſatisfy the Word *Intravit* in an Indictment of Burglary; as if one do but put his Foot over a Threſhold, or his Hand, or a Hook or Piſtol within a Window, or turn the Key of a Door which is locked on the Inſide, or diſcharge a loaded Gun into a Houſe, *&c.* Dalt. c. 99. H. P. C. 81. And. 115. Crom. 31, 32 Hawk. P. C. 103. Foſt. Cr. Law 107, 108. Crom. 32. H. P. C. 80, 81.

Alſo in ſome Caſes, an Entry in Law is ſufficient, though there be no actual Entry; as where divers come to commit a Burglary, and ſome ſtand in adjacent Places, and the others enter and rob, they are guilty; for the Act of one is the Act of all.

And upon this Ground *Hawkins* argues, that a Servant within a Houſe, who in Confederacy with a Rogue lets him in to him, is as much guilty of Burglary as if he had been without the Houſe. Hawk. P. C. 103. Hawk. P. C. 103, But *Quære*; for *Hale* ſays it is only Robbery in the Servant. H. P. C. 81. H. H. P. C. 553. ſays it is Burglary in both. See 2 Stra. 881. ‡

‡ *Cornwal*'s Caſe, ſimilar to the Text, and at a Meeting of all the Judges at *Serjeants Inn*, they were all of Opinion it was Burglary in both.

(C) Whether both be neceſſary.

THERE muſt be both a Breaking and an Entry; for both the Words *fregit* and *intravit* are neceſſary in the Indictment; and therefore if, on a bare Aſſault upon a Houſe, the Owner fling out his Money, it is no Burglary. H. P. C. 80. 3 Inſt. 80. Hawk. P. C. 103. S. P. accord'. But he ſays there are ſome looſe Opinions to the contrary; for which *vide* the Authorities there cited.

(D) What ſhall be counted Night-time for that Purpoſe.

THE Word *Noctanter*, being preciſely neceſſary in every Indictment for this Offence, cannot therefore be ſatisfied in a legal Senſe, if it appear upon the Evidence, that there were ſo much Day-light at the Time, that a Man's Countenance might be diſcerned thereby. Dalt. c. 99. S. P. C. 30. Crom. 33. H. P. C. 79. 3 Inſt. 63. 7 Co. 6.

Hawk. P. C 101. But in ſome of theſe Books there are Opinions that Burglary may be committed at any Time after Sun-ſet, and before Sun-riſing. *

* That ſhould ſeem the moſt reaſonable Opinion, being the beſt Rule, as being the moſt certain.

*Page 335 * (E) In what Place this Offence may be committed.

H. P. C. 82. Hawk. P. C. 103. 4 Co. 40. a. 3 Inst. 64, 67. but And. 302 and S. P. C. ACCORDING to the constant Course of late Precedents and Opinions, it seems necessary to have the Word *Mansionalis* in the Indictment; and therefore that the Offence can be only committed in a Dwelling-house.

Also it is agreed that Burglary may be committed in breaking Churches, or the Walls or Gates of a walled Town, in which the Word *Mansionalis* cannot be made use of; but these are said to be distinct Burglaries; though Lord *Coke* says, that as to a Church, it may properly enough be alledged, being the Mansion-house of GOD; *Quære.* 3 Inst. 64. Bract. 144. b. Bro. Coron. 93. 22 Ass. 39, 95. Poph. 42. 27 Ass. 38. Dalt. c. 99. Burglary in an Apartment in the *African* House, it must be laid to be the *Mansion* House of the Company. Fost. Cr. Law 38, 39.

Crom. 33. b. Dalt. c. 99. H. P. C. 82. Mo. 660. pl. 903. 4 Co. 40. a. Cro. Car. 470. Jones 394. Kelynge 54. Poph. 42, 52. 3 Inst. 64. so agreed by all these Books. Hawk. P. C. 103. Fost. Cr. Law. 77.

A House which a Man dwells in but for Part of the Year, or which he has hired to live in, and brought Part of his Goods into, but has not yet lodged in, or which his Wife has hired, though without his Privity, and lives in without him, will satisfy the Words *Domus Mansionalis* in an Indictment of Burglary, though no Person were in it at the Time of the Offence.

3 Inst. 64. Dalt. c. 99 Bro. Tit. Coron. 180. Crom. 32. b. H. P. C. 82. Hawk. P. C. 104.

Also all Out-Buildings, as Barns, Stables, Dairy-Houses, &c. adjoining to a House, are looked upon as Part thereof, and consequently Burglary may be committed in them; but if they be removed at any Distance from the House, it seems that it has not been usual of late to proceed against Offences therein as Burglaries.

But it does not seem agreed that an Apartment hired by a Lodger for a certain Time, and not divided from the Rest of the House, by having a different Door, &c. can be called his Mansion-house. Kelynge 83. holds that it cannot, but Hawk. P. C. 104. seems *cont'*.

Also a Chamber in one of the Inns of Court, wherein a Person usually lodges, or a Lodging in a Part of a House actually divided from the Rest of the House, and having a Door of its own to the Street, are agreed to be called properly Mansion-houses.

Kelynge 27. Hawk. P. C. 104.

If several Persons dwell in one House, as Servants, Guests or Tenants at Will, and a Burglary be committed in any of their Apartments, it seems clear that the Indictment ought to lay it in the Mansion-house of the Proprietor.

H. P. C. 88. 22 Ass. 95. Bro. Coron. 63.

Burglary cannot be committed in a Shop * or Workhouse, which is leased to one for his Use in the Day-time only, nor in a Ground inclosed, nor in a Booth † or Tent.

S. P. C. 30. Dalt. c. 99. Crom. 31. Hawk. P. C. 104. * See the Note at the End of G. fol. 336.

† Clergy is taken away from those who rob any Person in their Dwelling-house or Booth, 5 and 6 Ed. 6. c. 9. 18 El. c. 7.

(F) Of

(F) Of the Intention to commit ſome Felony.

*Page 336

THE Indictment muſt alledge, and the Verdict find, an Intention to commit ſome Felony, though it be not neceſſary that a Felony be actually committed; for if it appear that there was only an Intention to commit a Treſpaſs, there can be no Burglary; but it ſeems that an Intention to commit a Rape, or ſuch other Crime, which was a Treſpaſs only at Law, and is made Felony by Statute, will make a Man guilty of Burglary, as much as if ſuch Offence were a Felony at Common Law; becauſe where-ever a Statute makes any Offence Felony, it incidently gives it all the Properties of a Felony at Common Law.

Dyer 99. pl. 58. Daliſ. 22. 3 Inſt. 65. Kely. 30. H. P. C. 83, 84. Crom. 32. *cont'*. Dalt. c. 99. Hawk. P. C. 105.

(G) How this Offence is puniſhed, and the Offender excluded his Clergy.

THIS Offence has been puniſhed like all other Felonies, by hanging, ſince the following Statutes, which ouſt the Offenders of the Benefit of their Clergy. For,

By 1 *Ed.* 6. *cap.* 12. *par.* 10. the Principal is excluded in all Caſes except that of challenging more than Twenty, if any Body be in the Houſe at the Time of breaking, and thereby put in Fear, *&c.*

Vide 2 Hawk. P. C. 355, 356. and the Authorities there cited.

Alſo the Principal in every Burglary, whether any Perſon were in the Houſe at the Time or not, is excluded from his Clergy, by 18 *Eliz. cap.* 7. upon a Conviction by Verdict, Outlawry or Confeſſion.

Alſo by 3 & 4 *W.* & *M. cap.* 9. every Perſon who ſhall counſel, hire or command any Perſon to commit any Burglary, being thereof convicted or attainted, or being indicted, and ſtanding mute, or challenging peremptorily above Twenty, ſhall not have his Clergy; and by this Statute Principals in Burglary ſtanding mute, or challenging peremptorily more than Twenty, are ouſted of their Clergy. *

*Stealing to 40s. Value in any Houſe, though it be not broken, and though no one be in it, is ouſted of Clergy, by 12 Ann. ſt. 1. c. 7. ſ. 1. *Vide* alſo 6 Geo. 1. c. 23. and ſee as to ſtealing Goods in a Houſe, Shop, *&c.* 3 W. and M. c. 9. 10 and 11 W. 3. c. 23.

* BY-LAWS.

Moor 583, 584. 5 Co. 62. (a) A Power of making By-Laws is

A By-Law is a private Law made by those who are (a) duly (b) authorized thereunto, by Charter, Prescription or (c) Custom, for the (d) Conservation of Order and good Government within some particular Place or Jurisdiction.

included in the very Act of Incorporating, and incident to every Corporation Aggregate, without express Words in the Charter; all By-Laws must ever be subject and squared to the Rule of the general Law of the Realm, as subordinate to it. Hob. 211. (b) By the 19 H. 7. c. 7. it is enacted, that no Ordinance shall be made in Diminution, or to the Disinheritance of the Prerogative of the King, nor against the common Profit of the People, unless they are examined and approved by the Chancellor, Treasurer of *England*, Chief Justices of either Bench, or three of them, or both Justices of Assise in their Circuit, where the Ordinance is, &c. nor shall restrain any to sue to the King against such Ordinances. * *Vide* Rol. Abr. 363. 5 Co. 63. Comb. 228. (c) Where a By-Law founded on a particular Custom before allowed, and become Part of the Common Law, shall be operative by the Custom, though otherwise it would be void. *Vide* Head of *Customs*, and Raym. 294. Carter 68, 114. Bridgm. 140, Brown 177, 178. Skin. 375. (d) The Inhabitants of a Town, without any Custom, may make By-Laws for the Repair of their Church Highways, or such other Thing which is for the publick Good; and in such Case the greater Part without any Custom, shall bind all. 5 Co. 63. Mo. 579. Brownl. 288. Hob. 212. Mod. 19 Of By-Laws for the better Regulation of Commons, *vide* Head *Common*, and Rol. Abr. 365. Leon 190. And. 284. 3 Leon. 38, 264. Dalf. 95. Palm. 396.

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* *Qu.* Notwithstanding this Statute, if a By-Law can be good, which is in Diminution, or t the Disinheritance of the Prerogative of the King, or against the common Profit of the People Or, if a By-Law can affect any but the Members of the Body, making it? See *post* the Heads D, and E.

As every By-Law must be reasonable in itself, and agreeable to th general Laws of the Realm, and be framed so as to advance the Benefit that Place where it is made to operate, I shall therefore consider,

(A) Such By-Laws as relate to the appointin and electing Members of a Corporation. 33
(B) Such as are made in Restraint of Trade. 33
(C) Such as are made to prevent Nuisances. 34
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(E) Such as in the Frame and Make of the are void, by ordaining a Method of inforcin Obedience to them contrary to Law. 342.

(A) Such By-Laws as relate to the appointin and electing Members of a Corporation.

Vide Head of *Corporations*. 4 Co. 78.

IF there be a Corporation made and incorporated by the Name of *Ma and Commonalty*, and by the Charter the Mayor is appointed to chosen by the Commonalty, and in the said Charter there is a Power gi

to them to make By-Laws, for the better Order and Government of the ſaid Corporation, *(a)* they may make a By-Law, that a ſelect Number of the Commonalty ſhall be choſen, by whom the Mayor ſhall be choſen, for Avoidance of popular Confuſion.

Jenk. Rep. 273. S. C.

(a) But where Members of Parliament are to be choſen by all the Commonalty, the Election cannot by a By-Law be given to a ſelect Number; for free Elections for Members of Parliament are *pro bono publico*; and this is not to be compared to the Caſe of Elections of Mayors, *&c.* 4 Inſt. 48, 49. ‖

‖ If Power of making By-Laws is by Charter given to a *Select* Body, they do not repreſent the whole Community, and cannot aſſume to themſelves what belongs to it; if the Power of making By-Laws is in the Body at large, they may delegate their Rights to a ſelect Body, *Rex* v. *Spencer*. H. 6 Geo. 3. 3 Bur. 1827.——A By-Law cannot ſuperadd a Qualification to an Elector which the Charter does not require. *Ibid.*

* If a By-Law is made by the Company of *Vintners* in *London*, that every Freeman of the ſaid Company, who ſhall be choſen and admitted to be a Liveryman, ſhall pay 31*l.* 13*s.* 4*d.* *&c.* this is a good By-Law; for this being a Degree of Pre-eminence to which Men of Subſtance only are raiſed; and there being a Neceſſity for Money to ſupport the Honour and Reputation of the Company, were the Sum more or leſs, it could not make the By-Law void, while it binds only the Members of the Corporation; for when a Man doth agree to be of a Company, he doth thereby ſubmit himſelf to the Laws thereof.

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Raym. 446. *Taverner's* Caſe. Comb. 221. A By-Law by the Company of Barber-Surgeons, that every one choſen Steward ſhall forfeit 20*l.* on Refuſal of his taking upon him the Office, held good. 2 Lev. 252. *Vide* Lutw. 402.

A By-Law made in *London*, that no Freeman choſen Sheriff, *&c.* ſhall be excuſed, unleſs he voluntarily ſwear he is not worth 10,000*l.* and bring ſix other Citizens to vouch in like Manner, on their Oaths, that they believe it to be true; and if he openly refuſe to take the Office, then to forfeit the Sum of 500*l.* *viz.* 400*l.* to the City; and 100*l.* to the next Man that ſhall hold the Office; held *(b)* a good By-Law.

Salk. 142. pl. 1. Ld. Raym. 496. 2 Mod. 270, 686. 2 Will. Rep. 109. Carth. 460. S. C. at large, and ſeveral Exceptions taken to it. 5 Mod. 438, 440. S. C.

(b) That every Common-Councilman who reſigns his Office, ſhall forfeit 10*l.* a good By-Law. Lut. 402, 405. Of a Company to elect upon their Livery ſuch and ſo many of their Members, as ſhould ſeem moſt meet and convenient to them, on Pain to forfeit 25*l.* on Refuſal to accept, or to pay the Admiſſion-fee, is a good By-Law. Bur. Rep. 239.

(B) Such as are made in Reſtraint of Trade.

A New Corporation not having any (*b*) Preſcription to appropriate to themſelves, and exclude others, cannot make a By-Law to exclude all Perſons from uſing an Art or Trade in their Town to which they were not Apprentices in the ſame Town, though they have ſerved as Apprentices to it in another Place.

Therefore

Rol. Abr. 364. Hob. 211. 212. *Norris* and *Staples*. Hutton 5, 6. S. C. Moor 869.

(*b*) But a By-Law, founded upon Preſcription or Cuſtom, may reſtrain a Man from the Exerciſe of his lawful Trade, in a particular Place. Lutw. 564. Carter 86, 114. But a By-Law ſhall not be carried farther than the Preſcription warrants. *Vide* Raym. 294. 2 Brownl. 178, 184. Bridg. 140. A By-Law founded on the Cuſtom of *London*, that no Perſon not being free of the City of *London*, ſhall keep any Shop, or uſe any Trade within the City, reſolved good in *Wagener's* Caſe. 8 Co. 129. And ſo the Practice has been to this Day.——So where the Corporation of Weavers claim by Cuſtom, that none ſhall intermeddle with their Art within *London* and

Therefore if a Corporation make a By-Law, that none ſhall uſe the Art of Weaving within the Corporation, who has not ſerved ſeven Years as an Apprentice there, or who has not exerciſed that Trade there for five Years before the making of the By-Law, (c) nor unleſs he be allowed and approved of by the Wardens of the Company, this is a void By-Law; for any Perſon may lawfully follow what Trade he pleaſes, and where he pleaſes, unleſs prohibited by the general Law of the Land.

Hob. 211. *Norris* verſ. *Staper*, or the Weaver of *Newbery*'s Caſe. Hutt. 6. S.C. Moor 869. S.C. Brownl 49. S. C.

(c) If the King creates a Corporation, and by the ſame Charter grants to the Members that none ſhall uſe a Trade within the ſaid Corporation, but ſuch as ſhall be approved by them, or any two of them, this Grant is void, being againſt the Liberty of the Subject, and tending to a Monopoly, and what the King cannot immediately do, cannot be done by any derivative Authority from him. Godb. 252. Lutw. 564.

So where the Corporation of Taylors in *Ipſwich* made a By-Law, that none ſhould (d) exerciſe the Trade of a Taylor in *Ipſwich*, *qui non fuerit* * *allocatus per legale warrantum vel authoritatem datam* by the ſaid Corporation, or three of the Maſters and Wardens; nor ſhould ſet up any Shop for this Art, nor exerciſe it, until they preſented themſelves to the Maſter, &c. or three of them, or proved that they had ſerved in this Trade as Apprentices for ſeven Years.

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11 Co. 53, 54. The Taylors of *Ipſwich* Caſe adjudged.

Rol. Rep. 4, 5. S. C. adjudged. Godb. 252. S. C. adjudged. Rol. Abr. 364, 365. S. C. adjudged.

(d) That if a Servant makes Clothes for his Maſter, Miſtreſs, or their Children, this is not exerciſing the Trade of, &c. but for this *vide* Rol. Rep. 4. 11 Co. 54. Hob. 211. Godb. 253. Bridg. 141. 8 Co. 129. and *vide* Statute 5 Eliz. c. 4. and 28 H. 8. c. 5. That no Apprentice or Journeyman ſhall, by Oath or Bond, be compelled not to keep any Shop, &c. without Licence of the Maſter.

So where the Town of *Bedford* made a By-Law, that none, except Freemen, ſhould exerciſe any Art, Trade or Myſtery, within the Corporation, which, not being founded on any Cuſtom they had of excluding Foreigners, was held void.

Comyns 269. pl. 148. Lutw. 562. Mayor of *Bedford* v. *Fox* adjudged.

If the Merchant-Taylors of *London*, by Virtue of their Charter, make a By-Law, that no Merchant ſhall put his Cloth to be dreſſed but at a Clothworker's of their Company, this is a void By-Law; for it is againſt Reaſon and the general Liberty of the Subject, to be reſtrained from putting his Work to whom he pleaſes.

Rol. Abr. 364. Moor 576, 577, &c. 591. pl. 766. adjudged between *Davenant* and *Hardis*.

2 Inſt. 47. S. C. 11 Co. 86. S. C. cited. Carth. 116. S. C.

So a By-Law in *London*, that none ſhall bring any Sand, nor ſell nor uſe any within the City or Suburbs, but only that which is taken out of the River of *Thames*, &c. is void, becauſe it is againſt Reaſon that a Freeman ſhould be reſtrained from Merchandizing and Selling; and this may concern the Inheritance of ſome who may have Sands in their Land.

Godb. 106, 107. adjudged. Raym. 293. S.C. cited.

If the City of *London* make a By-Law, that no Perſon ſhall follow the Profeſſion of a Dancing-Maſter within the City, who is not free of the

5 Mod. 104. *The Chamberlain of London* verſ. *Greſcourt* adjudged. Comb. 373. S. C.

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and *Southwark*, but thoſe of their Guild or Fraternity, held good. Cro. Eliz. 803. A By-Law in Reſtraint of Trade is not good, without ſetting forth a particular Cuſtom to ſupport it; ſuch particular Cuſtom cannot be preſumed. A By-Law to confine ſuch as have a Right to the general Freedom of the City of *London*, to take it up in ſome one particular Company, is a Reſtraint of Trade. Bur. Rep. 16, 17. A By-Law to prevent being made free, till called at three ſeveral Meetings of the Mayor, &c. and approved of by the Majority, was holden to be a reaſonable Regulation of Trade. *Id.* 131.

Company

Company of Muſicians *, this is a void By-Law, for if he be free of any other Company it is ſufficient; and the obliging a Man to be free of a particular Company, when he has no Remedy to compel that Company to admit him, is creating a Kind of (a) Monopoly in ſuch Company, and putting a certain Number of Men under the final Juriſdiction and Power of others.

(a) A By-Law made by the Merchant-Adventurers, that no Man ſhould buy or ſell at four Fairs within ſuch a Prince's Dominions, without firſt compounding with them, and paying a Fine, was made void by the Statute 12 H. 7. c. 6. becauſe it was an Infringement of the Liberties of all others, not being free of that Company. Rol. Abr. 363.

* Under a general Power to make By-Laws, a By-Law cannot be made to reſtrain Trade; therefore a By-Law, that no Freeman of the City of *London* ſhall exerciſe the Trade of a Butcher, without being free of the Butchers Company, adjudged void. *Harriſon* v. *Goodman*, M. 30 Geo. 3. 1 Bur. 12. But *vide Rex* v. *Harriſon*, T. 2 Geo. 3. 3 Bur. 1324. where a By-Law, that Butchers, not free, ſhall take their Freedom in the Butchers Company, and no Butcher be admitted to the Freedom of the City in any other Company; and all Butchers not free of the City, and intitled to their Freedom of another Company, ſhall be made free of the Butchers Company, on paying the uſual Fees and Fine, was adjudged good.

But if an Ordinance be made in *London* by the Common-Council, (who have Power by Cuſtom, which is among other Cuſtoms confirmed by Act of Parliament by general Words) that if any Freeman, Citizen or Stranger within the City, ſhall put any Broad-Cloth to Sale within the City of *London*, before it be brought to *Blackwell-Hall* to be viewed and ſearched, ſo that it may appear to be ſaleable, and that Hallage be paid for it, *ſcilicet* one Penny for every Cloth, that he ſhall forfeit for every Cloth 6s. 8d. this is a good Ordinance, as well to bind Strangers as Freemen, becauſe it is made to prevent Fraud and Falſity in Cloth, and for the better Execution of the Statutes without Deceit; and the one Penny for Hallage is but a reaſonable Recompence or Charge, for the Benefit which the Subject hath by it. 5 Co. 62. Chamb. of *London*'s Caſe. Rol. Abr. 365. S. C. 3 Leon. 264. S. C. ill reported.

If in *London* there is an Act of Common Council made, that the Bricklayers ſhall not Plaiſter with Lime and Hair, but with Lime and Sand only, and that Plaiſtering with Lime and Hair ſhall belong to the Plaiſterers, under the Penalty of, &c. (admitting this before to have been Part of the Trade of a Bricklayer) the By-Law is void: for though they have *regimen Perſonarum* in their Manufactures, yet this Power extends only to their Demeanor in their Trade, and not to annex that to one Trade which before belonged to another. Palm. 305. *per Cur.*

* But if a By-Law is made by the Corporation of *Throwſters* in *London*, that none ſhall have above ſuch a Number of Spindles in one Week, this is a good By-Law, for it is not in Reſtraint of Trade, but to make a more equal Diſtribution of it. *Page 340 Lev. 229. adjudged.

By-Law to confine Brewers to certain Hours for carrying out Drink, good. 2 Stra. 1085. Andr. 9. 10 Mod. 131.

All By-Laws intended to hinder Trade are void.

(C) Such as are made to prevent Nuiſances.

IT ſeems clearly agreed, that wherever any Trade by its Excreſcence tends to a Nuiſance, and thereby proves of publick Inconvenience, it may be reſtrained by a By-Law; therefore if the Mayor, &c. of *London*, having Time out of Mind had the Right to order and diſpoſe of Cars, &c. to the Raym. 248. Cr. 328. adjudged between *Player*.

End

and *Vere*, Sid. 284. S. C. adjudged. Keb. 463, 496. Vent. 21. 2 Keb. 27. S.P. adjudged between *Player* and *Jenkins*.

End the Streets may not be peſtered with Cars, &c. make a By-Law, that but 420, &c. ſhall be permitted to work for Hire within the City and the Liberties thereof, and that the Preſident, &c. of *Chriſt's Hoſpital* ſhall have the Regulation thereof, and that 20*s*. Admittance, and 17*s*. and 4*d*. yearly, ſhall be paid, &c. to the Uſe of the Poor of the ſaid Hoſpital; this *quoad* (*a*) the Fine and Rent is void, but in all Things elſe a good By-Law, becauſe a Multitude of Cars, by the Stoppage of the Streets, may prove a public Nuiſance.

Vide Vent. 195. 196. Like Point between *Player* and *Broadnox*, admitted, ſuch By-Law being founded on the Cuſtom; and *vide* Skin. 371. pl. 19. to 384. 4 Mod. 228. A By-Law to reſtrain the Number of Hackney Coaches, and that they ſhould not exceed 400, and objected, That Coaches being of a new Invention, a By-Law founded on the Cuſtom was void; but there is no Reſolution; and now *vide* the Statutes 5 W. and M. c. 22. 9 Ann. c. 23. 1 Geo. 1. c. 57. (*a*) A By-Law, that no Carman within the City of *London* ſhould go with his Cart without a Licence from the Guardians of ſuch an Hoſpital, &c. is void; for this only tends to the private Benefit of the Guardians of the Hoſpital, and is in Nature of a Monopoly. Rol. Abr. 364. *Vide* Bulſt. 11, 12.——And all By-Laws ought to be for the common Benefit of, &c. and not for the private Benefit of a particular Man. Goldſb. 79. Moor 580. Carth. 480. Ld. Raym. 496. Salk. 142. pl. 1. 5 Mod. 438. 12 Mod. 270, 686. 2 Will. Rep. 209.

Sid. 284. *per Cur.*'

So if the Number of Taverns, Alehouſes, &c. increaſes to ſo great a Number as to become Nuiſances, they may be reſtrained by a By-Law.

Skin. 380. (*b*) Sid. 284. *per Cur.*' March 15. S. P. March 15. *per Cur.*' (*c*) So of a Brew-houſe. March 15. *per Cur.*'——A Man reſtrained from ſetting up a Tavern in *Birchin-Lane*. March 15.

So if a By-Law be made in *London*, that none ſhall make a Hot-preſs, nor uſe it within the City, under the Penalty of 10*l*. for the making thereof, and 5*l*. for the Uſe thereof, this is a good By-Law; becauſe the Uſe of thoſe Preſſes is dangerous with Regard to Fire, and alſo deceitful, in as much as thoſe Preſſes make Cloths and Stuffs look better to the Eye than in Truth they are. *

Rol. Abr. 365. adjudged.

* That Brewers Drays ſhould not be in the Streets of *London* after eleven in the Forenoon in Summer, and one in Winter, is good. *Boſworth* v. *Hearne*. H. 11 Geo. 2. Stra. 1085. B. R. H. 405. Andr. 91.

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* (D) Such as affect Strangers.

Bulſt. 11. adjudged. See Lucas 131, 135. (*d*) For the general Learning where Strangers ſhall be bound by By-Laws, or not, *vide* Moor 579. Dalſ. 103. Savil 74. Godb. 180. Carter 179. Salk. 142. pl. 1. Ld. Raym. 496.

IF the Corporation of Butchers in *London*, having Power to make By-Laws, make one, That no Butcher, or Perſon being a Stranger ſhall ſell any Veal within the City of *London*, unleſs they dreſs the Kidneys of their Veal in ſuch a Manner as the Kidneys of Sheep are dreſſed, under the Penalty of, &c. a Stranger, ſelling Veal in *London*, is not (*d*) bound to take Notice of this By-Law.

But

But if such By-Law is made to suppress Fraud, or any general Inconvenience used by a Foreigner, as Corruption, &c. in the Sale of Meat, this is a good By-Law; and such of which he (a) must take Notice. Bulst. 12. *per Cur'*.

(a) That Strangers coming into a Corporation must, at their Peril, take Notice of the By-Laws of such Corporation. Skin. 350. pl. 19. Lutw. 404.

If the Master, Wardens, and Assistants of the *Trinity-House* in *Deptford-Strand*, being incorporated by Letters Patent of *Car.* 2. and having thereby Power to make By-Laws, do make one, That every Mariner within twenty-four Hours after Anchorage in the River of *Thames*, shall send his Gunpowder on Shore, if the Weather will permit, under the Penalty of, &c. though *quoad* the Matter, this is a good By-Law, because for the Publick Good, and Prevention of the Danger which might otherwise accrue to the City of *London*; yet because the By-Law extended beyond the Jurisdiction of the Makers, *dubitatur*. 2 Jones 144. *Vide* Bridg. 141, and 2 Vent. 33.

Where the University of *Oxford* made a By-Law, That whoever, *Privilegiatus sive non Privilegiatus*, should be taken walking in the Streets after Nine at Night, and having no reasonable Excuse, to be allowed by the Proctor, should forfeit 40s. and whether this could affect or extend to a Townsman, *dubitatur*; and a Prohibition granted, to the End the Merits may be determided.

If the Company of Horners of *London*, being incorporated by Letters Patent, and impowered to make By-Laws for the better Government of their Corporation, make a By-Law, That two Men by them appointed shall buy rough Horns for the said Company, and bring them to the Hall, there to be distributed every Month by the Master, &c. for the Use of the Company; and that no Member of the Company shall buy rough Horns within twenty-four Miles of *London*, but only of those two Men appointed, under the Penalty of, &c. this is no good By-Law; for they being a Company incorporated in the City of *London*, have no Jurisdiction elsewhere; and may as well extend their Power all over *England*, as for twenty-four Miles. 3 Mod. 159. Adjudged.

A By-Law, that all Strangers, coming into the Port of *London*, should employ City Porters to carry their Goods, &c. is naught; but they may (b) make a By-Law, * That none but Freemen shall be Porters; but to confine Strangers to none but such as are City Porters, is unreasonable; for if the City will appoint no Porters, they have no Remedy against the City; also Strangers cannot know who are City Porters, nor compel them to serve them. (b) Salk. 143. pl. 7. *per Cur'*. *Vide* Salk. 192. pl. 5. S. C.

That they being a Corporation cannot make a Corporation, but may a Fraternity. See 10 Mod. 338, &c.

* A Corporation may inforce a Custom by a By-Law, imposing a Penalty for a Breach of it; but it cannot give an Action to a *Stranger* to recover that Penalty, but must sue for it themselves, or some one for them. *Bedwell* v. *Fennell*, M. 22 Geo. 2. 1 Wilf. 233. *Totterdell* v. *Glazby*, T. 5 Geo. 2. 2 Wilf. 366.

(E) Such as in the Frame and Make of them, are void, by ordaining a Method of inforcing Obedience to them contrary to Law.

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BY-Laws are usually made with certain Penalties, which regularly are to be recovered by (c) Action of Debt, or may be *(d)* levied by Distress. 5 Co. 64.

(c) A By-Law by the City of *London*, and that the Penalty shall be recovered by the Chamberlain, is good. But 5 Co. 63. —But if the Mayor and Commonalty limit the Penalty of the By-Law to themselves, it cannot be recovered in the Mayor's Court, unless he be severed. Salk. 397. pl. 3. 398. Ld. Raym. 501. Where, upon a By-Law made in *London*, the Penalty was limited to be recovered by Action of Debt,

5 Co. 64. 8 Co. 127. S. P. Resolved. 2 Inst. 54. Moor 411. S. P.

But a By-Law with a Penalty of (*a*) Impriſonment, or Forfeiture of Goods and Chattels, is void; for, by the General Law of the Kingdom, no Man is to be impriſoned, or diſpoſſeſſed of his Goods and Chattels, *niſi per Legale Judicium Parium ſuorum, vel per Legem terræ*; and were By-Laws with ſuch Penalties allowed, it would be enabling Corporations to ſet up private particular Laws, in Contradiction to the Laws of the Land; which would be againſt the very Nature and Eſſence of a By-Law; which, though it may be *præter* the General Law of the Realm, it cannot be *contra*.

(*a*) And there the By-Law was, That if any gave opprobrious Words to the Mayor, he ſhould be impriſoned. *&c. Per Cur'*: Such a By-Law is not lawful; but a By-Law to diſfranchiſe the Offender had been good.——The City of *London* cannot ſet a Fine, *&c.* for Non-performance of a By-Law. Comb. 10.

2 Vent. 182. adjudged between *Clerk* and *Tucker*.

If the Company of Taylors in the City of *Exeter*, being incorporated by Letters Patent of *Edw.* 4. and having thereby Power given them to make By-Laws, make a By-Law under a certain Penalty, to be (*b*) levied by Diſtreſs and Sale of the Offender's Goods; this is no good By-Law; for the Forfeiture cannot be levied by Sale of the Offender's Goods.

(*b*) So a By-Law cannot be made upon Pain of Forfeiture of the Goods, *&c.* 8 Co. 127. b. 2 Vent. 183. *Vide* Keb. 735.

Moor 411.

If in *London* a By-Law is made, that if any Freeman takes the Son of an Alien to be his Apprentice, the Bonds and Covenants ſhall be void; this is no good By-Law; for though the Common-Council might have inflicted a Fine or other Puniſhment upon ſuch Maſter, yet they cannot make the Bonds and Covenants void. *

* A By-Law that none but Freemen ſhall keep Shop, and which confines the Action to the Portmote Courts where none but the Sheriff or Coroner (*who muſt be Freemen*) can array a Jury, is bad. *Heſketh* v. *Broddock*. H. 6. Geo. 3. 3 Burr. 1847.

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* CARRIERS.

(A) What Perſons come under the Denomination of Carriers. 343.

(B) In what Caſes chargeable for a Failure in his Duty. 344.

Debt, wherein no Eſſoin, Protection, or Wager of Law ſhould be allowed; the Juſtices ſaid, They were very preſumptuous in making By-Laws in ſo Legiſlative a Strain; and ſaid, they might be ſued in *B. R.* for their Preſumption and Inſolence. Godb. 107. 3 Mod. 193.——The Action cannot be reſtrained to the Court of the Corporation in which the By-Law is made; but Debt, notwithſtanding, will lie thereupon in the Superior Courts. 2 Sid. 105, 178.—Where under the Penalty of ſuch a Sum (not exceeding 40s.) as by the Makers of the By-Law ſhould be aſſeſſed. Bridg. 139, 142.——How the Penalty muſt be aſcertained. 2 Lutw. 1324. (*d*) A Penal Sum to be forfeited for Non Performance of a By-Law, cannot be levied by Diſtreſs, without a Preſcription to do it, or Limitation by the By-Law ſo to do. 5 Co. 64.

(C) Of

(C) Of his Intereſt in the Things delivered to his Charge. 346.
(D) Of the Regulations Carriers are under by Acts of Parliament, with reſpect to their Carriages, and the Prices they are to take. 347.

(A) What Perſons come under the Denomination of Carriers.

ALL Perſons carrying Goods for Hire, as *(a)* Maſters and Owners of Ships, Lightermen, Stage-coach-Men, *&c.* come under the Denomination of Common Carriers, and are chargeable on the *(b)* General Cuſtom of the Realm, for their Faults and Miſcarriages. Co. Lit. 89. Rol. Abr. 2, 338.

(a) For this *vide* Head of *Merchant and Merchandize*, and *Maſter and Servant*.

(b) And though a Declaration againſt a Carrier may be good without reciting the general Cuſtom, yet the beſt and moſt uſual Way is to bring a ſpecial Action on the Caſe, and declare *quod ſecundum Legem & Conſuetudinem Angliæ, &c.* Sid. 245. Hard. 485, 486. This Cuſtom is not confined to a particular Place, but extends to all the King's People. 3 Mod. 227. And therefore in Truth it is the Common Law. Hob. 18.——Are liable in reſpect of the Reward and not of the Hundred's being anſwerable over to them. Salk. 17. pl. 8, 143. Ld. Raym. 646. 5 Mod. 455. Carth. 487. Comyns 100. 12 Mod. 482.

Alſo if a Perſon, who is no common Carrier, takes upon himſelf to carry my Goods, though I promiſe him no *(c)* Reward, yet if my Goods are loſt or damaged by his Default, I ſhall have an Action againſt him.

(c) If he be a common Carrier, though there be no Agreement or Promiſe of Payment, he ſhall recover his Hire on a *Quantum Meruit*; and therefore liable. Alſo a private Perſon undertaking, without any Reward, to carry my Goods, ſhall anſwer for his own Neglect; for by taking the Truſt on himſelf, he is obliged to execute it; but if the Goods are miſuſed by another, he is not liable. *Per Holt* Ch. Juſt. in *Cogge* and *Barnard*'s Caſe, Salk. 26. pl. 12. 2 Ld. Raym. 909. 3 Salk. 11. *Vide* his Argument at large. Head of *Bailment ante* 243.

But the Maſter of a Stage-Coach who *(d)* only carries Paſſengers for Hire, ſhall not be liable for the Goods of his Paſſengers that are loſt; and therefore (*e*) where *A.* delivered a Trunk to the Driver or Servant, who loſt it out of his Poſſeſſion, it was held, That the Maſter was not liable in an Action upon the Caſe on the Cuſtom of the Realm; for though the Servant received Money for it, yet that was but a Gratuity; and the Maſter ſhall not be chargeable with the Acts of his Servant, otherwiſe than he acts in Execution of the Authority given him. Comyns 25. pl. 16.

(d) But if he carries Goods as well as Paſſengers for Hire, then he is a common Carrier, and ſhall be liable. 2 Show. Rep. 128. Salk. 282. pl. 11. S. P. *per Holt.*

(*e*) Ruled by *Holt* on Evidence, and the Plaintiff nonſuited. Salk. 282. pl. 11.

(B) In

*Page 344 * (B) In what Cases chargeable for a Failure in his Duty.

Rol. Abr. 2. Hob. 17. Cro. Jac. 262.

IF a Man delivers Goods to a (*a*) common Carrier, to carry them to a certain Place, if he (*b*) loſes them, an Action upon the Caſe lies againſt him; for, by the common Cuſtom of the Realm, he ought to carry them ſafely.

(*a*) Though no common Carrier, yet, if he takes Hire, he may be charged upon his Special *Aſſumpſit*. Cro. Jac. 262. Sid. 245. Keb. 852. Stra. 128. 1 Term Rep. 27, 33, 659. (*b*) So if damaged; and the Declaration ſhall be good, though not particularly alledged how they were damnified. Palm. 523. Hern's Plead. 76, 77.

2 Show. Rep. 327. pl. 334.

Alſo, if a (*c*) common Carrier, who is offered his Hire, and who has (*d*) Convenience, refuſes to carry Goods, he is liable to an Action, in the ſame Manner as an Inn-keeper who refuſes to entertain a Gueſt, or a Smith who refuſes to ſhoe a Horſe.

(*c*) That an Action will lie againſt a common Ferryman, who refuſes to carry Paſſengers. Hard. 163. *ſed arguendo*. *Vide* Rob. Ent. 103. A Special Declaration againſt a Letter-Carrier, for the Non-delivery of a Letter delivered out to him at the General Poſt-Office. (*d*) But if the Porter puts up the Box of a Paſſenger behind a Stage-Coach, and the Maſter, as ſoon as he knows of it, ſays, That he is already full, and refuſes to take the Charge of it, the Maſter ſhall not be liable; Ruled upon Evidence. 2 Show. Rep. 128. For this is the ſame Caſe with an Hoſt who refuſes his Gueſt, his Houſe being full, and yet the Party ſays he will ſhift, &c. if he be robbed, the Hoſt is diſcharged; for this *vide* Head of *Inns and Inn-keepers*.

Cro. Jac. 330. Hob. 17. S. C. adjudged.

If a Man delivers Goods to a common (*e*) Hoyman, who is a common Carrier of Goods, to carry them to a certain Place, and pays him according to the Cuſtom for the Carriage of them, and after for Default of good keeping they are loſt; an Action upon the Caſe lies againſt him; for by the common Cuſtom of the Realm he ought to have kept and carried them ſafely.

(*e*) When Goods of Value are put into a Lighter to be conveyed from the Ship to the Quay, it is uſual for the Maſter to ſend a competent Number of his Men to look to the Merchandize, ſo that if any of the Goods are loſt or imbezilled, the Maſter is anſwerable, and not the Wharfinger; but if ſuch Goods are ſent aboard a Ship, the Wharfinger, at his Peril, muſt take Care to preſerve them. Molloy 212. Said to be ruled at *Guildhall*, *per Holt* Ch. Juſt. So if he does not pay him, or make any Agreement; for the Carrier may have his *Quantum Meruit*. Cro. Jac. 263. Sid. 36. *Bro. Action on the Caſe* 78. 2 Show. 81, 129. *

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* If the Wharfinger takes Charge of the Goods, and loſes or ſuffers them through Negligence to be damnified, he is liable to an Action.

Rol. Abr. 2. Hob. 17. Cro. Jac. 330. S. C. 1 Wilſ. 281. 4 Burr. 2298.

If a Man delivers Goods to ſuch common Hoyman, to carry to a Place, and after delivers them (being of good Value) to another to keep ſafely in the Boat, and does not diſcharge the Hoyman, and after they are loſt through Negligence, an Action on the Caſe lies againſt him.

1 Term Rep. 27, 33.

Sid. 36. *Vide* Rol. Abr. 338. 2 Show. 129.

If *A.* delivers Goods at *York*, to *B.* (who is a Water-Carrier between *Hull* and *London*) to carry them from *Hull* to *London*; though the Agreement is to carry the Goods from *Hull* to *London*, and no Mention is made of the Carriage to *Hull*, yet if the Goods are loſt, *B.* ſhall anſwer for them; for upon his general Receipt of them at *York*, he is liable.

If a Merchant lades Goods aboard a Ship, to be tranſported at a reaſonable Reward of Freight to be paid to the Owners, and in the Night-time, while the Ship rides in the River *Thames*, notwithſtanding a com-

*Page 345 * petent Number of Men are left aboard for the Guard of the Ship and Goods, yet ſeveral Perſons, under the Pretence of Preſſing Seamen, ſeize on the Men aboard, and take away the Goods; an Action will lie againſt the Maſter, for in Effect he is paid by the Merchant, for the Merchant pays the Owners, and the Owners pay the Maſter; ſo that the Money of the Merchant

Vent. 190, 233. *Mors and Sluce*, adjudged.

Merchant is but handed over by them to the Maſter; adjudged and ſaid, That though by the Admiral Law, the Maſter is not chargeable *pro Damno fatali*, as in Caſe of Pirates, Storm, &c. where there is no Negligence in him; yet becauſe the Ship was *infrà Corpus Comitatus* (*a*) this Caſe muſt not be meaſured by the Rules of that Law. upon a Special Verdict, *per totam Curiam* Raym. 220. S. C. 3 Keb. 74, 112, 135. S. C. Mod. 85. S. C. ill-reported. 2 Ld. Raym. 918. Stra. 128. 2 Lev. 69. S. C. 3 Lev. 259. S. C. cited, and *Holt* Ch. Juſt. ſaid, The Maſter is chargeable in reſpect of his Wages, and the Proprietors in reſpect of his Freight. Molloy 209, 210. S. C. For he muſt ſee all Things forth-coming which are delivered to him, let what will happen; the Act of God or an Enemy, Perils and Dangers of the Sea only excepted; but for Fire, Thieves, &c. he muſt anſwer. (*a*) In an Action againſt a common Hoyman from *Walton* to *London*, the Defendant pleads, that the Boat and Goods *ſupra Thamiſam* were ſunk and loſt, *abſque hoc*, that they were loſt *pro defectu bonæ Cuſtodiæ*, and Iſſue thereupon joined.

If *A.* and ſeveral others take their Paſſage in a Ferry-Boat, and being upon the Water a Tempeſt ariſes, ſo that they are in much Danger of being drowned; upon which, to preſerve their Lives, ſeveral of the Goods were caſt over-board, among which, a Pack of Goods of *A.*'s of great Value is thrown over; (*b*) *A.* ſhall have no (*c*) Action againſt the Bargeman, 2 Bulſt. 280. 2 Ld. Raym. 918. Stra. 128. (*b*) But when and how, by the Marine Law he ſhall have Average, &c. *vide* Molloy 246. and the Head of *Merchants and Merchandize*. (*c*) So if any Paſſenger, *ex neceſſitate* for the Safeguard of his Life, throws it over-board, no Action lies againſt the Bargeman. 12 Co. 62. But it ſeems ſettled, notwithſtanding theſe Caſes, that a Ferryman who carries Goods for Hire, ſhall anſwer for the Goods though robbed of them, for though he throws them over-board to ſave the Lives of the Men in the Boat, becauſe for his Hire he runs the Venture of the Voyage. *Vide* Allen 93.

It is clearly reſolved, that if a Carrier be robbed he ſhall anſwer the Value of the Goods, for he hath his (*d*) Hire, which implies an Undertaking for the ſafe Cuſtody and Delivery of them, which charges him at all Events; and this Political Inſtitution was introduced the better to ſecure People in their Dealings, and to prevent Carriers, who are often intruſted with Things of the greateſt Value, from confederating with Robbers, &c. Co. Lit. 89. 4 Co. 84. Owen 57. 8 Co. 84. Rol. Abr. 2, 124. 2 Rol. Abr. 367. Rob. Rep. 79. Hob. 17, 18. Cro. Jac. 162, 330, 331. Bulſt. 280. Sid. 36. Mod. 85. 2 Ld. Raym. 918. Stra. 121. 2 Sand. 380. Palm. 532. Moor. 462. (*d*) He is liable in reſpect of his Reward, and not of the Hundred's being anſwerable over to him; for the Hundred is liable by the Statute of *Wincheſter*, but he was ſo at Common Law; *per* Holt Ch. Juſt. Salk. 143. Ld. Raym. 646. 5 Mod. 455. Carth. 487. Comyns 100. 12 Mod. 482.

So if *A.* delivers a Box to a Carrier to carry, and he aſks what is in it, and *A.* tells him, a Book and Tobacco, and in Truth there is 100*l.* beſides, yet if the Carrier is robbed, he ſhall anſwer for the Money; for *A.* was not bound to tell him all the Particulars in the Box, and it was the Buſineſs of the Carrier to have made (*e*) a ſpecial Acceptance: Ruled by *Roll* at the *Niſi Prius* at *Guildhall*; but in Regard of the intended Cheat to the Carrier, he told the Jury, they might conſider of it in Damages; but yet the Jury gave the Plaintiff 97*l.* Damages, abating 3*l.* only for Carriage; *quod durum videbatur Circumſtantibus*. Allen 93. *Kenrig* and *Eccleſton*. (*e*) It ſeems now ſettled, that without a ſpecial Acceptance the Carrier ſhall be liable. Vent. 238. 3 Keb. 135. *Vide* Doct. & Stud. 130. and Head of *Inn and Innkeepers*, and ſee Stra. 145.

But if *A.* being a common Carrier, receives by his Book-keeper from the Servant of *B.* two Bags of Money ſealed up, containing, as was told him, 200*l.* and the Book-keeper gives a Receipt for his Maſter to this Effect, *Received of* &c. *two Bags of Money ſealed up, ſaid to contain* 200*l. which I promiſe to deliver on ſuch a Day at* Exeter, *unto*——*he to pay* 10*s.* per Cent. *for Carriage and Riſque*; though the Bags contain 450*l.* and the Carrier is robbed, he ſhall be anſwerable only for 200*l.* for this is a particular Undertaking; and as it is by Reaſon of the Reward that the Carrier is Carth. 483. Sir *Joſeph Jekyll* and *Morrice*. And the like Point ſaid to have been ſo ruled between others and the ſame Plaintiff.

*Page 346 * is liable, which when the Plaintiff endeavours to defraud him of, it is but reaſonable he ſhould be barred of that Remedy which is only founded on the Reward.

(C) Of his Intereſt in the Things delivered to his Charge.

Co. Lit. 89. 4 Co. 83. 7 H. 6. 60. 2 Bulſt. 311. Sid. 438. Mod. 30. 2 Sand. 47. Yelv. 44. Dyer 98. 2 Hawk. P. C. 167.

A Carrier who hath Goods delivered to him, undertakes for his Hire to deliver them ſafely, and he hath the Poſſeſſion of them for no other Purpoſe; yet he hath ſuch a ſpecial limited Property, that he may bring Trover and Converſion againſt a Stranger that takes them away, or he may ſue the Hundred when robbed of them, becauſe he is anſwerable over in Damages to the abſolute Owner.

So a Carrier by reaſon of his Poſſeſſion, and this ſpecial kind of Property, may have an Appeal of Larceny againſt one who robs him of the Goods committed to his Charge.

18 E. 410. S. P. C. 25. Dalt. c. 102. Kelynge 35. Rol. Abr. 73. Hawk. P. C. 90.

Alſo a Carrier by not delivering the Goods, or by imbeziling of them, cannot be guilty of Felony; but if he opens a Pack and takes out Part of the Goods, with an Intent to ſteal that Part, he is guilty of Felony; for a Poſſeſſion of Part diſtinct from the Whole was gained by Wrong, and not delivered by the Owner; alſo it was obtained baſely, fraudulently and clandeſtinely, in hopes to prevent its being diſcovered at all, or fixed upon any one when diſcovered.

H. P. C. 62. 3 Inſt. 107. Bro. Coron. 160. S. P. C. 25. Hawk. 90.

So if a Carrier, after he has brought the Goods to the Place appointed, take them away again ſecretly *animo furandi*, he is guilty of Felony, becauſe the Poſſeſſion which he received from the Owner being determined, his ſecond Taking is in all Reſpects the ſame as if he were a mere Stranger.

7 H. 6. 43. 5 H. 7. 18. b. Bro. Coron. 45, 160. Cro. El. 536. S. P. C. 26. a. 3 Inſt. 310. Mo. pl. 981. H. P. C. 67. Kelw. 70. Hawk. P. C. 94.

Alſo if a Stranger ſteals the Goods delivered to a Carrier, he may be indicted generally, as having ſtolen his Goods; ſo by reaſon of this ſpecial Property, if the Owner, with an Intent to make the Carrier anſwer for them, fraudulently and ſecretly takes them away, he is guilty of Felony, and may be indicted generally, as having ſtolen his Goods; for the Injury is altogether as great, and the Fraud as baſe, where they are taken away by the Owner, as by a Stranger.

*Page 347 * **(D) Of the Regulations Carriers are under by Acts of Parliament, with reſpect to their Carriages, and the Prices they are to take.**

See 22 Car. 2. c. 12. 7 & 8 W. 3. c. 29. 6 Ann. c. 29. 9 Ann. c. 18. and 1 Geo. 1.

BY the 5 *Geo.* 1. *cap.* 12. it is enacted, "That no Waggon travelling "for Hire ſhall go, or be drawn with more than ſix Horſes, either at "Length or in Pairs, or Sideways; and that no Cart travelling for Hire "ſhall go or be drawn with more than three Horſes, under the following "Penalties, *i. e.* That if any travelling Waggon for Hire ſhall go or be "drawn with more than ſix Horſes, that the Owner or Driver of ſuch "Waggon

" Waggon ſhall forfeit and loſe all the Horſes above ſix in the Waggon, with all Geers, Bridles, Halters and Accoutrements, to the ſole Uſe and Benefit of any Perſon or Perſons who ſhall ſeize or diſtrain the ſame; and if any Cart travelling or carrying for Hire ſhall go, travel, or be drawn with more than three Horſes, that the Owner or Driver of ſuch Cart ſo travelling for Hire ſhall forfeit and loſe all the Horſes above three, (4) with all Geers, Bridles, Halters and Accoutrements, to the ſole Uſe and Benefit of any Perſon or Perſons who ſhall ſeize or diſtrain the ſame.

ſt. 2. c. 11. 15 Geo. 2. c. 2. Statutes to this Purpoſe; and Hawk. P. C. 214. 1 Geo. ſt. 2. c. 57. ſ. 8. Carmen ſding in

Carts, not having ſome Perſon on Foot to guide them, forfeit 10s. or within ten Miles of *London*, 24 Geo. 2. c. 43. ſ. 8. a general Prohibition of it. 27 Geo. 2. c. 16. ſ. 7. 30 Geo. 2. c. 22. ſ. 9. *Vide* 6 Geo. 2. c. 6. 14 Geo. 2. c. 42. ſ. 6. 18 Geo. 2. c. 33. ſ. 3, 4, 7. 16 Geo. 2. c. 29. 26 Geo. 2. c. 30. ſ. 4, 6. 30 Geo. 2. c. 22. ſ. 2, 5. 30 Geo. 2. c. 28. ſ. 13. (*a*) Four, by 16 Geo. 2. c. 29.

" *Provided*, That the Perſons making any Seizure or Diſtreſs for any of " the Penalties hereby incurred, ſuch Perſon or Perſons ſhall deliver the " Horſe or Horſes, or other Things ſo ſeized or diſtrained, into the " Cuſtody of the Conſtable, or ſome other Pariſh Officer of the ſame, " next or adjacent Town or Pariſh where ſuch Diſtreſs or Seizure is made, " (who are hereby required to receive into their Cuſtody, and ſafely to keep " the ſame) till the Perſon or Perſons who made ſuch Diſtreſs or Seizure, " ſhall make Proof upon Oath before ſome Juſtice of the Peace, of the " Offence committed; and the ſaid Juſtice or Juſtices before whom ſuch " Proof is made, are hereby required to iſſue their Precept to ſuch Con- " ſtable or Pariſh Officer, immediately to deliver the Horſe or Horſes, or " other Things ſo forfeited, to the Party or Parties who ſeized or diſtrained " the ſame, to and for their ſole Uſe and Benefit, paying ſuch reaſonable " Charge for keeping and ſecuring ſuch other Thing, as the ſaid Juſtice " ſhall direct."

Alſo it is enacted by the ſaid Statute, " That no ſuch travelling Waggon " for Hire, having the Wheels bound with Streaks or Tire of a leſs Breadth " than two Inches and a Half when worn, or being ſet or faſtened on with " Roſe-headed Nails ſhall go, or be drawn with more than three Horſes; " every ſuch Owner or Driver of any ſuch Waggon, being ſo bound with " Tire or Streaks of a leſs Breadth than two Inches and a Half when worn, " or if of a greater Breadth, ſuch Tire or Streak ſhall be faſtened on with " Roſe-headed Nails, ſhall forfeit and loſe all ſuch Horſes above the Num- " ber of three, with all Geers, Bridles, Halters and Accoutrements, to be " ſeized and diſpoſed of as aforeſaid.

" And that if any Perſon or Perſons ſhall or do hinder, or with Force " or otherwiſe attempt, or endeavour to hinder or obſtruct the Seizing, " Diſtraining, Taking or Carrying away of any Seizure or Diſtreſs, or " Matter or Thing ſeized or diſtrained for any the Penalties or Forfeitures " incurred, or to be incurred or forfeited by Virtue of this Act, or ſhall " * reſcue the ſame, or ſhall uſe any Violence to the Perſon or Perſons con- *Page 348
" cerned in making ſuch Seizure or Diſtreſs, each and every ſuch Perſon or " Perſons ſhall upon due Proof made upon Oath, by one or more credible " Witneſs or Witneſſes, before one or more Juſtice or Juſtices of the " Peace for the County wherein ſuch Offence is done, be committed by " the Juſtice or Juſtices to the common Gaol for the ſaid County for three " Months, there to remain without Bail or Mainprize, and ſhall alſo loſe " and forfeit for every ſuch Offence the Sum of 10*l.* to be levied and re- " covered by Diſtreſs and Sale of the Offender's Goods and Chattels, by " Virtue of a Warrant under the Hand and Seal of ſuch Juſtice or Juſtices " (who is and are hereby authorized and required to grant the ſame); and " in caſe the ſaid Penalty be not paid within three Days after ſuch Diſtreſs

" made,

" made, then it ſhall and may be lawful to and for the Perſon or Perſons ſo
" diſtraining as aforeſaid, to ſell the Goods and Chattels ſo diſtrained,
" rendering the Overplus to the Owner or Owners, the Charge of ſuch
" diſtraining and ſelling being firſt deducted."

" *Provided*, That nothing in this Act ſhall extend, or be conſtrued to
" extend, to ſuch Waggons, Wains, Carts or Carriages, as are or ſhall be
" employed in or about Huſbandry, or manuring of Land, and in the
" carrying of Cheeſe, Butter, Hay, Straw, Corn unthreſhed, Coals, Chalk,
" or any one Tree or Piece of Timber, or any one Stone or Block of
" Marble, Caravans, and the covered Carriages of Noblemen and Gentle-
" men for their own private Uſe, or ſuch Timber, Ammunition or Artillery,
" as ſhall be for the Service of his Majeſty, his Heirs and Succeſſors."

Note; In the Statute 6 *Ann. cap.* 29. 9 *Ann. cap.* 18. which prohibit the Drawing with more than five Horſes, there is this *Proviſo*, Except only where ſuch five Horſes ſhall not be ſufficient to draw ſuch Cart or Waggon up any ſteep Hill, or out of any foul Place; in which Caſe it ſhall be lawful to join any Horſes from another Cart or Waggon then travelling that Road, with the Conſent of the Owner or Driver of ſuch Cart or Waggon, to help ſuch inſufficient Horſes up ſuch ſteep Hill, or out of ſuch foul Place.

See Penalty of taking more than the Rates, 21 Geo. 2. c. 28. ſ. 3. Juſtices of the City of *London* to aſſeſs the Rates of carrying Goods between *London* and *Weſtminſter*, 30 Geo. 2. c. 22. ſ. 3.

As to the Regulation of the Prices of Carriage of Goods, by the 3 *W. & M. cap.* 12. *ſect.* 24. it is enacted, " That the Juſtices of the Peace of
" every County, and other Place within the Realm of *England*, or Domi-
" nion of *Wales*, ſhall have Power and Authority, and are hereby enjoined
" and required at their next reſpective Quarter or General Seſſions after
" *Eaſter* Day, yearly to aſſeſs and rate the Prices of all Land Carriage of
" Goods whatſoever, to be brought into any Place or Places within their
" reſpective Limits and Juriſdictions, by any Common Carrier or Wag-
" goner; and the Rates and Aſſeſſments ſo made to certify to the ſeveral
" Mayors, and other chief Officers of each reſpective Market-Town, to
" which all Perſons may reſort for their Information; and that no ſuch
" common Waggoner or Carrier ſhall take for Carriage of ſuch Goods and
" Merchandizes above the Rates and Prices ſet, upon Pain to forfeit for
" every ſuch Offence the Sum of five Pounds, to be levied by Diſtreſs and
" Sale of his and their Goods, by Warrant of any two Juſtices of the Peace
" where ſuch Waggoner or Carrier ſhall reſide, in Manner aforeſaid, to
" the Uſe of the Party grieved*."

* Commiſſioners for regulating the Navigation of the *Thames*, to rate the Price of Water-Carriage, 24 Geo. 2. c. 8. ſ. 9. ——Penalty for taking above the Price. *Ibid.*——What Rate to be paid for Carriages attending Soldiers on their March, 33 Geo. 2. c. 8. ſ. 25.——The Laws prohibiting the Carriage of exceſſive Loads of Meal, Malt, and Coals, within ten Miles of the Cities of *London* and *Weſtminſter*, repealed 11 Geo. 3. c. 51. ſ. 4.

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* CERTIORARI.

(A) Out of what Court it Iſſues; and herein of the Diſcretionary Power of the Court of King's Bench in granting, denying and ſuing it. 349.

(B) To what Courts it lies. 351.

(C) Where

(C) Where it is neceſſary, or the Record may be removed without it. 352.
(D) What the Party, who applies for it, muſt do before it is granted. 352.
(E) Where by Acts of Parliament the Court of King's Bench is reſtrained from granting it. 354.
(F) To whom it ought to be directed. 355.
(G) How far it is a Superſedeas to the Court below. 356.
(H) In what Manner it is to be returned. 357.
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(A) Out of what Court it Iſſues; and herein of the Diſcretionary Power of the Court of King's Bench in granting, denying and filing it.

A *Certiorari* is an original Writ iſſuing out of Chancery, or the *King's Bench*, directed in the King's Name, to the Judges or Officers of (*a*) Inferior Courts, commanding them to return the Records of a Cauſe depending before them, to the End the Party may have the more ſure and ſpeedy Juſtice before him, or ſuch other Juſtices as he ſhall aſſign to determine the Cauſe.

F. N. B. 543. (*a*) The Court of Chancery may iſſue a *Certiorari* to the King's Bench; as if in an Action of Debt brought in the Common Pleas, upon a Judgment in *B. R.* the Defendant pleads *Nul tiel Record*, the Plaintiff may have a *Certiorari* out of Chancery to ſend the Record thither; and the ſame may be ſent after by *Mittimus* into the Common Pleas, notwithſtanding the general Rule, that Records in *B. R.* ſhall not be moved out of that Court into any other Court. Cro. Car. 297. Dyer. 187. 4 Inſt. 73. So if in an Action of Debt brought in an inferior Court upon a Bond, the Defendant pleads, that the Plaintiff had recovered in *B. R.* upon the ſame Bond; and the Plaintiff replies *Nul tiel Record*, and thereupon Iſſue is joined *quod habetur tale Recordum*, the Record in *B. R.* may be certified into Chancery, and from thence ſent by *Mittimus* to the Inferior Court. Sand. 97, 99. Sid. 223, 329, 330. 2 Keb. 205, 249, 278.

The Court of *King's Bench* has a Superintendancy over all Courts of an Inferior Criminal Juriſdiction, and may by the Plenitude of its Power award a *Certiorari*, to have any Indictment removed and brought before itſelf; and where ſuch *Certiorari* is allowable, ought of Right to award it at the Inſtance of the King, becauſe every Indictment is at the Suit of the King, and he has a Prerogative of ſuing in what Court he pleaſes. *Page 350

Vent. 63. Mod. 41. 10 Mod. 225, 278. 12 Mod. 390, 403, 601, 645. 5 & 6 W. & M. c. 11. Ld. Raym. 216, 469, 580, 608. Salk. 146. pl. 9. 150. pl. 17. 2 Ld. Raym. 971, 1203, 1515. 2 Hawk. P. C. 287.

But though the Court is to grant it at the Suit of the King, yet it has a diſcretionary Power in granting or refuſing it at the Suit of the Defendant; and agreeably hereto it is laid down as a general Rule, that the Court will never

2 Hawk. P. C. 27, 28. Salk. 144.

pl. 2. 149. pl. 15. 150. pl. 18. 151. pl. 20. Keb. 4. never grant it for the Removal of an Indictment before Juſtices of Gaol-Delivery, without ſome ſpecial Cauſe; as where there is juſt Reaſon to apprehend that the Court below may be unreaſonably prejudiced againſt the Defendant; or where there is ſo much Difficulty in the Caſe, that the Judge below deſires that it may be determined in the *King's Bench*: or where the King himſelf gives ſpecial Direction that the Cauſe ſhall be removed; or where the Proſecution appears to be for a Cauſe not properly Criminal.

Sid. 54. 2 Hawk. P. C. 287. Neither will the Court of *King's Bench* ordinarily, at the Prayer of the Defendant, grant a *Certiorari* for the Removal of an Indictment of Perjury or Forgery, or other heinous Miſdemeanor; for ſuch Crimes deſerve all poſſible Diſcountenance, and the *Certiorari* might delay, if not wholly diſcourage the Proſecution.

2 Hawk. P. C. 287, 288. Salk. 145. pl. 5. S. P. Nor will the Court of *King's Bench* grant it for a Conviction of Recuſancy on a Default at the Seſſions, becauſe by the Statute ſuch Convictions are to be removed into the *Exchequer*, and Proceſs on them is to go from thence.

and that it was never done but in the Duke of *York*'s Caſe. *Vide* Head of *Papiſt and Popiſh Recuſants*.

2 Hawk. P. C. 288. 16 E. 4, 5. Alſo it is ſaid to be a good Objection againſt granting a *Certiorari*, that Iſſue is joined, and a *Venire* awarded for the Trial in the Court below.

Salk. 149. pl. 15. 6 Mod. 17. 8 Mod. 319. 320. Ld. Raym. 137. 2 Ld. Raym. 991, 1372. Stra. 610. A *Certiorari* ſhall not be granted to remove an Indictment or Appeal after a Conviction, unleſs for ſome ſpecial Cauſe; as where the Judge below is in Doubt what Judgment to give.

Sid. 296. 2 Keb. 81. 2 Hawk. P. C. 288. But it hath been adjudged, that a *Certiorari* for the Removal of a Preſentment before Juſtices in *Eyre*, of a Matter which is inquirable and puniſhable by the Foreſt Law only, ſhall not be granted before, but only after Conviction; for if it ſhould be granted before, the Offence ſhould be diſpuniſhed; but it may be granted after Conviction, in order to give the Party, the Right of whoſe Freehold is concerned in it, an Opportunity ſo far to traverſe it.

2 Hawk. P. C. 288. The Court has refuſed to grant a *Certiorari* to remove a Recognizance of Appearance before Juſtices of *Oyer* and *Terminer*, &c. becauſe the Court below is moſt proper to judge upon the whole Circumſtances of the Caſe, which are equitably to be conſidered, whether it ought to be eſtreated or not.

2 Hawk. P. C. 288. By a Rule of the *King's Bench*, no Order of Commiſſioners of Sewers is to be filed without Notice to the Parties concerned; neither will the Court ſuffer the Return of a *Certiorari* for ſuch Order to be filed, without hearing Affidavits of the Facts; whereon if the Matter appear doubtful, it is uſual in order to a Trial of feigned Iſſues, and after ſuch Trial, either to file the Return, or ſupercede the *Certiorari*, and grant a *Procedendo*, and give (*a*) Coſts, &c. as ſhall appear to be moſt reaſonable.

(*a*) *Vide* 2 Keb. 500.

(B) To what Courts it lies.

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THE Courts of *Chancery* and *King's Bench* may award a *Certiorari* to remove the Proceeding from any Inferior Courts, whether they be of an antient or newly created Juriſdiction, *(a)* unleſs the Statute or Charter, which creates them exempts them from ſuch Juriſdiction. S. P. C. 70. Salk. 144. pl. 3. 146. pl. 7. 148. pl. 13. Ld. Raym. 113, 252, 454. Carth. 421, 491. Comyns 76. See 12 Mod. 386, 643. 2 Ld. Raym. 836. 7 Mod. 138. 3 Salk. 79. pl. 4. 2 Lev. 86. Lev. 312. Cro. Car. 265. 3 Mod. 93. 12 Mod. 145.

(a) As the Statutes concerning the Commiſſioners of *Cambridgeſhire Fens*, &c. as ſaid by ſome to have done. Sid. 296. *cont'*, 2 Keb. 43, 722.

And therefore it is agreed, that the *King's Bench* may award ſuch *Certiorari* to Juſtices in *(b) Eyre*, or of *(c)* Gaol-Delivery, or of a *(d)* County Palatine, and to the *(e)* College of Phyſicians, having a ſpecial Power by Statute to impoſe Fines, &c. and to Juſtices of the Peace, &c. even in ſuch *(f)* Caſes, which they are impowered by Statute finally to hear and determine; and to *(g)* Commiſſioners of Sewers, for the Clauſe in 13 *Eliz. cap.* 9. *That ſuch Commiſſioners ſhall not be compelled to make any Return of their Ordinances*, *(h)* has been conſtrued to intend only to exempt them from returning their Orders into Chancery, as by the Statute of 23 *H.* 8. *c.* 5. they were obliged to do. (b) Sid. 226. 2 Keb. 81. 4 Inſt. 294. (c) Salk. 144. pl. 3. (d) 3 Mod. 229. 2 Lev. 223. Salk. 146. pl. 7. Rol. Abr. 395. Allen 49. (e) Salk. 144. pl. 3. (f) 3 Mod. 93. 12 Mod. 145. pl. 5. (g) Salk. 145. pl. 6. Keb. 129. March 196. Raym. 186. (h) Mod. 44, 45. Lev. 288. Vent. 66.

Alſo it ſeems ſettled at preſent, that a *Certiorari* lies to the Courts of the *Cinque Ports*, to remove an Indictment from thoſe Courts, and that the Privilege of the *Cinque Ports*, which they have enjoyed Time out of Mind, that the King's Writs do not run there, is to be intended only of Civil *(i)* Cauſes between Party and Party. Cro. Car. 252, 291. Rol. Abr. 395. Stile 14. 2 Lev. 86. 3 Keb. 154. (i) Cro. Eliz. 910, Palm. 54. Cro. Jac. 531. Sid. 432. Hard. 475. Doug. 749. 3 Term Rep. 658.

Alſo a *Certiorari* lies from the *King's Bench* to the Courts of Grand Seſſions, and to other Courts in *Wales*, whether in the old *Welſh* Counties, or in the Lordſhips Marches; and whether ſuch Indictments be for inferior Crimes or for Felony. 2 Hawk. P. C. 287. *Vide* Courts and their juriſdiction in general.

Alſo it lies to remove an Indictment from any Court of Criminal Juriſdiction in *London* or *Middleſex*; but by the City Charter only the Tenor of the Indictment ſhall be removed. 2 Hawk. P. C. 244.

(C) Where it is neceſſary, or the Record may be removed without it.

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IF a Juſtice of Peace, or other Judge of Record, having taken a Recognizance or Inquiſition, or recorded a Riot, or done any other executory Matter, ſtill continue in the Commiſſion without Interruption the *King's Bench* may, without any *Certiorari*, receive the Record from his Hands; alſo the Clerk of the Aſſizes may, without *Certiorari*, bring in the Records of *Niſi prius* on the Death of the Juſtices; but the Executor of the Judge *Vide* 2 Hawk. P. C. 290. and ſeveral Authorities there cited.

cannot do it without Writ; neither can a Record executed, as by Acquittal, &c. be brought into a higher Court without Writ; neither can a Juſtice who is out of the Commiſſion at the Time, nor one who has been out, and is reſtored, certify any Record without Writ.

(D) What the Party, who applies for it, muſt do before it is granted.

BY the 21 *Jac.* 1. *cap.* 8. *ſect.* 6, 7. "All *Certiorari's* for Indictments "of Riots, Forcible Entry, or Aſſault and Battery, at any Quarter-"Seſſions of the Peace or otherwiſe, ſhall be delivered in open Court, and "the Defendant ſhall, before the Allowance, become bound to the Proſe-"cutor in 10*l.* with ſuch Sureties as the Juſtices at their Quarter-Seſſions "ſhall think fit, to pay to ſuch Proſecutor ſuch Coſts and Damages as the "Juſtices of the County, &c. ſhall think fit; and in Default thereof it "ſhall be lawful to proceed, ſuch *Certiorari* notwithſtanding."

And the like Recognizance in the Sum of 40*l.* is required by 13 & 14 *Car.* 2. *cap.* 6. on *Certiorari's* for Indictments on that Statute concerning the Highways.

Keb. 225. 2 Salk. 526. pl. 8. 2 Hawk. P. C. 291.

Theſe Statutes do not extend to all Indictments at Seſſions in general, but only to thoſe particular ones therein mentioned; but this Defect was in a great Meaſure ſupplied by the Rules of the Court of *King's Bench*, which, upon the Removal of an Indictment from *London* to *Middleſex*, required a Recognizance from the Defendant, to carry down the Record to Trial the ſame Term on which the *Certiorari* was returnable, or the Sittings after, and on the Removal of an Indictment from other Counties, required ſuch Recognizance for a Trial at the next Aſſiſes.

10 Mod. 193, 205, 278.

And agreeably hereto it is enacted by 5 *W. & M. c.* 11. and 8 & 9 *W.* 3. *cap.* 33. "That all Parties indicted at a General or Quarter Seſſions "of the Peace, proſecuting a *Certiorari*, before the Allowance thereof "ſhall firſt find two ſufficient Manucaptors, who ſhall enter into a Re-"cognizance in the Sum of 20*l.* before one or more Juſtices of the "Peace of the County or Place, (or elſe before one of the Judges of the "*King's Bench*, in which Caſe ſuch Judge ſhall make Mention of it "under his Hand on the Back of the Writ) and the Recognizance ſhall "be with Condition, at the Return of ſuch Writ, to appear and plead to "the Indictment or Preſentment in the Court of *King's Bench*, and at "his own Coſts to procure the Iſſue that ſhall be joined upon the ſaid "Indictment or Preſentment, or any Plea relating thereto, to be tried "at the next Aſſiſes for the County wherein the Indictment was found, *Page 353 "* after ſuch *Certiorari* ſhall be returnable, if not in *London*, *Weſtminſter* or "*Middleſex*; and if there, then to cauſe it to be tried the next Term after "wherein ſuch *Certiorari* ſhall be granted, or at the Sitting after the ſaid "Term, if the Court of *King's Bench* ſhall not appoint any other Time "for the Trial thereof; and if any other Time ſhall be appointed by the "Court, then at ſuch other Time; and to give due Notice to the Proſe-"cutor or his Clerk in Court; and alſo that the Party or Parties proſe-"cuting ſuch *Certiorari*, ſhall appear from Day to Day in the ſaid Court "of *King's Bench*, and not depart till he or they ſhall be diſcharged by "the ſaid Court; and ſuch Recognizances, *Certiorari's* and Indictments, "ſhall be filed in the *King's Bench*, and the Name of the Proſecutor, "(if he be the Party grieved or injured) or ſome publick Officer, en-"dorſed on the Back of the Indictment; and if the Perſon proſecuting "ſuch *Certiorari*, being the Defendant, ſhall not before Allowance thereof

"procure

" procure such Manucaptors to be found as aforesaid, the Justices of the " Peace shall and may proceed to Trial of the Indictment notwithstanding " such *Certiorari*."

And it is further enacted by the said Statute of 5 & 6 *W. & M. cap.* 11. " That if the Defendant prosecuting such *Certiorari* be convicted, the " *King's Bench* shall give reasonable Costs to the Prosecutor, if he be the " Party grieved or injured, or be a civil Officer, who shall prosecute on " Account of any Fact that concerned him as Officer to prosecute or pre- " sent; which Costs shall be taxed according to the Course of the said " Court; and the Prosecutor, for the Recovery of such Costs, shall within " ten Days after Demand made of the Defendant, and Refusal of Pay- " ment on Oath, have an Attachment granted against the Defendant by the " said Court for such his Contempt, and the said Recognizance shall not " be discharged till the Costs so taxed shall be paid."

And the like in Effect is enacted by the said Statute of 5 & 6 *W. & M. cap.* 11. concerning the Removal of Indictments by *Certiorari*, within the Counties Palatine of *Chester*, *Lancaster* and *Durham*.

In the Construction of these Statutes, the following Points seem most remarkable.

That notwithstanding the express Words are, That Justices may proceed to Trial, &c. if a proper Recognizance be not given, notwithstanding such *Certiorari*, yet they will be in Contempt if they make no Return to it, for all Writs must be obeyed, unless good Cause shewn to the contrary. Keb. 225. 8id. 70. 2 Hawk. P. C. 292.

That these Statutes extend only to *Certiorari*'s procured by Defendants, and therefore those procured by Prosecutors remain as they were at Common Law. 6 Mod. 246.

That these Statutes being in the Affirmative, as to the taking Recognizances, do not take away the Power which the Justices of the *King's Bench* had before; and therefore, if such a Justice take a Recognizance variant from the Form prescribed by the Statute, it will be as effectual as before; but it is said, That in such Case the *Certiorari*, if procured by the Defendant, will be no *Supersedeas*, because the Statutes seem to be express, that the Sessions may proceed notwithstanding any *Certiorari* procured by a Defendant, whereon such Recognizance is not given as is prescribed. 2 Hawk. P. C. 292. 2 Salk. 564. pl. 3. 2 Ld. Raym. 756.

That if the Persons offering to be Sureties appear to be worth twenty Pounds, the Justices cannot refuse them. March 27. 2 Hawk. P. C. 292.

That if there be several Defendants, and some find Sureties, and others not, the Indictment shall be removed as to those at least who find Sureties, because they shall not be prejudiced by the Fault of others; and, as *(a)* some say, it shall be removed as to all. 2 Hawk. P. C. 292. March 2^d. (a) Keb. 231. Salk. 55. pl. 5.

That in the taxing Costs, those only are to be considered that were subsequent to the *Certiorari*. 2 Ld. Raym. 854.

That the Prosecutor, by accepting the Costs so taxed, is not restrained from aggravating the Fine, because he has a Right to them by the express Words of the Statute, but in other Cases, if a Prosecutor accept Costs from a Defendant, he cannot afterwards aggravate the Fine, because having no Right to the Costs, if he takes them at all, he must take them in Satisfaction of the Wrong; after which it is unreasonable for him to harass the Defendant. *Page 354 2 Hawk. P. C. 292. Salk. 55. pl. 5. 2 Ld. Raym. 854.

That notwithstanding the Condition of the Recognizance be, That the Defendant shall procure a Trial at the next Assizes, yet the Recognizance shall not be forfeited unless the Prosecutor give Rules, &c. Salk. 370. pl. 4.

That after the Recognizance is forfeited for not procuring a Trial, &c. no Motion shall be made to quash the Indictment. Salk. 380. pl. 26. 2 Hawk. P. C. 293.

It

And the like in Effect is enacted by 4 and 5 W. and M. c. 23. ſ. 7,

It is enacted by 3 *W. & M. cap.* 10. *ſect.* 6. againſt Deer-ſtealers, "That no *Certiorari* ſhall be allowed to remove any Proceedings on that "Act, unleſs the Party convict ſhall become bound with good Sureties in "50*l.* to pay full Coſts and Damages within one Month after the Convic-"tion ſhall be confirmed, or a *Procedendo* granted."

and 5 Ann. c. 14. in relation to Conviction in thoſe Acts of Offences concerning the Game. Or Information concerning the Duties on Hides, by 9 Ann. c. 11. ſ. 47. or of Orders made at Seſſions, by 5 Geo. 2. c. 19. ſ. 2. *Vide* Head of *Game.**

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* See farther in what Caſes a *Certiorari* is or is not grantable, the Tables to the Statutes, particularly the *Octavo* Table, Title *Certiorari.*

(E) Where by Acts of Parliament the Court of King's Bench is reſtrained from granting it.

BY the 1 & 2 *Ph. & Ma. c.* 13. it is enacted, "That no Writ of "*Habeas Corpus* or *Certiorari* ſhall be granted to remove any Priſoner "out of any Goal, or to remove any Recognizance, except the ſame Writs "be (*a*) ſigned with the proper Hands of the Chief Juſtice, or, in his Ab-"ſence, of one of the Juſtices of the Court out of which the ſame Writ "ſhall be awarded or made, upon Pain that he that writeth any ſuch "Writs, not being ſigned as is aforeſaid, to forfeit for every ſuch Writ "five Pounds."

(*a*) If a *Certiorari* be taken out in Vacation, and teſted of the precedent Term, the *Fiat* for it muſt be ſigned by ſome Judge of the Court ſome Time before the Eſſoin Day of the ſubſequent Term, otherwiſe it is irregular; and the Court, upon Motion, will order a *Procedendo*; but it is ſaid, that there is no Need for any Judge to ſign the Writ of *Certiorari* itſelf, but only in ſuch Caſes wherein it is required by Statute. Salk. 150. pl. 19. 2 Ld. Raym. 1379. 11 Mod. 174. pl. 16. 12 Mod. 2 3. 2 Stra. 895.

On this Statute no Coſts are payable, unleſs the Indictment be brought by the Party grieved, or by Juſtices, Mayors, &c. or other civil Officers proſecuting as being ſuch. Bur. Rep. 431.

And by 5 *W. & M. cap.* 11. "No *Certiorari* in Term-time, at the "Proſecution of the Defendant, ſhall be granted out of the *King's-Bench*, "to remove any Indictment or Preſentment from any General or Quarter "Seſſions before Trial, but on Motion and Rule in open Court; but in "Vacation ſuch Writ may be granted by any Judge of the ſaid Court, "whoſe Name ſhall be indorſed thereon; and alſo the Party's Name at "whoſe Inſtance it is granted."

It is enacted by 7 *Geo.* 3. *cap.* 42. *ſect.* 15. "Every Juſtice of Aſſize, of "*Cheſter*, *Lancaſter*, and *Durham*, and great Seſſions in *Wales*, and Juſtice "of the Peace, may upon his own View, or Information upon Oath by "any Surveyor of the Highways, make Preſentment, of any Highway, "Cauſeway, or Bridge, not well and ſufficient repaired, or of any other

Page 355 " Default or Offence, contrary to this Act; which are to be preſented in "ſuch Juriſdiction, where the ſame do lie, and not elſewhere; and no Pre-

(*b*) But by Stat. 5 W. & M. c. 11. it muſt be upon Sug-geſtion "ſentment or Indictment ſhall be removed by (*b*) *Certiorari*, till Indictment "or Preſentment traverſed, and Judgment given, except where the Duty "or Obligation of repairing Highways, Cauſeways, or Bridges, may come "in Queſtion; and every Preſentment ſhall be as good in Law as if found "by

" by twelve Men; and for every Default or Offence the ſaid Juſtices ſhall " fine, ſaving Traverſes. And five Juſtices may direct the Proſecution " to be carried on at the Expence of the County, and to be paid out of the " general Rates."

and Affidavit of the Truth thereof; and it hath been adjudged, That if the Seſſions manifeſtly exceed their Authority in making Orders concerning Highways, ſuch Orders may be removed by *Certiorari* into the King's Bench, and quaſhed. 2 Hawk. P. C. 289.

By the 7 & 8 *W.* 3. *cap.* 6. made for the Recovery of ſmall Tithes before Juſtices of the Peace, it is enacted, " That no Proceedings, or Judg- " ment by Virtue thereof, ſhall be removed or ſuperſeded by any Writ of " *Certiorari* out of any Court whatſoever, unleſs the (*b*) Title of the " Tithes, &c. ſhall come in Queſtion. 7 & 8 W. 3. c. 34. ſ. 4.

(*b*) If the Party inſiſts on any Matter of Law before the Juſtice of Peace, which is any way doubtful; as on a Cuſtom in a Pariſh, to be diſcharged of a certain Kind of Tithe, &c. the Order may be removed, within the Intent of the Statute. 2 Hawk. P. C. 289. Nor on the following Proceedings. Bridges. 1 An. ſt. 1. c. 18. ſ. 5. Hides. 9 Ann. c. 11. ſ. 47. Coaches. 1 G. c. 57. ſ. 6. Malt. 12 An. ſt. 1. c. 2. ſ. 37. Coffee. 10 G. c. 10. ſ. 42. Woollen Manufacture. 13 G. c. 23. ſ. 6. Seamen. 1 G. 2. c. 25. ſ. 15. Attornies. 2 G. 2. c. 23. ſ. 25. Turnpikes. 8 G. 2. c. 20. ſ. 16. County Rates. 12 G. 2. c. 29. ſ. 21. Houſes of Correction. 17 G. 2. c. 5. ſ. 31. Swearing. 19 G. 2. c. 21. ſ. 8. Havens. 19 G. 2. c. 22. ſ. 5. Coals. 19 G. 2. c. 35. ſ. 23. Wages, 20 G. 2. c. 19. ſ. 6. Artificers. 23 G. 2. c. 13. ſ. 9. Soap, &c. 23 G. 2. c. 21. ſ. 33. Small Debts. 23 G. 2. c. 33. ſ. 4. Bawdy-Houſes. 25 G. 2. c. 36. ſ. 10. Clocks and Watches. 27 G. 2. c. 7. ſ. 4. Stealing Lead, &c. 29 G. 2. c. 30. ſ. 7. *London* Bridge. 29 G. 2. c. 40. ſ. 39. Gaming. 30 G. 2. c. 24. ſ. 20. Militia. 30 G. 2. c. 25. ſ. 58, &c. Bread. 31 G. 2. c. 29. ſ. 37, &c. The *Thames*. 32 G. 2. c. 16. ſ. 24, 27. 2 G. 3. c. 28. ſ. 11, *London* Streets. 33 G. 2. c. 30. ſ. 31. See further the Tables to the Statutes, Title *Certiorari*.

(F) To whom it ought to be directed.

REgularly a *Certiorari* ought to be directed to the Judge of the Inferior Court; but in ſome Caſes it may be directed to the Officer known to have the Cuſtody of the Record; and in ſome other Caſes to others, as ſhall be moſt agreeable to the Courſe of approved Precedents; which ſeems to be the beſt Guide in this Matter. 2 Hawk. P. C. 289.

If the Perſon who ought to certify a Record, as a Juſtice of (*c*) Peace, who hath taken a Recognizance; or (*d*) a Judge of *Niſi Prius*, who has taken a Verdict; or a (*e*) Coroner, who hath taken an Inqueſt, die with the Record in his Cuſtody, the *Certiorari* may go to his Executor, &c. (*c*) 2 Keb. 750. 8 H. 4. 3. Cro. Jac. 669. (*d*) Dyer 163. Raſt. Ent. 439. 2 Inſt. 424. 2 Rol. Abr. 689. (*e*) Bro. *Certiorari* 9. Indictment 23.

Alſo it hath been adjudged, that it may be directed to a Juſtice of Aſſiſe, to certify a Record of Aſſiſe taken before his Companion in his Abſence, 11 H. 7. 5. Bro. Receipt 81. 2 Hawk. P. C. 290.

Certiorari's for the Removal of Indictments, &c. from Seſſions of the Peace, are commonly directed either to the Juſtices of the Peace of the Diſtrict generally, or to ſome of them in particular by Name, and not to the *Cuſtos Rotulorum*; yet it hath been holden, That after a Recognizance is brought in to him he ſhall (*f*) certify it, Regiſter Origin. 90. F. N. B. 81. Hob. 135. (*f*) *Vide* 2 Hawk. P. C. 290.

leaves it a Doubt whether it can be certified by him, unleſs he does it as Juſtice of Peace.

A *Certiorari* from the King's Bench to remove an Indictment of Felony from one of the *Cinque Ports*, muſt be directed to the *Mayor* and *Juratt*, and not to the Lord Warden. 3 Term Rep. 658.

(G) How

Page356 (G) How far it is a Superſedeas to the Court below.

Cro. Car. 261. Salk. 148. pl. 13. Cro. Eliz. 915. Dyer 98. Mo. 677. 2 Ld. Raym. 836. 7 Mod. 138. 12 Mod. 643. 3 Salk. 79. pl. 4. Tidd's Prac. 176. Cowp. 672. 1 Term Rep. 279.

IT is clearly ſettled, that after a *Certiorari* is allowed by the Court below, all ſubſequent Proceedings on the Record are erroneous. Alſo before 21 *Jac.* 1. *c.* 8. (which requires that all *Certiorari*'s for Indictments, Forcible Entries, at Seſſions, ſhall be delivered in Court) the Delivery of ſuch *Certiorari* to any one Juſtice of the Peace of the ſame Place, made all ſubſequent Proceedings erroneous; and if any Proceſs had been before awarded on the Indictment, the Juſtice to whom the *Certiorari* was delivered, ought immediately to have awarded a *Superſedeas* to the Sheriff, in order to have ſtopped the Execution of it; and it ſeems that the Delivery of ſuch a *Superſedeas* to the Sheriff before he has begun to put a Proceſs in Execution, makes his ſubſequent Execution of it wholly void, becauſe it is but a miniſterial Act; but if it be not delivered till after the Execution is begun, he may afterwards go through with it, by Virtue of a (*a*) Writ of *Venditioni exponas.*

3 Term Rep. 390. (*a*) But 2 Hawk. P. C. 293. queſtions whether without ſuch Writ he can proceed.

Vide 2 Hawk. P. C. 293, 294. and the Authorities there cited.

It is ſaid that the bare Delivery of a *Certiorari* makes all ſubſequent Proceedings on the Record, whether before or after the Return of the *Certiorari*, erroneous, by Force of the Words *coram nobis terminari volumus & non alibi*; in which Reſpect a *Certiorari* is of greater Force than a Writ of *Error*, for that becomes of no Effect if the Record be not certified in a reaſonable Time; alſo it hath been held that the very iſſuing of a *Certiorari* is of itſelf a *Superſedeas*, though it be never delivered, in the ſame Manner as an Appearance in the Court above; and a *Superſedeas* purchaſed there, though not delivered to the Sheriff till after the *Quinto exactus*, will avoid an Outlawry pronounced after; but it ſeems the better Opinion, that if a *Certiorari* be not delivered before Iſſue is joined, or at leaſt before the Return of it is expired, it is of no Effect; however it is of no Force at this Day as to Indictments at Seſſions, as appears *ſupra*, Letter (D) *ante* 352, *&c.*

Cro. Jac. 282. Yelv. 207. Skin. 244. 2 Hawk. P. C. 294. 2 Rol. Abr. 492. *cont.* and Dalt. cap. 75. *cont.*

A *Certiorari* for the Removal of a Recognizance for the good Behaviour, or for an Appearance at the Seſſions, will not ſuperſede its Obligation, becauſe it would be highly inconvenient that the Party, againſt whom there may be very juſt Matter of Complaint, ſhould be let looſe upon the late bringing a Writ.

(H) In what Manner it is to be returned.

(*b*) Cro. Eliz. 821. (*c*) Lev. 311. (*d*) 2 Salk. 479. pl. 27. (*e*) Rol. Abr. 752. 2 Keb. 385.

THE Return of a *Certiorari* ought to be under the Seal of the (*b*) Inferior Court, or of the Juſtice or Juſtices to whom it is directed; and if ſuch Court have no proper Seal, it may be under any (*c*) other Seal. Alſo it muſt be made, by the Perſon to whom the *Certiorari* is directed, to the Juſtices of Peace of ſuch a Place, and if the (*d*) Clerk of the Peace only return it, or to the Conſtable, or to the Recorder of *B.* and the (*e*) Deputy Conſtable or Deputy Recorder return, (without ſhewing in the Return, that the Principal had Power to make a Deputy)

or

* or to the Steward of St. *Paul's*, and the Steward of the Church of St. *Peter* and St. *Paul* return it, nothing is removed. *Page 357

But if it be directed to the Juſtice of *Cheſter*, it may be (*b*) returned by *A. B.* Chief Juſtice; for the ſame Officer is known to be meant in the Writ and Return, and his Deſcription in both is in Subſtance the ſame. (*a*) 2 Keb. 385. cited. Sid. 64. Lev. 50. Keb. 165.

2 Salk. 452. pl. 3. (*b*) But if a *Certiorari* directed to ſeveral Juſtices, be returned by one of them only, *Quære* what ſhall be done. *Vide* 2 Hawk. P. C. 294, 295.

A Recognizance taken by a Juſtice of Peace, ought to be certified by ſuch Juſtice only till it be made a Record of the Seſſions, after which it ſhall be certified in the ſame Manner as the other Records of the Seſſions. Cro. Jac. 669.

The Return to a *Certiorari*, directed to Juſtices of the Peace for the Removal of an Indictment, ought to have the Clauſe *nec non ad diverſas felonias, &c.* in the Deſcription of the Juſtices who make the Return, where ſuch Clauſe is neceſſary in the Caption of an Indictment. 2 Hawk. P. C. 295.

A *Certiorari* iſſued to remove an Indictment upon the Statute 5 *Eliz. c.* 4 for exerciſing a Trade in a Borough, to which the Mayor made this Return, *viz. Humillime Certifico quod ad Seſſionem pacis, &c. per juratores præſentatum exiſtit quod billa ſequens eſt vera, viz. quod prædict'* S. J. did exerciſe, omitting the Clauſe *juratores pro Domino Rege præſentant quod, &c.* and though the Court held that without theſe Words no indictment was returned, yet they would not quaſh it, but ordered the Mayor to amend his Return; alſo the Court held that *Humillime Certifico* was not a good Return. Carth. 223. The *King* verſ. *Berry*. See the Form of Returns to *Certiorari's*, Lamb. B. 2. c. 2. 107. Dalt. c. 73. and 134.

The Perſon to whom a *Certiorari* is directed, may make what Return to it he pleaſes, and the Court will not ſtop the filing of it, on Affidavit of its (*c*) Falſity, except only where the public Good requires it; as in the Caſe of the (*d*) Commiſſioners of Sewers, or for ſome other ſpecial Reaſon. 6 Mod. 90.

(*c*) 2 Hawk. P. C. 295.

(*d*) But an Action on the Caſe lies for a falſe Return at the Suit of the injured Party, or there may be an Information at the Suit of the King. 6 Mod. 90. 2 Hawk. P. C. 295.

Whatſoever is put into the Return to a *Certiorari* by Way of Explanation or otherwiſe, beſides what is ordered to be returned, is put in without Warrant and not to be regarded. 2 Salk. 492. pl. 58. 2 Hawk. P. C. 295.

Generally the Record itſelf, or the Tenor of it, or the Tenor of the Tenor, is to be certified in the Return of a *Certiorari*, according as the Writ requires; for if on a *Certiorari* to return an Order of Juſtices of the Peace, the Tenor of it be only certified, the Return is naught; but the Return of the Tenor of an Indictment from *London* is good, by the City Charter; alſo it is ſaid to be ſufficient to certify the Tenor only in all Caſes where the Purport of the *Certiorari* is not to proceed on the Record removed, but only to try the Iſſue of *Nul tiel Record*. However it ſeems clear, that if the Court, which awards a *Certiorari*, have no Juriſdiction to proceed on the Record ordered to be removed, as where the Court of Common Pleas award a *Certiorari* for an Indictment, the Tenor only ſhall be removed, leſt there ſhould be a Failure of Juſtice. 2 Hawk. P. C. 295. and *vide* ſeveral Authorities there cited.

*Page 358 * (I) Where the Record shall be said to be removed.

For which *vide supra* (F) (G) and (H).

WHERE the Writ of *Certiorari* is improperly directed or returned, nothing can be removed by it.

Salk. 148. pl. 13. 2 Ld. Raym. 836.

A *Certiorari* may remove a Record coming within its Description, before the Time of its Return, though there were no such Record at the Time of its Teste, or at the Time of its Delivery to the Court below.

It will remove an Indictment, though there were a Discontinuance below, in the same Manner as a *Recordare* will remove a Plaint that was discontinued below. 2 Hawk. P. C. 296.

Vide 2 Hawk. P. C. 296, 297. and the several Authorities there cited, most of which were on the Returns to Writs of *Error*, for which *vide* Head of *Error*.

But it removes no Record which materially varies from the Record described in it; as where the Writ describes a Record taken before *A. B. Justiciario nostro* and eight others, and the Record certified was taken before *A. B.* and seven others only, or before him and others, besides the eight, or before *C. D.* and the other eight, or before Justices of a former Reign, or where the Writ describes an Indictment for stealing two Horses, or an Order concerning foreign Salt, or the Manor of *Aneſley*, and the Record certified mentions one Horse only, or Salt in general, or relates only to the Manor of *Anſley*, without shewing in the Return, that *Anſley* and *Aneſley* † are the same, *&c.* or where the Writ mentions Orders of Indictments against *A. B.* and *C.* and those certified are against *A.* only, or against *A.* and *B.* only.

† See *post* next Clause but one.

Salk. 146. pl. 9. 2 Hawk. P. C. 296, (*b*) But *per* 2 Hawk. P. C. 296. it is not agreed whether in such a Case the Indictment shall be removed, so far as it concerns the other twenty.

But a Writ for the Removal of all Indictments against *A.* may remove an Indictment against *A.* and twenty others, so far at least as it (*b*) concerns him; because in Judgment of Law it is a several Indictment against each Defendant.

Vide 2 Hawk. P. C. 297. and the Authorities there cited.

A Variance between the *Certiorari* and the Record certified in the Spelling only, where the Words are of the same Sound, as *Bird* and *Burd*, seems not to be material, because it appears not by any Record of the Court, but that the Name in the *Certiorari* may be the true one, and that in the Record, being in the same Sound, shall be intended to mean the same Person; neither does it seem to be a material Variance that the *Certiorari* omits an Addition which the Record gives the Party; but if the *Certiorari* give the Party an Addition which the Record does not, the Variance is fatal; and so *a fortiori* is a Variance in giving the Party Names of a different Sound, or Additions of a different Kind in the *Certiorari* and Record certified; as where the one calls him *William Giggure*, and the other *William Giggeer*; or the one calls him *Henry Coachman, quocunque nomine censeatur*, and the other *Henry Murton Coachman*; or the one calls him *John S.* and the other *John S.* or the one calls him Knight and Baronet, and the other Baronet only; or the one calls him *Garret* and the other *Gerard*; or the one *J. S. nuper de B.* and the other *J. S. nuper de C.* or the one *J. S. de B. Sadler*, the other *J. S. de B. Salter*.

Vide Head of *Miſnomer*.

(K) D

* (K) Of the Proceedings of the Superior or Inferior Court, after the iſſuing out of the Certiorari.

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AFTER the *Certiorari* delivered, if the Inferior Court proceeds, where by Law it ought not, it is a Contempt, for which the Court will grant an Attachment. Raym. 186. Vent. 66. Salk. 144.

But if an Indictment be removed after Iſſue joined and remanded, the Inferior Court *(a)* ſhall proceed as if no *Certiorari* had been granted. 2 Hawk. P. C. 294.

(a) But by the Common Law, if a *Certiorari* be once filed, the Proceedings below can never be revived by any *Procedendo*. 2 Hawk. P. C. 294.

Alſo if a *Certiorari* iſſues, and the Record is not thereby removed, the Court *(b)* above cannot proceed upon it, but will *(c)* quaſh the Writ, and award *(d)* a new one, or ſuffer the Court below to proceed, and take ſuch *(e)* Order in Relation to the Defendant's Appearance, either in the one Court or the other, to anſwer the further Proſecution of the Cauſe againſt him, as ſhall in Diſcretion appear to be moſt proper. (b) 12 H. 7. 25. Sid. 193. 2 Keb. 142. (c) Keb. 101. Salk. 147. (d) 2 Hawk. P. C. 297.

(e) 12 H. 7. 25. 3 Aſſ. pl. 3. 2 R. 2. 9. 2 Keb. 14. Carth. 223.

If the Defendant, againſt whom a Record is removed into the *King's-Bench*, do not appear, the like Proceſs ſhall go from thence as if the Cauſe had been commenced there; but ſince the Record is put without Day, by the Removal, there is no Way to nonſuit the Plaintiff before he has appeared there, but by taking out a *Scire facias* to warn him to proſecute, whereon if the Sheriff *(f)* return a *Scire feci*, he may be nonſuit. 6 Mod. 246. Salk. 61.

(f) But if two *Nihils* are returned, *Quære* what is to be done. 2 Hawk. P. C. 297. * We ſhould ſuppoſe a Nonſuit.

If a *Certiorari* iſſues *improvide emanavit*, it may be ſuperſeded, the Return taken off from the File, and the Orders remanded. Bur. Rep. 488.

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* CHAMPERTY.

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CHamperty is the unlawful Maintenance of a Suit, in Conſideration of ſome Bargain to have Part of the Thing in Diſpute, or ſome Profit out of it. Hawk. P. C. 256. 2 Inſt. 208. Co. Lit. 368 b.

As there is little ſaid in our modern Books on this Head, I ſhall only ſet down the Acts of Parliament relating to it, and thoſe Reſolutions which are to be met with in the old Ones.

By

By *West.* 1. or 3 *E.* 1. *cap.* 25. it is enacted, "That no Officers of the "King, by themselves or by other, shall maintain Pleas, Suits or Matters "hanging in the King's (*a*) Courts, for Lands, Tenements, or (*b*) other "Things, for to have Part or (*c*) Profit thereof by (*d*) Covenant made "between them; and he that doth shall be punished at the King's Plea-"sure."

(*a*) Courts of Record only are intended. 2 Inst. 208. Hawk. P. C. 257.

(*b*) Maintenance in an Action Personal, to have Part of the Debt or Damages, is within the Statute. 47 Ass. pl. 5. Hawk. P. C. 257. (*c*) A Grant of Rent out of the Lands in Question, is within the Statute; but not a Grant of Rent out of other Lands. F. N. B. 172. Hawk. P. C. 257. (*d*) Any Contract, whether by Writing or Parol, is within the Statute. 2 Inst. 209, 563. F. N. B. 172.

Hawk. P. C. 257. The Maintenance of the Tenant or Defendant, is as much within the Meaning of the Statute, as the Maintenance of a Demandant or Plaintiff.

2 Rol. Abr. 113. pl. 3. 15 H. 7. 3. a. Bro. Tit. *Champerty* 6. A Grant of Part of a Thing in Suit, made in Consideration of a precedent Debt, is not within the Meaning of the Statute, but such only as is made in Consideration of Maintenance.

Hawk. P. C. 257. and *vide* the Authorities there cited. In a Prosecution on this Statute, it doth not seem material whether the Plea, wherein the Maintenance is alledged, be determined or not, or whether the Party did not suffer any Prejudice by it.

By the Statute *Westm.* 2. *cap.* 49. it is enacted, "That the Chancellor, "Treasurer, Justices, nor any of the King's Counsel, nor Clerk of the "Chancery, nor of the Exchequer, nor any Justice, or (*e*) other Officer, "nor any of the King's House, Clerk nor Lay, shall not receive any "Church, nor Advowson of a Church, Land or Tenement in Fee, by "Gift or by Purchase, or to Farm, nor by Champerty nor otherwise, so "long as the Thing is in Plea before the King, or before any of his Offi-"cers, nor shall take no Reward thereof; and that he that doth contrary "to this Act, either himself or by another, or make any Bargain, shall be "punished at the King's Pleasure, as well he that purchaseth as he that "doth sell."

(*e*) This Statute extendeth only to the Officers therein named. 2 Inst. 484. It has been held that it so strictly restrains all such Officers from purchasing any Land, pending a Plea, that they cannot be excused by any Consideration of Kindred or Affinity, and that they are within the Meaning of the Statute, by barely making such a Purchase, whether they maintain the Party in his Suit or not; whereas such a Purchase for good Consideration, made by any other Person, or any Ter-tenant, is no Offence, unless it appear that he did it to maintain the Party. Hawk. P. C. 257. and the Authorities there cited.

And it is further enacted by 28 *E.* 1. *cap.* 11. in the following Words, "Because the King hath heretofore ordained by Statute, that none of "his Ministers shall take no Plea for Maintenance, by which Statute "* other Officers were not bounden before this Time, the King will that "no Officer, nor any other, (for to have Part of the Thing in Plea) shall "not take upon him the Business that is in Suit, nor none upon any such "Covenant, shall give up his Right to another; and if any do, and be at-"tainted thereof, the Taker shall forfeit unto the King so much of his "Lands and Goods as doth amount to the Value of the Part that he hath "purchased for such Maintenance; and to obtain this, whosoever will "shall be received to sue for the King, before the Justices before whom "the Plea hangeth, and the Judgment shall be given by them; but it may "not be understood hereby that any Person shall be prohibited to have "Counsel of Pleaders, or of learned Men in Law, for his Fee, or of his "Parents or next Friends."

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Hawk. P. C. 258. Champerty in any Action at Law, seems to be agreed to be within this Statute, and a Purchase of Land, pending a Suit in Equity concerning it, hath also been holden to be within it; also a Lease for Life or Years, or a voluntary

voluntary Gift of Land, pending a Plea, is as much within the Statute as a Purchaſe for Money.

But neither a Conveyance executed, pending a Plea, in Purſuance of a precedent Bargain, nor any Surrender by a Leſſee to his Leſſor, nor any Conveyance or Promiſe thereof made by a Father to his Son, or by any Anceſtor to his Heir Apparent, nor a Gift of Land in Suit, after the End of it, to a Counſellor for his Fee or Wages, without any Kind of precedent Bargain relating to ſuch Gift, are within the Meaning of the Statute. Hawk. P. C. 258.

Charitable Uſes and Mortmain.

(A) Of the ſeveral Statutes prohibiting to purchaſe in Mortmain. 362.
(B) Of Things exempt from, or out of the Statutes of Mortmain. 363.
(C) What is a good charitable Uſe within the Statute 43 Eliz. 364.
(D) What is a ſuperſtitious Uſe to which the King is intitled. 365.
(E) How charitable Diſpoſitions have been conſtrued. 366.
(F) Of the Commiſſioners of charitable Uſes, purſuant to the Statute 43 Eliz. 368.
(G) Of the Statute 9 Geo. 2. c. 36. Reſtraining Gifts in Mortmain by Will, &c. 369.

* (A) Of the ſeveral Statutes prohibiting to purchaſe in Mortmain.

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THE Clergy in former Days had ſo great an Aſcendant over the People, by inſtilling in them the Notions of Purgatory, and had ſo wrought on them by their Art and Management, that they prevailed on them to be very liberal of their Poſſeſſions, and eſpecially at their Deaths, to diſpoſe of them to thoſe only who could promiſe them

them Happineſs in another World; this proving very prejudicial to the Lords, who thereby loſt the Advantages of Wardſhips, Marriage, Relief, Eſcheat, &c. (Lands in the Hands of a Religious Houſe or Perſon being conſidered as in a *dead Hand*, yielding no Fruits to the Lord) occaſioned
9 H. 3. c. 36. the Clauſe in the Statute of *Magna Charta*, by which it is enacted, *That it ſhall not be lawful, for any to give his Lands to any Religious Houſe, and to take the ſame Lands again to hold of the ſame Houſe*, &c.

But Religious Men found Means to avoid this Statute, by purchaſing Lands held of themſelves, and by taking long Leaſes; alſo all Eccleſiaſtical Perſons regular, as Abbots, &c. thought themſelves out of this Statute; to meet therefore with theſe Evaſions, the 7 *Ed.* 1. *ſtat.* 2. called the Statute of *Mortmain*, was made.

Co. Lit. 2. By which it is provided, *That no Corporation, Civil or Religious, ſhall purchaſe Lands in Mortmain; and that if they do, the immediate Lord may enter within a Year after ſuch Purchaſe made, and the ſuperior Lords, up to the King, in Half a Year afterwards; and if all ſuch Lords, immediate and mediate, being of full Age, within the four Seas, and out of Priſon, are negligent, the King may enter and enfeoff a Tenant by Services to the King, ſaving the Wardſhip and Eſcheat to the Lord of the Fee*, &c.

2 Inſt. 75. *Comp. Incumb.* 374. The Clergy, when they found themſelves prohibited by *Magna Charta* from purchaſing Lands, and perceived that their Evaſion of that Law was provided againſt be 7 *E.* 1. *ſtat.* 2. which prohibited them not only from Purchaſing, but alſo *ulla arte vel ingenio terras ſibi ipſis appropriare ſub pœna foriſfacturæ earundem*, began to apply the Judgments of the Courts, againſt the Intention of the Law, to their own Advantage; for they brought their *Præcipe* againſt the Tenant, who had agreed either to give or ſell them the Lands in Demand, and proſecuted the Suit, as if it had been really an adverſary one, till the Tenant, according to the precedent Agreement, made Default, which was always looked upon as ſufficient Ground for a Judgment in Favour of the Demandant; and the Judges preſuming all Recoveries juſt and lawful, which were proſecuted in the uſual Courſe of Law, would not bring thoſe covinous ones within the Statute, though they were apparently *in fraudem legis*, and attended with all thoſe Inconveniencies which thoſe Statutes were made to prevent; but the Clergy were quickly ſtopped in this Courſe, for *(a)* 32 *Weſtm.* 2. made theſe Recoveries by Default to be Mortmain; and the Expoſition of this Statute by the Judges has been carried as far beyond the Letter, as their Expoſition on 7 *E.* 1. ſeems to have fallen ſhort of the Meaning and Intention of that Law; for though the Letter of this Act extends only to Recoveries by Default, yet they, and with good Reaſon too, have extended it to all other Recoveries, whether by Demurrer or Verdict, or otherwiſe; for if theſe ſhould not be within the Meaning of the Act, an Iſſue might be taken ſo much in Favour of the Clergy, and the Evidence offered might be ſo weak, that the whole Intention of the Statute might be eluded.

(a) 13 E. 1. c. 32.

2 Inſt. 429, 430.

*Page 363 * Afterwards they found out the Method of conveying to Uſes, which was firſt introduced to evade the Statutes of Mortmain; and this ſerved them effectually; for they generally ſitting in Chancery, where Uſes were ſolely cognizable, obliged the Feoffee to execute the Uſe according to the Truſt and Confidence repoſed in him; but this Miſchief was provided againſt by the Statutes of 15 *Rich.* 2. *cap.* 5. and 23 *H.* 8. *cap.* 10.

15 Rich. 2. c. 5.

23 H. 8. c. 10.

Gifts in Mortmain, by Will, &c. are alſo reſtrained by 9 *Geo.* 2. *cap.* 36. with Exceptions as to Univerſities and Royal Colleges.

(B) What Things are exempt from, or out of the Statutes of Mortmain.

WHERE the *(a)* King *(b)* licences any Corporation Civil or Religious, they may purchaſe notwithſtanding the above-mentioned Statutes of Mortmain. This Power the King ſeems always to have had; but the diſpenſing Power having been carried too high, and greatly abuſed in a late Reign, it was thought proper to reſtrain it by 1 *W. & M. St.* 2. *c.* 2. *ſ.* 12. (alſo *vide* 3 *W. & M. c. ſ.* 17.) but now, Co. Lit. 99. (a) Formerly this Licence of Diſpenſation was to have been made by the King and all the Lords mediate and immediate; but now by 7 and 8 W. 3. it may be granted by the King alone, of whomſoever the Lands are holden. (b) And it hath been holden, that ſuch Licence is good without any Clauſe of *Non obſtante*. Co. Lit. 99. Plow. 502. Dyer 269.—Alſo if the King dies before Execution thereof, it may be executed afterwards. Co. Lit. 52. b.

By the 7 & 8 *W.* 3. *cap.* 37. it is enacted, "That it ſhall and may be "lawful to and for the King, his Heirs and Succeſſors, when and as often, "and in ſuch Caſes as his Majeſty, his Heirs or Succeſſors, ſhall think fit, "to grant to any Perſon or Perſons, Bodies Politick or Corporate, their "Heirs or Succeſſors, Licence to Alien in Mortmain, and alſo to purchaſe, "acquire, take and hold in Mortmain, in Perpetuity, or otherwiſe, any "Lands, Tenements, Rents or Hereditaments whatſoever, of whomſoever "the ſame ſhall be holden; and it is hereby declared that Lands, Tene"ments, Rents or Hereditaments ſo aliened or acquired, and licenſed, ſhall "not be ſubject to any Forfeiture, for or by Reaſon of ſuch Alienation "or Acquiſition." 7 and 8 W. 3. c. 37.

By 17 *Car.* 2. *cap.* 3. *For the Augmentation of poor Benefices with Cure*, it is enacted, "That every Owner or Proprietor of any Impropriation, "Tithes or Portion of Tithes, ſhall be enabled and impowered to give or "beſtow, unite or annex the ſame, or any Part thereof, unto the Parſonage "or Vicarage of the Pariſh or Chapel where the ſame do lie or ariſe, or "ſettle the ſame in Truſt for the Benefit of the ſaid Parſonage or Vicarage, "or of the Curate or Curates there ſucceſſively, where the Parſonage is "impropriate, and no Vicar endowed, according to his or their reſpec"tive Eſtates, without any Licence or Mortmain. And it is further "enacted, That if the ſettled Maintenance of ſuch Parſonage, Vicarage, "Churches or Chapels ſo united, or of any other Parſonage or Vicarage, "with Cure, ſhall not amount to the full Sum of 100*l. per Ann.* clear and "above all Charges and Reprizes; that then it ſhall be lawful for the "Parſon, Vicar and Incumbent of the ſame, and his Succeſſors, to take, "receive and purchaſe to him and his Succeſſors, Lands, Tenements, "Rents, Tithes or other Hereditaments, without any Licence of Mort"main.

"By the 2 *Ann. cap.* 11. A Corporation is erected for the Diſpoſing of 2 Ann. c. 11
"the Firſt fruits of the Clergy, with Power to take Lands and Tenements
"for the Uſe of the Clergy, having no ſettled competent Proviſion, by
"Bargain and Sale inrolled, according to the Statute 27 *H.* 8. *cap.* 16. as
"by laſt Will and Teſtament in Writing, duly executed according to *Page 364
"Law, without any Licence or Writ *Ad quod Damnum*, notwithſtanding
"the Statute of Mortmain."

Alſo by the Cuſtom of *London*, any Citizen being a Freeman of *London*, and being reſident there, and taxable to Scot and Lot, may by Will, in Writing, deviſe his Lands lying in the ſaid City in Mortmain, notwithſtanding the above Statutes. Doct. & Stud. c. 10. Bridgm. 103. Bro. Cuſtoms 7.

38 Aſſ. pl. 18. 45 Ed. 3. 26. Rol. Abr. 556.

Alſo

Hob. 136. *Flood*'s Caſe. Lev. 284. S. P. (*a*) 43 Eliz. c. 4. which *vide infra*.

Alſo ſince the (*a*) Statute of Charitable Uſes, it has been held, that a Deviſe to the Principal, Fellows and Scholars of *Jeſus College* in *Oxford*, and their Succeſſors, for Maintenance of a Scholar, is good, though ſuch Deviſe had been Mortmain, by the Statute 23 *H.* 8. *cap.* 10.

(C) What is a good Charitable Uſe within the 43 Eliz.

Vide 35 Eliz. c. 7. 39 Eliz. c. 5. 1 Co. 24. 11 Co. 70. That a Diſpoſition to any of thoſe Uſes will be good at this Day, without any Licence, notwithſtanding the Statutes of Mortmain.

THE Statute 43 *Eliz. cap.* 4. enacts, "*That the Commiſſioners, impowered by the Lord Chancellor ſhall inquire*, &c. *as to the Lands*, &c. *given by well diſpoſed People*, for Relief of aged, impotent and poor People; for Maintenance of ſick and maimed Soldiers and Mariners, Schools of Learning, Free-Schools, and Scholars of Univerſities; for Repair of Bridges, Ports, Havens, Cauſeways, Churches, Sea-Banks and Highways; for Education and Preferment of Orphans; for, or towards the Relief, Stock or Maintenance of Houſes of Correction; for Marriages of poor Maids; for Supportation, Aid and Help of young Tradeſmen, Handicraftſmen and Perſons decayed, and others; for Relief or Redemption of Priſoners or Captives, and for Aid or Eaſe of any poor Inhabitants; concerning Payment of Fifteens, ſetting out of Soldiers, and other Taxes."

In the Conſtruction of this Statute, it has been held,

Duke's Char. 109.

That Lands, &c. given for the Building of an Hoſpital, for the Relief of poor People, is a Charitable Uſe within the Equity of the Statute.

Duke's Char. 109.

So for the Building of a Seſſions-Houſe for a City or County; the making of a new or repairing of an old Pulpit in a Church, or the Buying of a Pulpit-Cuſhion or Pulpit-Cloth, or the ſetting up of new Bells, where none are, or the amending them where they are out of Order.

Poph. 139. decreed. Duke's Char. 109. S. C.

It ſeems ſettled, that Money given for the Maintenance of a Preaching Miniſter, though not a Charitable Uſe (*b*) mentioned in the Statute, yet comes within the Equity of it; for *ſumma eſt ratio quæ pro Religione facit.*

(*b*) A Gift of Lands, &c. to a Chaplain or Miniſter to celebrate Divine Service, is neither within the Letter or Meaning of this Statute; for it was on Purpoſe omitted in the Penning of the Act, leſt the Gifts intended to be employed on Purpoſes grounded on Charity, might in Change of Time, contrary to the mind of the Giver, be confiſcated into the King's Treaſury; for Religion being variable according to the Pleaſure of ſucceeding Princes, that which at one Time is held for Orthodox, may at another be accounted Superſtitious, and then ſuch Lands are forfeited, as appears by the Statute of 1 Ed. 6. c. 14. Sir Francis Moor's Reading on the Statute 43 Eliz. c. 4.

2 Vern. 387. *Page 365

But if a School-Houſe is erected by the voluntary Contributions of the Inhabitants of *A.* on the Waſte of the Lord of the Manor, and the Lord enfeoffs Truſtees, in Truſt that the Inhabitants of *A.* may for ever have a School, as of the Gift of the Lord of the Manor; this is not a Free-School, and ſo not a Charity within the Statute of 43 *Eliz.* for which the Inhabitants have a Right to ſue in the Attorney General's Name.

2 Vern. 387.

So if the Lord of the Manor ſhould erect a Mill, and convey it to Truſtees, to the Intent that the Inhabitants might have the Convenience of Grinding there, this would not be a Charity within the Statute.

(D) What

(D) What is a superstitious Use to which the King is intitled.

A Superstitious Use is described to be where Lands, Tenements, Rents, Goods or Chattels are given, secured or appointed, for and towards the Maintenance of a Priest or Chaplain to say Mass; for the Maintenance of a Priest, or other Man, to pray for the Soul of any dead Man, in such a Church, or elsewhere; to have or maintain perpetual Obits, Lamps, Torches, &c. to be used at certain Times, to help to save the Souls of Men out of Purgatory; these, and such like Uses are declared Superstitious, to which the King, by Force of several (a) Statutes, and as Head of the Church and State, and intrusted by the Common Law, to see that nothing is done in Maintenance or Propagation of a false Religion, is intitled to, so as to direct and appoint all such Uses to such as are truly charitable. 4 Co. 104. Bridg. 105. Cro. Jac. 51. Salk. 162. pl. 1. (a) *Vide* 1 E. 6. c. 14. 15 Rich. 2. c. 5. 23 H. 8. c. 10. 37 H. c. 4.

And all Limitations of Land, &c. in Fee-tail, for Life or Years, to any of the above-mentioned Uses, are said to be Superstitious, and to belong to the King, who is to direct and appoint them *in eodem genere*; so that they cannot revert to the Donor, his Heirs or Representatives, during the Time that they were to continue to the Purposes aforesaid. Duke's Char. 107.

So if Lands be given on Condition to find a Priest, &c. though no Priest be found, yet this is a Superstitious Use, to which the King is intitled. 4 Co. 104. Duke's Char. 106.

But if there be a charitable Use intermixt with the superstitious Use, so that they may be distinguished, the King shall have only so much as is limited to the superstitious Use. 4 Co. 104. Duke's Char. 107.

It was found by Inquest, that *A.* devised to *J. S.* and his Heirs absolutely, without a Trust, that he did it for the Good of his Soul, and that the Devisee owned that this Estate was not his, but belonged to GOD, and his Saints; the Court of *King's Bench* held that this could not be averred to be a superstitious Use, by Reason of the Statute of Frauds and Perjuries; and said that a *Monk* might now take by Purchase, and seemed to think so of a *Nun*; but an Information being exhibited in the Exchequer, for a Discovery, and that an Application might be made of the Devise to a Use truly charitable, it was held there that the Statute of Frauds did not bind the King, that he, as Head of the Commonwealth, is intrusted and impowered to see that nothing is done to the Dishersion of the Crown, or the Propagation of a false Religion, and to that End intitled to pray a Discovery of a Trust to a superstitious Use; and that this being a superstitious Use, the King shall order it to be applied to a proper Use. Salk. 162. pl. 1. *The King* and Lady *Portington.*

A. having devised 100*l.* to be applied to such charitable Uses as he had, by Writing under his Hand, formerly directed, and no such Writing being to be found, it was held that the King should appoint, who gave it to the Mathematical Boys in *Christ's Hospital*, which was decreed accordingly; and that the Parties should be indemnified against the Writing referred to. Vern. 224. *Attorney General* and *Syderfin. Vide* 2 Vern. 105. where a Charity for Maintaining of Independent Lectures, is said to be changed into Catechistical Lectures.

* *A.* being a beneficed Clergyman, devised 600*l.* to Mr. *Lexter*, to be distributed by him to sixty *Pious ejected Ministers*, and adds, that he did not give it to them for the Sake of their Nonconformity, but because he knew many of them to be pious and good Men, and in great Want; he also gave Mr. *Baxter* 20*l.* and 20*l.* to be laid out in a Book of his, intitled, *Page 366 Vern. 248. *Attorney General* v. *Baxter.* Dec

titled, *Baxter's Call to the Unconverted*; and this was held a Superſtitious Uſe, which though void, yet the Charity is good, and ſhall be applied *in eodem genere*; and it was decreed for the Maintenance of a Chaplain in *Chelſea* College.

creed by North, Lord Keeper; but this Decree was reverſed 1 *W.* and *M.* by the Lords Commiſſioners. 2 Vern. 105.

2 Vern. 266. Piſch. 1692. *Attorney-General* and *Guiſe.*

A. by Will charged his Eſtate with an annual Sum for the Maintenance of *Scotchmen* in the Univerſity of *Oxon*, to be ſent into *Scotland*, to propagate the Doctrine of the Church of *England* there; and *Preſbyteries* being ſettled in *Scotland* by Act of Parliament, the Queſtion was, Whether this Deviſe ſhould be void, and ſo fall into the Eſtate and go to the Heir, or ſhould be applied *Cy pres?* But the Matter does not appear by the Report to have been determined.

† *Note*; Gifts in Mortmain by Will, *&c.* are reſtrained, by 9 *Geo.* 3. *c.* 36.

(E) How charitable Gifts and Diſpoſitions have been conſtrued.

Duke's Char. 109, 110.

OUR Chancellors have been very liberal in their Conſtructions as to Charitable Diſpoſitions, ſo as to make them anſwer the Intention of the Donors, and for that Purpoſe have diſpenſed with ſeveral Ceremonies required in other Grants; and therefore it has been held, that an Appointment to a Charity without Livery of Seiſin, or Attornment, is good.

Preced. Chan. 391.

So a Deed of Bargain and Sale to a Charitable Uſe, though not good by 27 *H.* 8. *c.* 16. for Want of Inrollment, yet ſhall be good as an Appointment within the Statute 43 *Eliz. c.* 4.

Duke's Char. 110.

So if Copyhold Lands are deviſed to a Charity, they ſhall paſs without any Surrender, and ſhall bind the Heir, but the Lord ſhall not loſe his Fine.

Duke's Char. 110. 2 Vern. 453. S. P.

Tenant in Tail, without levying a Fine or ſuffering a Recovery, may deviſe to a Charity, and ſuch Diſpoſition ſhall be good, by Way of Appointment within the Statute 43 *Eliz. c.* 4. which being ſubſequent in Time, hath ſo far repealed and abrogated the Statute *de donis.*

Preced. Chan. 390. S. P.

2 Vern. 597. Salk. 163. pl. 3. S. P. Preced. Chan. 270, 390.

But if *A.* deviſes Lands by Will, not duly executed within the Statute of *Frauds and Perjuries*, ſuch Diſpoſition is void, and cannot operate as an Appointment; for the Statute of *Frauds* is ſubſequent to the 43 *Eliz. c.* 4. and requires, That all Deviſes of Lands, *&c.* ſhould be in Writing duly atteſted, *&c.* without making any Exceptions as to charitable Diſpoſitions.

Duke's Char. 110. Moor 822.

Alſo if an Infant, Lunatick, or Feme Covert, by Will or Deed, give any Thing to a Charitable Uſe, it ſhall be void in the ſame Manner as all other Acts of theirs are.

Duke's Char. 79.

But *Choſes in Action*, as Statutes, Bonds, *&c.* though not aſſignable at Law, yet a Gift of them is good; as an Appointment to a Charity.

Duke's Char. 82. ſaid to be decreed.

Alſo if Lands are given to Churchwardens of a Pariſh, to a Charitable Uſe, although the Deviſe be void in Law, they not being a Corporation capable of taking Lands in Succeſſion, yet they ſhall be capable for this Purpoſe.

A Deviſe to the Principal, Fellows and Scholars of *Jeſus College* in *Oxford*, and their Succeſſors, for Maintenance of a Scholar, is good; and they ſhall be in Nature of Truſtees for this Purpoſe, though before 43 Eliz. c. 4. ſuch Diſpoſition would have been Mortmain, by 22 H. 8. c. 10. Hob. 136. Lev. 28. S. P.

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* So where an Impropriator deviſed to one who ſerved the Cure, and to all that ſhould ſerve the Cure after him, all the Tithes and other Profits, &c. though the Curate was incapable of Taking by this Deviſe, in ſuch Manner, for Want of being Incorporate, and having Succeſſion; yet it was held, that the Heir of the Deviſee ſhould be ſeized in Truſt for the Curate for the Time being. *Page 367 2 Vent. 349

Where there has been an Uncertainty in the Deſcription of the Perſons to take, the Courts have been very liberal in their Expoſitions; as where a Deviſe of Lands to a Charity was to a Corporation by a Wrong Name; as to the Mayor and Chamberlain, inſtead of the Mayor and Commonalty. Duke's Char. 82. Mayor of *London's* Caſe. So where Money was given generally to a Pariſh, it was held, That it muſt be intended to the Poor of the Pariſh, *Chan. Ca.* 134. So where Lands were deviſed to *A.* for Life, Remainder to the Church of *St. Andrew's Hubbard*, it was held, That the Parſon of the Church ſhould have this Remainder. Duke's Char. 113.

If one diſpoſes of Lands worth 10*l.* a Year, to maintain a Preacher, Schoolmaſter, and poor People in *Deal*, and the Land after comes to be worth 100*l.* a Year, it muſt be all employed to increaſe the ſeveral Charities. 8 Co. 130. School of *Thetford's* Caſe. That the Price of Lands increaſing, the Rents ſhall be raiſed, and laid out in Augmentation of the Charity. *Vide* Duke's Charitable Uſes 71, 112. 2 Vern. 414. Preced. Chan. 225.

If in the Conſtitutions for founding an Hoſpital, it be ordained, That no Leaſe ſhould be made for above twenty Years, and the Rent not to be raiſed, nor above three Years Rent taken for a Fine, though the Tenant of the Hoſpital Lands is intitled to a beneficial Leaſe upon Renewal, yet this Conſtitution is not to be followed according to the Letter; but as Times alter, and the Price of Proviſions increaſes, ſo the Rent ought to be raiſed in Proportion. 2 Vern. 596, 746. S. P.

If *A.* ſeiſed of a Manor of the yearly Value of 240*l.* deviſes ſeveral Legacies, and particularly to his Heir at Law 40*l.* and then adds, *that being determined to ſettle for the future, after the Death of me and my Wife, the Manor of* F. *with all Lands, Woods and Appurtenances, to Charitable Uſes, I deviſe to* M. *and* N. *upon Truſt, that they ſhall pay yearly and for ever, ſeveral particular Sums to Charitable Uſes amounting in the whole to* 120*l.* per Ann. and gives the Truſtees ſomething for their Pains; and there being an Overplus, it was decreed to go in Augmentation of the Charities, it appearing to be the Teſtator's Intent to ſettle the whole Manor, and that the Heir ſhould have no more than 40*l.* Show. P. C. 22.

Neither will the Courts ſuffer a Charity to be diverted to other Uſes than the Donor intended it; and therefore where Money was given for the Relief of the Poor, and the Truſtees laid it out in the building a *Conduit*, this was held a Miſemployment. Duke's Char. 94.

So where ſeveral diſtinct Charities were given to a Pariſh, *viz.* 12*l.* *per Ann.* for repairing the Church, 6*l.* *per Ann.* for mending the Highways, and ſo much to the Poor, in all 40*l.* *per Ann.* and the Truſtees having paid 10*s.* for every Day's Lecture to a Lecturer, and laid out other Parts of it for the Service of the Pariſh, but not according to the Directions of the Donor; it was held by my Lord Chancellor, That if it ſhould be admitted that Pariſhioners might change and apply Parochial Charities as they thought fit, it would deſtroy all Charities; and therefore ordered, that for what was paid the Parſon, they ſhould not be allowed a Farthing, but that for the other Payments they ſhould be allowed the Money, being promiſcuouſly paid for ſeveral Years before; but for the future, that it ſhould be paid according to the Terms of the Charity. 2 Vern. 42. *Man* and *Ballet*.

Page 368 * Nor will the Courts be eaſily prevailed on to change the Terms of a Charity, though by the Conſent of all the Parties intereſted; as where *A.* Vern. 55. deviſed 50*l. per Annum* for a Lecturer in Polemical or Caſuiſtical Divinity, ſo as he was a Bachelor or Doctor in Divinity, and fifty Years of Age, and would read five Lectures every Term, and at the End of the Term deliver fair Copies of the ſame, to be kept in the Univerſity; and in Default of ſuch Lecturer he gave the 50*l. per Annum* to ——— *College* in *Oxon*, with Conſent of the Heir. Application was made to mitigate the Rigour of the Qualifications, *viz.* That a Man of forty might be capable, that three Lectures may be ſufficient every Term, and that if fair Copies were delivered in every Year, it may ſuffice; but my Lord Chancellor refuſed to intermeddle, though no Oppoſition was made, and ſaid, that it was not in the Power of the Heir to alter the Diſpoſition of his Anceſtor.

(F) Of the Commiſſioners of Charitable Uſes, purſuant to the Statute. 43 Eliz.

(a) *Vide* the Uſes before mentioned, Letter (C). 364. *Note*: The ſame Power is given to the Chancellor of the Duchy of *Lancaſter*, for Lands lying within the Duchy. *Vide* 2 Inſt. 710.

BY the 43 *Eliz. cap.* 4. it is enacted, "That where Lands, &c. are "given to any (a) Charitable Uſe, the Lord Chancellor or Keeper of "the Great Seal, may award Commiſſions under the Great Seal, unto any "Parts of the Realm, directed to the Biſhop and his Chancellor, in caſe "there ſhall be any Biſhop of the Dioceſe at the Time, and to other Per"ſons of good Behaviour, authorizing them, or any four or more of them "to inquire, as well by the Oaths of twelve Men or more of the County "as by all other good and lawful Ways and Means, of all and ſingular "ſuch Gifts, Limitations, &c. of Lands, Tenements, &c. and of all "Abuſes, Breaches of Truſt, Negligences, Miſemployments, not imploy"ing, concealing, defrauding, miſconverting or miſgoverning any Lands "&c. heretofore or hereafter to be given to any charitable Uſe; and after "calling before them the Parties intereſted in any ſuch Lands, &c. ſhall "make Inquiry by the Oaths of twelve Men or more of the County, (to "which the Parties intereſted may make their Challenges) and upon ſuch "Inquiry, Hearing and Examination, ſet down ſuch Orders, Judgments "and Decrees, as the ſaid Lands, &c. may be faithfully employed to the "Intent for which they were given; which Orders, Decrees, or Judg"ments, being agreeable to the Intention of the Donors or Founders, ſhall "ſtand good and be affirmed until the ſame be undone or altered by the "Lord Chancellor, upon the Complaint of any Party grieved; which ſaid "Orders, Judgments and Decrees of the ſaid Commiſſioners, ſhall be certi"fied under the Seal of the ſaid Commiſſioners or any four of them "within the Time limited in the Commiſſion, to the Lord Chancellor "who ſhall take ſuch Order for the due Execution of all or any of the ſaid "Judgments, Orders or Decrees, as ſhall be fit and convenient; and may "upon the Hearing thereof at the Application of any party grieved, alter "nul, diminiſh, alter or inlarge the ſaid Orders, Judgments and Decrees "of the Commiſſioners, and may tax and award good Coſts againſt Per"ſons complaining without Cauſe."

Vide the Statute and the Exceptions thereto as to Lands given to Colleges, where Truſtees are appointed by the Founder, &c.

Duke's Char. 124. By Virtue of this Act the Commiſſioners may appoint Truſtees, and enable a certain Number of them to demiſe Lands, &c. for the beſt Advanta-

* vantage of the Charity; and that when such a Number of them die, the Survivors may elect others, and so continue the Number appointed. *Page 369

They may likewise turn out Trustees who misbehave themselves, as by making of Leases at low Fines and small Rents, &c. and may decree such Leases void. 2 Inst. 710. Duke's Char. 124.

If one who hath a Lease of Lands charged with a Charity, commits Waste, this is such a Misemployment for which the Commissioners may decree the Lease void. Duke's Char. 116.

If a Rent-charge is granted to a Charitable Use out of Lands in several Counties, the Commissioners are to charge this Rent, by their Decree, upon all the Lands in every County, according to an equal Distribution, having a Regard to the yearly Value of all the Lands charged; and (*a*) cannot by their Decree charge one or two Manors with all the Rent, and discharge the Residue in other Counties or Places; for that would be decreeing contrary to the Intent of the Donors. Duke's Char. 65. —

(*a*) The Town of *A.* was, upon a Commission of Charitable Uses, decreed liable to a Charity, and the Grantees distrained for the Whole on one who held only Part of the Lands chargeable; and it was held, That, the whole Town being made chargeable, they might sue for the Whole or any Part; but a Commission was awarded to apportion each Man's Share. Chan. Rep. 91. It has been held, That all the Tertenants of Lands liable to a Charity need not be made Parties to the Suit, for this would put the Charity to too great Difficulty; but yet those who are sued may make the other Parties to the Information, and compel them to a Contribution.

The Commissioners of Charitable Uses cannot decree Costs on this Statute; but if there be an Appeal from their Decree, my Lord Chancellor may decree the Costs, not only of the Appeal, but likewise of the Commission; and though they decree Costs, yet that shall not, upon an Appeal, be sufficient to reverse the Decree; for my Lord Chancellor may either increase or lessen the Costs, or exempt the Party from them intirely. Salk. 163. Abr. Eq. 126.

[(G) Of the Statute 9 Geo. 2. c. 36. Restraining Gifts in Mortmain by Will, &c.]

BY that Statute it is enacted, That no Manors, Lands, Tenements, Rents, Advowsons, or other Hereditaments, corporeal or incorporeal whatsoever, nor any Sum or Sums of Money, Goods, Chattels, Stocks in the Publick Funds, Securities for Money, or any other personal Estate whatsoever to be laid out and disposed of in the Purchase of any Lands, Tenements or Hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned or appointed, or any ways conveyed or settled to or upon any Person or Persons, Bodies politic or corporate, or otherwise, for any Estate or Interest whatsoever, or any ways charged or incumbered by any Person or Persons whatsoever, in Trust, or for the Benefit of any Charitable Uses whatsoever; unless such Gift, Conveyance, Appointment or Settlement of any such Lands, Tenements or Hereditaments, Sum or Sums of Money, or personal Estate (other than Stocks in the Publick Funds) be and be made by Deed indented, sealed and delivered in the Presence of two or more credible Witnesses, *twelve* Calendar Months at least before the Death of such Donor or Grantor (concluding the Days of the Execution and Death) and be inrolled in his Majesty's High Court of Chancery, within *six* Calendar Months next after the Execution thereof; and unless such Stocks be transferred in the publick Books, usually kept for

for the Transfer of Stocks, ſix Calendar Months at leaſt before the Death of ſuch Donor or Grantor (including the Days of the Transfer and Death) and unleſs the ſame be made to take Effect in *Poſſeſſion* for the Charitable Uſe intended, immediately from the Making thereof, and be without any Power of Revocation, Reſervation, Truſt, Condition, Limitation, Clauſe or Agreement whatſoever, for the Benefit of the Donor or Grantor, or of any Perſon or Perſons claiming under him.

Sect. 2. *Provided always*, That nothing herein before mentioned relating to the ſealing and delivering of any Deed or Deeds, twelve Calendar Months at leaſt before the Death of the Grantor, or to the Transfer of any Stock *ſix* Calendar Months before the Death of the Grantor, or Perſon making ſuch Transfer, ſhall extend, or be conſtrued to extend, to any Purchaſe of any Eſtate or Intereſt in Lands, Tenements or Hereditaments, or any Transfer of any Stock, to be made really, and *bona fide*, for a full and valuable Conſideration actually paid at or before the making of ſuch Conveyance or Transfer without Fraud or Colluſion.

By *ſect.* 3. All Gifts, Grants, Conveyances, Appointments, Aſſurances, Transfers and Settlements whatſoever made in any other Manner or Form than by this Act is directed and appointed, ſhall be abſolutely null and void.

But not to prejudice the two Univerſities, or the Colleges of *Eton*, *Wincheſter*, or *Weſtminſter*.

No College to hold more Advowſons than ſhall be equal to a Moiety of their Fellows, *&c.*

This Act not to extend to Eſtates in *Scotland*.

If a Man by Will gives 500*l.* out of his perſonal Eſtate to Truſtees, in Truſt, to lay out Part in building a School-houſe, and School-maſter's-houſe, and directs that *the Purchaſe of the Ground*, and the Expence of building ſhall not exceed 200*l.* and the remaining 300*l.* to be laid out in Lands or *real Security*, for the Maſter's Maintenance; the laſt is void by *ſtat.* 9 *G.* 2. *c.* 36. and Ground may not be purchaſed with the 200*l.* but if the Pariſh has Lands, it may be laid out in the building on them. *Attorney General* v. *Bowles*, *T.* 1754. 3 *Atkyns* 806. 2 *Vezey* 547.

If a Man gives a Legacy to his Executors, and then deviſes a Copyhold to *A.* he paying his Executors 1000*l.* and gives the Reſidue of his Eſtate to a Charity, this 1000*l.* is a Charge on Real Eſtate, and the Deviſe of it void by the *Stat.* *Arnold* and *Chapman*. *T.* 1748. 1 *Vezey* 108.

If a Man gives his Real Eſtate to Truſtees to ſell, and with the Produce and his Perſonal Eſtate to pay Debts and Legacies, and *(inter alia)* to purchaſe Freehold Land for a Fund for an Annuity to preach a Sermon, to keep a Tomb-ſtone in Repair, and for Management of this; it is within 9 *G.* 2. and void. *Durour* and *Motteux*. *M.* 1749. 1 *Vezey* 320.

If a Mortgagee, in Poſſeſſion under *habere facias*, deviſes all the Money due on the Mortgage to a Charity; though the Heir at Law of Mortgagor inſiſts to redeem, yet it is within 9 *G.* 2. *Attorney General* and *Myrick*. *M.* 1750. 2 *Vezey* 44.

As to the Caſes before 9 *G.* 2. *c.* 36. *vide* 1 *Vezey* 178, 182, 186.

CHURCHWARDENS. *Page 370

CHurchwardens (*a*) are Officers instituted for the Benefit and Advancement of Religion, whose chief Duty is to suppress all Prophaneness and Immorality, and to see that the Publick Worship be performed with due Decency and Reverence.

(*a*) Of their first Institution, *vide* Kennet's Par. Antiq.

649. Of Sidesmen, or Sinodsmen, *vide* Degg's Parson 183.

But though they deal chiefly in Matters belonging to the Church, yet are they every where treated of in our Law Books, as (*b*) Temporal Persons, and are undoubtedly to be considered as a (*c*) Lay Corporation vested with a Temporal Right in their Offices, and a Special Property in the Goods belonging to the Church; which further appears by the Duties injoined them by several Statutes and Acts of Parliament; as will be more fully explained under the following Heads.

(*b*) *Vide* Hard. 379.

(*c*) And may take Goods for the Benefit of the Church. Rol. Abr. 393. March 66. but not Lands; and therefore if a Feoffment be made to the Use of the Churchwardens of *D.* the Use is void. 12 H. 7. 27. Kelw. 32. a. Co. Lit. 3. a. S. P. March 66. S. P. *per Cur.* and *vide* Duke's Char. Uses 82. where it is said, That Lands given them for a Charitable Use, shall be a good Appointment within the 43 El. c. 4. *Vide* Tit. *Charitable Uses and Mortmain.* —But in *London* the Parson and Churchwardens are a Corporation, and may purchase and demise Lands, *&c.* Cro. Jac. 532. March 66, 67. Lane 21. 5 Mod. 395. Ld. Raym. 337. And *Q.* Whether they may not have Land by Prescription for the Reparation of the Church? But admitting they may, yet they cannot prescribe generally *in non decimando*, for they are not Spiritual Persons, though their Office be a Kind of an Ecclesiastical Office. Rol. Abr. 653. 2 Rol. Rep. 107. Comp. Incumb. 507, 508.

(A) Of the Manner and Right of chusing Churchwardens. 371.

(B) Of their Interest in, and Power over the Things belonging to the Church. 372.

(C) Of their Power and Duty in making Rates in Matters relating to the Church. 373.

(D) Of their Power and Duty in making Presentments, and hindering Irreverence in the Church. 374.

(E) Of their Accounts; and herein of Actions brought by, or against them, and the Remedies they have when their Time is expired. 375.

(A) Of

*Page 371 * (A) Of the Manner and Right of chuſing Churchwardens.

Cro. Jac. 532, 670. Cro. Car. 552. Noy 31, 139. 2 Rol. Abr. 234. pl. 1. Hard. 379. Raym. 439. That they may be choſen by a ſelect Veſtry.

BY the Common Law, the Right of chuſing Churchwardens belongs to the Pariſhioners, who are to be at the Charge of repairing the Church, &c. and (*a*) therefore it is but fitting that they ſhould have it in their Power to determine what Perſons are proper to be intruſted in theſe Concerns; nor (*b*) does any Canon deprive them of this Right; for though by Cuſtom the Pariſhioners in ſome Places chuſe one, and the Parſon another; yet this is by Virtue of the Cuſtom; the Validity of which, as of all other Cuſtoms, muſt be determined in the King's Temporal Courts; (*c*) nor can the Archdeacon, or any others, who by Virtue of their Offices are to ſwear and admit them, controul any ſuch Election; for herein their Offices are purely miniſterial.

Vide Jones 439. Cro. Car. 551. They are to be choſen every *Eaſter* Week. Degg 1, 183. What Perſons are exempted from ſerving, *vide* Head of *Privileges*, and 1 *W.* & *M.* c. 18. By which Statute, if any diſſenting from the Church be choſen Churchwarden, he may execute the Office by a ſufficient Deputy, by him to be provided, who ſhall comply with the Laws in that Behalf. (*a*) And hence alſo it is, That in *London*, where the Parſon and Churchwardens are a Corporation, and may purchaſe and demiſe Lands, and diſpoſe of Goods, the Churchwardens are always choſen by the Pariſhioners. Cro. Jac. 532. March 66. Lane 22. (*b*) For the Canon, *viz.* Can. 89. Ann 1603. is not regarded by the Common Law. Hard. 378. *per Hale*. Carth. 118. S. P. *per Holt*, Ch. Juſt. But *vide* 2 Vent. 41. (*c*) For if the Archdeacon refuſes them, a *Mandamus* lies; of which there are numberleſs Inſtances. *Vide* 6 Mod. 89. 2 Ld. Raym. 1098. 3 Salk. 88. And where for a falſe Return an Action on the Caſe lies, 2 Lutw. 1012. And that in ſuch Action both the Churchwardens may join. 3 Lev. 362. And for an ill and evaſive Return, *vide* Vent. 267. 2 Salk. 433. pl. 14. And that before he is ſworn he may officiate. Vent. 267. And that there is no Fee due for ſwearing them, except by Cuſtom. Salk. 330. pl. 2. Stra. 1045.

Carth. 118.

And though by Cuſtom the Rector or Vicar may name one, yet where the Vicar of *St. Giles* in *Northampton* was under a Deprivation for not taking the Oaths to King *William* and Queen *Mary*, and the Church being Vacant, the Pariſhioners proceeded to the Election of two Churchwardens, and preſented them to be ſworn; but the Regiſter of the Conſiſtory Court being a Friend to the Vicar, refuſing to ſwear them, unleſs that Perſon whom the late Vicar approved was nominated one, a *Mandamus* was granted.

Carth. 393. Hill. 8 W. & M. The *King* and *Rees*. Comb. 417. S. C.

The Pariſhioners are alſo Judges of the Fitneſs and Qualifications of the Perſons they chuſe for that Office; and, therefore, where to a *Mandamus* to ſwear a Churchwarden, choſen according to Cuſtom, the Archdeacon returned, That the Perſon preſented was a poor Dairy-man, who had no Eſtate, and was *Perſona minus habilis & idonea* for that Office; the Court granted a peremptory *Mandamus*.

Salk. 166. pl. 5. 12 Mod. 116. Ld. Raym. 138. S. C. 5 Mod. 325. S. C. Mich. 27 Car. 2. in *B. R.* between *Whaley* and *Lambert*. 3 Keb. 533, 542. S. C.

But where a Prohibition was granted *Niſi* to the Eccleſiaſtical Court, where *J. S.* ſued as Churchwarden of, &c. in *Colcheſter*, on a Suggeſtion, that in *Colcheſter* there is a Cuſtom for the Inhabitants to elect the Churchwardens, and that *A.* and *B.* were duly elected, which Matter the Defendant had pleaded in the Spiritual Court; but the Plea was refuſed; but it appearing that *J. S.* was Churchwarden *de facto*, choſen by the Parſon, and that he all the Year acted as ſuch; and that he, with the Inhabitants and another Churchwarden, made the Tax for which the Defendant was ſued in the Eccleſiaſtical Court; the Rule for a Prohibition was diſcharged; for, *per Cur'*, where the Queſtion is only, Who is Churchwarden? if ſuch Cuſtom is alledged, a Prohibition ſhall be granted; but the Matter here is for a Tax for the Repair of the Church; and it is not material now whether he was duly elected or not; it is ſufficient that he was Guardian *de facto*; and it may be as well put in Iſſue, Whether the Miniſter was a rightful Miniſter? Beſides, this Tax is not rated by the Churchwardens, for they have no ſuch Power but it is a common Charge, impoſed by the major Part of the Pariſhioners:

and

* and the Churchwardens do no more in aſſeſſing them, than the other Pariſhioners; and the Tax will be well aſſeſſed by the major Part of the Inhabitants, though the Churchwardens are againſt it; their chief Buſineſs is in collecting of it; and the Matter is a Matter of Eccleſiaſtical Cognizance, for the Spiritual Judge may inquire touching the Want of Reparations of the Church. And *Note*, That upon the Rule for diſcharging the Prohibition, all this Matter was ordered to be entered, for fear it ſhould be afterwards thought, that a Prohibition was decreed where a Cuſtom was in queſtion. *Page 372

(B) Of their Intereſt and Power over the Things belonging to the Church.

THE Churchwardens when choſen, are a Corporation, intruſted with the Care and Management of the Goods belonging to the Church, which they are to order for the beſt Advantage of the Pariſhioners; they are likewiſe enabled to take Goods for the Benefit of the Church; but cannot diſpoſe of them without the Conſent of the Pariſhioners. Rol. Abr. 392. 2 Inſt. 492. 2 Rol. Rep. 67. Yelv. 173. 2 Brownl. 215. Comp. Incumb. 390.

They have ſuch a Special Property in the (*a*) Organ, (*b*) Bells, (*c*) Pariſh Books, (*d*) Bible, Chalice, Surplice, &c. belonging to the Church, that for the taking away, or for any Damage done any of theſe, they may (*e*) bring an Action at Law; and therefore (*f*) the Parſon cannot ſue for them in the Spiritual Court. (*a*) Rol. Abr. 393. (*b*) Cro Eliz. 145, 179. (*c*) 5 Mod. 395, 396. Ld. Raym. 337. (*d*) Rol. Rep. 67. (*e*) That the Action muſt be for *bona Parochianorum*, and not *bona Eccleſiæ*. Mod. 65. *per Cur'*. 2 Keb. 675. S. C. and S. P. *per Cur'*. Vent. 89. S. C. and S. P. and the Court inclined accordingly; but ſaid the Precedents were both Ways.——Where they may ſue at Common Law for Damages, and in the Spiritual Court for the Things in Specie. Sid. 281. 2 Keb. 6. 22. (*f*) Rol. Abr. 393. 2 Inſt. 492.

If two Churchwardens ſue in the Spiritual Court for a Levy towards the Reparation of their Church, and have Sentence to recover, and Coſts aſſeſſed, and after, one of them releaſes, yet the other may proceed for the Coſts, &c. for Churchwardens have nothing but to the Uſe of the Pariſh; and the Corporation conſiſts of both; and one only cannot releaſe or give away the Goods of the Church. Cro. Jac. 235. Yelv. 173. 2 Brownl. 215. S. C.

Alſo they have ſuch a Special Property in the Goods of the Church, that when they are ſtolen they may bring an Appeal of Robbery for them; (*g*) they may alſo ſue the Offender in the Spiritual Court *pro Salute Animæ*, but not to recover Damages. 2 Hawk. P. C. 167. (*g*) 2 Keb. 23. Sid. 281. 2 Inſt. 492. 1 Keb. 743. Regiſt. 57.

But the Churchwardens have no Right to, or Intereſt in, the Freehold and Inheritance of the Church, which (*h*) alone belongs to the Parſon or Incumbent. Comp. Incumb. 381. And therefore the Churchwardens cannot grant a Licence for burying in the Church, being the Freehold of the Parſon. Cro. Jac. 366. Noy 104. Yet the Churchwardens, by Cuſtom may have a Fee for burying in the Church, becauſe the Pariſh is at the Charge of repairing the Floor. Vent. 274. 3 Keb. 564. 523. 527. But the Church-yard is a common burial Place for all the Pariſhioners. Comp. Incumb. 381. (*h*) If the Walls, Windows, or Doors of the Church be broken by any Perſon, or the Trees in the Church-yard cut down, or the Graſs thereon eaten by a Stranger, the Incumbent ſhall have his Action. 27 H. 7. 21. Bro. Treſpaſs 210. 38 H. 6. 19. 11 H. 4. 12. And ſo may his Leſſee, if the Church-yard be let. 2 Rol. Abr. 337.

Alſo

*Page 373 * Also the Seats in the Church being fixed to the Freehold, the Churchwardens (a) cannot dispose of them alone, nor can the Churchwardens and Rector jointly dispose of them without the Consent of the Ordinary; and though such Dispositions have been made, yet it has been always presumed that it was so done with the Consent and Approbation of the Ordinary.

Vide 12 Co. 105. Hetl. 94. Godb. 200. 2 Bulst. 150.

Hob. 69. Moor 878. Comp. Incumb. 382. Salk. 167. pl. 7. (a) But by the Custom of *London*, the Churchwardens have the ordering the Seats there, for the Parishioners are obliged to repair the Chancel, as well as the Body of the Church. Comp. Incumb. 387, 388. 2 Rol. Abr. 288. Poph. 140. 2 Rol. Rep. 24. And there may be the like Custom elsewhere, for the Churchwardens to dispose of Seats. Raym. 246. admitted *per Cur.* But the Churchwardens must shew some particular Reason why they are to order the Seats, exclusive of the Ordinary, for a general Allegation, that they used to Repair, which is no more than what they are obliged to by common Right is not sufficient. 2 Lev. 241.

Comp. Incumb. 382. 8 H. 7. 12. Whether Churchwardens may remove Seats

But as Seats are erected for the more convenient attending of Divine Service, and as the Parishioners are at the Expence of erecting them and keeping them in Repair, if any of them be taken away, though they are fixed to the Freehold, yet the Churchwardens, and not the Parson, shall bring the Action against the Wrong-doer.

erected by a Stranger in the Church. *Vide* Noy 108. Comp. Incumb. 387.

Godb. 279. That Churchwardens

It is said to have been holden, That at Common Law a Churchwarden may maintain an Action upon the Case for defacing a Monument in the Church.

themselves, nor any others, cannot take down Arms in Windows, or deface Grave-stones or Monuments erected in the Church or Church-yard; and if they do, an Action lies by the Heirs or Executors of the Parties for whom they were erected. Rol. Abr. 625. Noy 104. Godb. 200. Cro. Jac. 367. 2 Bulst. 151. But the Ordinary may deface any superstitious Picture. Noy 104.

(C) Of their Power and Duty in making Rates in Matters relating to the Church.

Vide Comp. Incumb. 389.

THE Churchwardens have no Power to make any Rate themselves, exclusive of the Parishioners, their Duty being only to summon the Parishioners, who are to meet for that Purpose, and when they are assembled, a Rate made by the Majority present shall bind the whole Parish, although the Churchwardens voted against it.

Vent. 367. Mod. 79, 194.

But if the Churchwardens give the Parishioners due Notice, that they intend to meet for that Purpose, and the Parishioners refuse to come, or being assembled refuse to make any Rate, they may make one without their Concurrence; for as they are liable to be punished in the Ecclesiastical Courts for (b) not repairing the Church, it would be unreasonable that they should suffer by the Wilfulness and Obstinacy of others.

(b) By the Civil and Canon Law the Parson is obliged to repair the whole Church, and it is so in all Christian Kingdoms but in *England*; for it is by the peculiar Law of this Nation, that the Parishioners are charged with the Repairs of the Body of the Church. Carth. 360. *per Holt* Ch. Just.—The Bishop cannot appoint Commissioners to tax the Parishioners, or make Rates for repairing the Church. 2 Mod. 8. 10 Mod. 13. 12 Mod. 9, 83, 327. Ld. Raym. 59, 512. 5 Mod. 389. But the Spiritual Court may compel the Parishioners to do it, and may excommunicate every one of them till it be repaired; but if any are willing to contribute, they are to be absolved till the greater Part agree to make a Tax. Comp. Incumb. 388, 389. Of the Manner it is to be made, *vide* 5 Co. 67. Ventr. 308. 2 Mod. 222, 254. 8 Mod. 314, 338. Pre. Chan. 42, 116, 233, 248, 416, 554. Stra. 624, 576. 1 Stra. 1145. Lit. Rep. 263. Poph. 137. Mod. 236. 2 Will. Rep. 125. 2 Ld. Raym. 1388. 2 Stra. 1045. Forteſc. 168.

Vent. 367. Comp. Incumb. 389.

The Churchwardens in summoning the Parishioners need not do it from House to House, but a general publick Summons at the Church is sufficient.

ſufficient, and the major Part of them that appear upon ſuch Summons will bind the whole Pariſh. *Page 374

On a Motion for a Prohibition, it appeared, that the Libel recited that *J. S.* Dean of, *&c.* had preſented that the Church and Chancel of *D.* was out of Repair, *&c.* and that the Churchwardens of the ſaid Pariſh did make, or cauſe to be made, a certain Rate upon the Inhabitants thereof, towards the Charge of repairing the ſaid Church and Chancel; and that the Churchwardens had accordingly repaired the Church and Chancel, and beautified the ſame with Ornaments, and that *H.* was a Pariſhioner of the ſaid Pariſh, and refuſed to pay his Proportion of the ſaid Rate; and it being objected, 1ſt, That the Churchwardens only could not make a Rate; 2dly, That the Parſon alone ought to repair the Chancel; a Prohibition was granted generally to the whole Suit, though it was ſtrongly inſiſted on that the Prohibition ought to go *quoad* the Rate for Repairs of the Chancel only. Carth. 362. *Hawkins* and *Rous.* Salk. 165. pl. 3. Comb. 344. 5 Mod. 384. S. C.

(D) Of their Power and Duty in making Preſentments and hindering Irreverence in the Church.

PReſentments made by Churchwardens relate to the Church, the Parſon and Pariſhioners, in which they are to be guided by the Articles delivered them; but theſe Articles muſt be agreeable to the Laws of the Church, and particularly to the Canons made and agreed on in the Year 1603; they need not take a particular Oath upon all the Preſentments they make, but may do it by Virtue of their *(a)* general Oath of Churchwardens. Cro. Car. 291. Vent. 114. 2 Vent. 42.

(a) That ſuch promiſory Oath does not ſeem to be puniſhable as Perjury. Keb. 582.

The Oath is to be general, *viz.* To do all Things which appertain to their Office; and therefore if the Oath tendered requires them to preſent *(b)* Matters not preſentable by Law, they are not obliged to take it, *(c)* nor are they to be required to preſent or accuſe themſelves. Hard. 364.

(b) Where the Articles enjoined the Churchwarden to preſent filthy Talkers, Revilers, and common Sowers of Sedition amongſt Neighbours; the Court held that theſe general Terms comprehended Matters out of their Juriſdiction, and that if the Churchwarden had pleaded there *quod non tenetur reſpondere* as to thoſe Matters, and the Plea had been refuſed, a Prohibition ought to have been granted. Vent. 114. The S. P. as to ſowing Sedition among Neighbours. Vent. 127. But whether any Perſon within his Pariſh hath incroached upon the Church-yard, is lawful, though Matter of Freehold. Vent. 127. Alſo if the Oath tendered has theſe general Words, *viz.* *To make Preſentations according to the King's Eccleſiaſtical Law*; the particular Articles by way of Direction will not be ſufficient Grounds for a Prohibition. Vent. 127. *(c)* But to preſent every Perſon in the Pariſh, does not include themſelves. Vent. 127.

Alſo if the Eccleſiaſtical Court proceeds againſt the Churchwardens in Matters not within their Juriſdiction, an Action on the Caſe lies againſt them. Hard. 364. *per Cur'.*

And if the Churchwardens maliciouſly preſent an innocent Perſon for any Crime, by which he is put to Expence, or ſuffers in his good Name or Reputation, an Action on the Caſe lies. Cro. Car. 285. Sid. 463. Vent. 86.

In

*Page 375 * In Assault and Battery against a Churchwarden, he justified that the Plaintiff was at Church in Time of Prayers with his Hat on, and that he demanded of him to pull it off, and because he did not do it, the Churchwarden took off his Hat and laid it by him; and the Court held this a good Justification; and that Churchwardens may justify to wake a Man, to switch Boys that are at Play, and turn an excommunicated Person out of the Church.

Lev. 196. adjudged between *Hall* and *Tanner*, for though they may present it in the Ecclesiastical Court, yet they are not bound in the mean Time to permit such Irreverence and Indecency in the Church. Sand. 13, 14. S. C. adjudged; and there said by the Reporter, That the Court, taking it to be a great Misdemeanor in the Plaintiff, gave Judgment against him, without Regard to the Exceptions to the Defendant's Plea. Sid. 301. S. C. and S. P. adjudged; *Twisden* only doubting upon the Words of the Canon, against wearing a Hat, &c. viz. What Hat intended, and said, they might appease a Disturbance in the Church, but laying Hands on a Man to pull off his Hat, tends to the raising a Disturbance and Breach of the Peace. 2 Keb. 124, 125. S. C. adjudged.

Comp. Incumb. 335. *Vide* 2 Bulst. 49. Churchwardens may restrain and hinder any Stranger not licensed from Preaching in their Church or Chapel.

(E) Of their Accounts; and herein of Actions brought by, or against them, and the Remedies they have when their Time is expired.

THE Churchwardens, at the Expiration of their Year, are to give up their Accounts to their (*a*) Parishioners, and on Refusal (*b*) may be proceeded against in the Ecclesiastical Court, or the (*c*) succeeding Churchwardens may bring an (*d*) Action of Account against them at Common Law.

(*a*) Or to a select Committee appointed by the Parishioners, according to the Custom of some Parishes, who may allow their Accounts, and such Allowance shall discharge them from being called in Question in the Spiritual Court. 2 Lutw. 1207. (*b*) By the succeeding Churchwardens, either in the Spiritual Court, or by Writ of Account at Common Law. Godb. 279. Rol. Rep. 71, 106, 107. 2 Keb. 6, 22. Sid. 281. (*c*) But the Parishioners cannot bring an Action of Account against them at Common Law, but must make new, &c. Bro. Account 71. 8 E. 4. 6. Bro. Corporations 55. 4 E. 4. 6. Bro. Garden 7. And though a Parish prescribe to chuse two Churchwardens, and that the Persons so chosen shall continue in that Office for two Years; yet the Parish may, notwithstanding the Prescription, remove such Wardens at their Pleasure, and chuse new ones. 26 H. 8. 5. b. 13 Co. 70. Comp. Incumb. 390. *Vide* 27 H. 8. c. 25. in *Rastal*, That no Churchwarden shall continue in his Office above one whole Year. (*d*) *Vide* Sid. 307. Where a Churchwarden of *St. Martin's in the Fields* was indicted for taking a Silver Cup of one, for the Place of Gallery-keeper, *colore Officii*, &c.

Rol. Abr. 121. pl. 9. 393. S. C. If the Churchwardens, by the Consent and Agreement of the Parishioners, take a ruinous Bell and deliver it to a Bell-Founder, and that he by their Agreement shall have for the Casting thereof 4*l.* and shall retain it till the 4*l.* be paid; this Agreement of the Parishioners shall (*e*) excuse the Churchwardens, in a Writ of Account brought against them by their Successors.

(*e*) But whether they can plead it in Bar to the Account, or must set it forth in Discharge before Auditors, *vide* Mod. 65. Vent. 88. 2 Keb. 675. 19 Mod. 22. Fitzgib. 44. Stra. 680.

If

* If the Churchwardens and Parishioners make an Assessment, and the Churchwardens lay out the whole Money, but before the whole is collected their Time is expired, and new Churchwardens are chosen, the former Churchwardens, by having presented such Parishioners as refused to pay before the Determination of their Time, may still proceed against them; otherwise the new Churchwardens must collect such Arrears, and reimburse their Predecessors. *Page 376

Vide Preced. in Chan. 42. 2 Ven. 262. where Bills have been exhibited for Relief against the new Churchwardens and Parishioners, for Money expended by Order of the Vestry.

If Goods belonging to the Church are taken away, and the Churchwardens for the Time being neglect to bring an Action, the succeeding Churchwardens may, by Virtue of their Office, bring an Action against the Wrong-doer, but they must declare *ad Damnum Parochianorum*, and not *inforum*; though the old Churchwardens, in whose Time the Fact was done, may lay it either way. Cro. Eliz. 145, 179. Leon. 177. *Vide* Dals. 105. 2 Brownl. 215. Kelw. 32.

If *A.* was Churchwarden of *B.* and at the End of the Year gave up his Accounts to his Successor, and yet *A.* is falsly and maliciously cited by *D.* into the Ecclesiastical Court, to render an Account, and at the Request of *D.* he is excommunicated for not rendering up his Account; an Action lies against *D.* 2 Jones 132. *Gray* and *Day*. Raym. 418. S. C. adjudged, though the Sentence was given by a Judge; but for this *vide* Hard. 194, 195, &c.

By the 3 & 4 *W.* & *M. cap.* 11. " In all Actions to be brought in the " Courts of *Westminster*, or at the Assises, for Money mispent by Church- " wardens, the Evidence of the Parishioners, other than such as receive " Alms, shall be taken and admitted.

Churchwardens are comprehended within the Purview of the Statutes 7 *Jac.* 1 *cap.* 5. and 21 *Jac.* 1. *cap.* 12. as to pleading the General Issue to Actions brought against them, (*a*) and as to double Costs when they have Judgment.

(*a*) But in an Action on the Case against a Churchwarden for a false and malicious Presentment, though there be Judgment for him, yet he shall not have double Costs; for the Statute does not extend to Spiritual Affairs. Cro. Car. 285, 286. Jones 305. S. C.

[By 11 *Geo.* 2. *c.* 76. *s.* 5. Churchwardens, &c. are required to carry Hawkers of Brandy, &c. before Justices of Peace, &c.]

COMMIT-

*Page 377 * COMMITMENTS.

(A) What kinds of Offenders are to be committed. 377.
(B) By whom. 377.
(C) To what Prison. 378.
(D) What is to be done previous to their Commitment. 380.
(E) What ought to be the Form of the Commitment. 380.
(F) At whose Charges they are to be sent to Prison. 383.
(G) To what Court the Commitment is to be certified. 384.
(H) By what Means the Party may be discharged from such Commitment. 384.

(A) What kinds of Offenders are to be committed.

2 Hawk. P. C. 116. ALL Persons who are apprehended for Offences not bailable, as also, Persons who neglect to offer Bail for Offences which are bailable, must be committed.

2 Hawk. P. C. 116. Also wherever a Justice of Peace is impowered to bind a Person over, or to cause him to do a certain Thing, he may commit him *quousque*, &c. if in his Presence he shall refuse to be so bound, or to do such Thing.

(B) By whom.

2 Hawk. P. C. 116, 117. (a) 10 H. 4. 7. a. 7 E. 4. 20. a. 3 E. 4. 26. b. 27. a. IT is laid down by Serjeant *Hawkins* as a Matter which seems agreed by all the old (*a*) Books, That wheresoever a Constable, or private Person, may justify the Arresting another for a Felony or Treason, he may also justify the sending or bringing him to the common Gaol; and that every private Person has as much Authority in Cases of this Kind as the Sheriff, or any other Officer, und may justify such Imprisonment by his (*b*) own Authority, but not by the Command of another.

20 E. 4. 6. b. 10 E. 4. 17. b. 18. a. 5 H. 7. 4. b. 5. a. 2 H. 7. 3. b. 11 Ed. 4. 4. b. (*b*) 5 H. 7. 4. b. 5. a. Fitz. False Imprisonment 8.

2 Hawk. P. C. 117. (c) 9 E. 4. 26. b. 27. a. 10 E. 4. 17. b. H. P. C. 91, 112. But inasmuch as it is certain, that a Person lawfully making such an Arrest, (*c*) may justify bringing the Party to the Constable, in order to be carried by him before a Justice of Peace; and inasmuch as the Statutes of 1 & 2 *Ph. & M. cap.* 13. and 2 & 3 *Ph. & M. cap.* 10. which direct in what Manner Persons brought before a Justice of the Peace for Felony shall be examined by him, in order to their being committed or bailed, seem clearly to suppose, that all such Persons are to be brought before such Justice for such Purpose; and inasmuch as the Statute of 31 *Car.* 2. c. 2. * commonly called the *Habeas Corpus* Act, seems to suppose, that all Persons who are committed to Prison are there detained by virtue of some Warrant

*Which see post (C. 378)

rant in Writing, which ſeems to be intended of a Commitment by ſome Magiſtrate, and the conſtant Tenor of the late Books, Practice and Opinions, are * agreeable hereto; it is certainly moſt adviſeable, at this Day, for any private Perſon who arreſts another for Felony, to cauſe him to be brought, as ſoon as conveniently he may, before ſome Juſtice of Peace, that he may be committed or bailed by him. *Page 378 H. P. C. 91, 112. Dalt c. 118.

It is certain, that the (*a*) Privy Council, or any one or two of them, or (*b*) a Secretary of State, may lawfully commit Perſons for Treaſon, and for other Offences againſt the State, as in all Ages they have done. 2 Hawk. P. C. 117. (*a*) And. 298 Palm. 558.

Sid. 78. Leon. 70. Sir *William Windham*'s Caſe, 2 Geo. 1. Str. 2. 3 Vin. Abr. 515. (*b*) That a Secretary of State may commit, Carth. 291. reſolved in *Yaxley*'s Caſe, 5 W. & M. Skin. 396. pl. 9. S. P. reſolved between *The King* and *Kendal*, Salk. 347. pl. 1. S. C. and S. P. reſolved. *Vide* 5 Mod. 80. S. C. and S. P. reſolved. Ld. Raym. 65. "The Author of a Libel called the *North Briton* No. 55" committed by the Secretaries of State, diſcharged by the Court of *Common Pleas*; See L. C. J. *Prat*, (afterwards Lord *Camden*, and Lord High Chancellor of *Great Britain*) his excellent Argument on that Occaſion in *Digeſt* of the Law concerning Libels in 4to. pl. 50. ‖

‖ *Vide* 2 Wilſ. 151. and 3 Burr. 169. 1742.

But the King cannot commit, as appears from the following Caſe which was upon an *Habeas Corpus*, wherein it appeared, the King had requeſted ſome of his Miniſtry to commit the Defendant to Gaol, but they, not having Evidence of the Defendant's Guilt, refuſed to grant any Warrant; upon which his Majeſty, thinking the Defendant guilty, called for a Warrant, which he ſigned with his own Hand, by which the Defendant was committed to the Cuſtody of a Meſſenger; and the Warrant being taken Notice of by the Court of *B. R.* and the whole Matter being conſidered, the Court gave their Opinion, that the Defendant ſhould be diſcharged, becauſe the Warrant was under the King's own Hand, and not under the Hand of any Secretary or Officer of State, or Juſtice of Peace. And the Reaſon given for this has been, that the King having given all his executive Power to his Judges and Juſtices of the Peace, there is none left in him, the executive Power being too mean and troubleſome for his Majeſty, and if the King erred ever ſo much there is no Remedy againſt him, but there is a Remedy at Law againſt any Subject whatſoever. See 2 Show. Rep. 484. pl. 445. See Pref. to Ld. Forteſcue's Rep.

(C) To what Priſon.

BY the 31 *Car.* 2. *cap.* 2. it is enacted, "That no Subject of this Realm, "being an Inhabitant or Reſiant of this Kingdom of *England*, Domi- "nion of *Wales*, or Town of *Berwick upon Tweed*, ſhall or may be ſent "Priſoner into *Scotland*, *Ireland*, *Jerſey*, *Guernſey*, *Tangier*, or into Parts, "Garriſons, Iſlands, or Places beyond the Seas, which then were, or at "any Time hereafter ſhould be, within or without the Dominions of "his Majeſty, his Heirs or Succeſſors; and that every ſuch Impriſonment "is by the ſaid Statute enacted and adjudged to be illegal; and that every "Subject ſo impriſoned ſhall have an Action of Falſe Impriſonment, and "recover treble Coſts, and no leſs Damages than Five Hundred Pounds "againſt the Perſon making ſuch Warrant, who ſhall alſo incur a "*Præmunire*."

By the 14 *E.* 3. *cap.* 10. it is enacted as followeth, "In the Right of the "Gaols which were wont to be in ward of the Sheriffs, and annexed to "their

" their Bailiwicks, it is aſſented and accorded, that they ſhall be rejoined " to the Sheriffs, and the Sheriffs ſhall have the Cuſtody of the ſame " Gaols as before this Time they were wont to have; and they ſhall put " in ſuch Under-keepers for whom they will anſwer." And this is confirmed by 19 *H.* 7. *cap.* 10. Alſo it is recited by 5 *H.* 4. *cap.* 10. " That divers Conſtables of Caſtles within the Realm, being aſſigned " Juſtices of the Peace by the King's Commiſſion, had, by Colour of " ſuch Commiſſion, uſed to take People to whom they bore evil Will, " and impriſon them within the ſaid Caſtles till they have made Fine and *Page 379 " * Ranſom with the ſaid Conſtables for their Deliverance." And thereupon it is enacted, " That none be impriſoned by any Juſtice of the Peace but " only in the Common Gaol; (*a*) ſaving to Lords, and others which have Gaols, their Franchiſe in this Caſe."

(*a*) But none can claim a Priſon as a Franchiſe, unleſs he have alſo a Gaol Delivery; nor can the King grant to private Perſons to have the Cuſtody of Priſoners committed by Juſtices of the Peace. And. 345. Cro. Eliz. 829. 9 Co. 119. b. Salk. 343. pl. 1. 2 Hawk. P. C. 118. 2 Ld. Raym. 767, 879.

Since this Statute it has been held, That regularly no one can juſtify the detaining a Priſoner in Cuſtody out of the common Gaol, unleſs there be ſome particular Reaſon for ſo doing; as if the Party be ſo dangerouſly (*b*) ſick, that it would apparently hazard his Life to ſend him to the Gaol; (*c*) or there be evident Danger of a Reſcous from Rebels, *&c.* (*d*) Yet conſtant Practice ſeems to authorize a Commitment to a Meſſenger; and it is (*e*) ſaid, That it ſhall be intended to have been made in order for the carrying of the Party to Gaol.

20 E. 4. 6. b. Bro. Faux Impriſonment 21, 27. 14 E. 4. 7. 2 Hawk. P. C. 118.

(*b*) 2 E. 4. 8. b.

(*c*) 11 E. 4. 4. b. 5. a.

(*d*) 2 Hawk. P. C. 118. (*e*) Salk. 347. pl. 1. Skin. 596. pl. 9. S. P.

And it is ſaid, That if a Conſtable bring a Felon to Gaol, and the Gaoler refuſe to receive him, the Town where he is Conſtable ought to keep him till the next Gaol-Delivery.

H. P. C. 114. 19 H. 4. 7. pl. 2. Fitz. Eſcape 8 Dalt. c. 118. Bro. Faux Impriſonment 25. 2 Hawk. P. C. 118.

If a Perſon arreſted in one County for a Crime done in it, fly into another County, and be retaken there, he may be committed by a Juſtice of the firſt County to the Gaol of ſuch County.

H. P. C. 93. Dalt. c. 18. Cromp. 172 2 Hawk. P. C. 118.

But by the better Opinion, If he had before any Arreſt fled into ſuch County, he muſt be committed to the Gaol thereof by a Juſtice of ſuch County.

Dalt. c. 118. H. P. C. 92. 11 E. 4. 4. b. 5. a.

13 E. 4. 8. Plow. 37. Keilw. 45. 2 Hawk. P. C. 118.

Alſo it ſeems to be laid down as a Rule by ſome Books, That any Offender may be committed to the Gaol next to the Place where he was taken, whether it lie in the ſame County or not.

Keilw. 45. 22 E. 4. 34. b. 2 Hawk. P. C. 118.

Alſo it ſeems that the Court of King's Bench is not reſtrained by the ſaid Statute, but may commit to ſuch Gaol as they ſhall think moſt convenient.

As Priſoners ought to be committed at firſt to the proper Priſon, ſo ought they not to be removed thence, except in ſome ſpecial Caſes; and to this Purpoſe it is enacted by 31 *Car.* 2. *cap.* 2. " That if any Subject of this " Realm ſhall be committed to any Priſon, or in Cuſtody of any Officer or " Officers whatſoever, for any criminal, or ſuppoſed criminal Matter, that " the ſaid Perſon ſhall not be removed from the ſaid Priſon and Cuſtody " into the Cuſtody of any other Officer or Officers, unleſs it be by *Habeas Corpus*,

2 Hawk. P. C. 118.

" *Corpus*, or ſome other legal Writ, or where the Priſoner is delivered to " the Conſtable or other inferior Officer, to carry ſuch Priſoner to ſome " common Gaol, or where any Perſon is ſent by Order of any Judge of " Aſſiſe, or Juſtice of the Peace, to any common Work-houſe or Houſe of " Correction; or where the Priſoner is removed from one Priſon or Place " to another within the ſame County, in order to a Trial or Diſcharge " by due Courſe of Law; or in caſe of ſudden Fire, or Infection, or other " Neceſſity; upon Pain that he who makes out, ſigns, or counter-ſigns, " or obeys or executes ſuch Warrant, ſhall forfeit to the Party grieved " One Hundred Pounds for the firſt Offence, Two Hundred Pounds for " the ſecond, *&c.*"

(D) What is to be done previous to their Commitment.

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BY the 2 & 3 *Ph. & M. cap.* 10. it is enacted, " That every Juſtice of " Juſtices, before whom any Perſon ſhall be brought for Manſlaughter " or Felony, or for Suſpicion thereof, before he or they ſhall commit or " ſend ſuch Priſoner to Ward, ſhall take the Examination of ſuch Priſoner, " and Information of thoſe that bring him, of the Fact, and Circumſtances " thereof; and the ſame, or as much thereof as ſhall be material to prove " the Felony, ſhall put in Writing, within two Days after the ſaid Exami- " nation; and the ſame ſhall certify in ſuch Manner and Form, and at ſuch " Time, as they ſhould and ought to do, if ſuch Priſoner ſo committed or " ſent to Ward had been bailed, or let to Mainprize, upon ſuch Pain as in " 1 & 2 *Ph. & M.* c. 13. is limited and appointed for not taking or not " certifying ſuch Examinations, *&c.*" And it is further enacted, " That " the ſaid Juſtices ſhall have Authority, to bind all ſuch by Recognizance " of Obligation, as do declare any Thing material to prove the ſaid Man- " ſlaughter or Felony, to appear at the next General Gaol-Delivery to be " holden within the County, City, or Town Corporate, where the Trial " of the ſaid Manſlaughter or Felony ſhall be, then and there to be given " in Evidence againſt the Party; and that the ſaid Juſtices ſhall certify " the ſaid Bonds taken before them, in like Manner, as they ought to cer- " tify Bonds mentioned in the ſaid former Act, *&c.*"

A Juſtice of the Peace may detain a Priſoner a reaſonable Time, in order to examine him; and it is (*a*) ſaid that three Days is a reaſonable Time for this Purpoſe. 2 Hawk. P. C. 119. (*a*) Cro. Eliz. 829, 830.

1 Hale's P. C. 586. 2 Hale's P. C. 79, 121.

(E) What ought to be the Form of the Commitment.

EVERY Commitment muſt be in Writing, and under the Hand and Seal, and ſhew the Authority of him that (*b*) made it, and the Time and Place, and muſt be directed to the Keeper of the Priſon. 2 Inſt. 52, 591. Dalt. c. 125. H. P. C. 94.

Hawk. P. C. 119. (*b*) It may be made either in the King's Name, and only teſted by the Juſtice, or in the Juſtice's Name. Dalt. c. 125. 2 Hawk. P. C. 119. Where a Commitment in Execution muſt be to the Sheriff, and not to the Gaoler, *vide* 5 Mod. 21.

2 Hawk. P. C. 119. (c) 8 Co. 100. 9 Co. 87. Dalt. 118.

It may command the Gaoler to keep the Party in safe and close Custody; for this being what he is obliged to do (c) by Law, it can be no Fault to command him so to do.

It ought to set forth the Crime with convenient (d) Certainty, whether the Commitment be by the (e) Privy Council, or any other Authority, otherwise the Officer (f) is not punishable by reason of such *Mittimus*, for suffering the Party to escape, and the Court, before whom he is removed by *Habeas Corpus*, ought to discharge or bail him; and *Page 381 * this doth not only hold where (g) no Cause at all is expressed in the Commitment, but also where it is (h) so loosely set forth, that the Court cannot adjudge whether it were a reasonable Ground of Imprisonment.

2 Hawk. P. C. 119.

(d) H. P. C. 94. Dalt. c. 125. 2 Inst. 52, 591. (e) 16 Car. 1. c. 10. Cro. Car. 138, 507, 579, 593. 2 And. 298. *cont.* Rol. Rep. 134. Leon. 71. (f) 2 Inst. 591. H. P. C. 109. Palm. 550. (g) Cro. Car. 579. Palm. 558. 2 Hawk. P. C. 119. (h) As where one was committed for manifold Contumacy to the High Commission Court. Rol. Rep. 245.——Or for refusing to answer before them, to certain Articles. Rol. Rep. 220, 245. Or for insolent Behaviour, and Words spoken at the Council-Table. Cro. Car. 133, 579. 2 Bulst. 139, 140.

2 Inst. 52. Cromp. 233. b. Dalt. c. 125. Sid. 78. And. 298. Keb. 305. Palm. 558. 2 Hawk. P. C. 119. *Vide* 2 Inst. 591. *cont.*

But a Commitment for High Treason or Felony in general, without expressing the particular Species, has been held good.

Skin. 596. pl. 9. *The King* verf. *Kendall* and *Row.* Salk. 347. S. C. pl. 1. Ld. Raym. 65. 5 Mod. 78. S. C.

But now, since the *Habeas Corpus* Act, it seems that such a general Commitment is not good; and therefore where *A.* and *B.* were committed for aiding and abetting Sir *James Montgomery* to make his Escape, who was committed by a Warrant of a Secretary of State for High Treason, on a *Habeas Corpus*, they were admitted to Bail, because it did not appear what Species of Treason Sir *James* was guilty of.

2 Hawk. P. C. 120. Dalt. c. 125. Cromp. 233. 2 Inst. 52, 591.

It is safe to set forth that the Party is charged upon Oath; but this is not necessary; for it hath been resolved, that a Commitment for Treason, or for a Suspicion of it, without setting forth any particular Accusation or Ground of the Suspicion, is good.

2 Hawk. P. C. 120. (i) 2 Inst. 52, 591. H. P. C. 94. Cromp. 233. Dalt. c. 124. (k) That the Omission of these Words, *until he be delivered by due Course of Law*, makes no Nullity in a Justice of Peace's *Mittimus*, for they are no more than the Law says. 3 Keb. 531.

Every such *Mittimus* ought to have a lawful Conclusion, (i) *viz.* that the Party be safely kept till he be delivered by Law, or by Order of Law, (k) or by due Course of Law, or that he be kept till further (l) Order, (which shall be intended of the Order of Law) or to the like Effect; and if the Party be committed only for want of Bail, it seems (m) to be a good Conclusion of the Commitment, that he be kept till he find Bail; but a Commitment (n) till the Person who makes it shall take further Order, seems not to be good: and it seems that the Party, committed by such or any other irregular *Mittimus*, may be bailed.

(l) Lev. 230. *cont.* Cro. Car. 558. (m) 6 Mod. 73, 74. 2 Ld. Raym. 978. 3 Salk. 91. pl. 1. 284. pl. 12. 6 Mod. 73. Holt 590. (n) 2 Inst. 52, 591. Rol. Rep. 220. Lev. 230. Cro. Car. 579. *cont.* 3 Bulst. 48, 49. Rol. Rep. 410.

Carth. 152, 153. adjudged, and a Difference taken between a

Also a Commitment grounded on an Act of Parliament ought to be conformable to the Method prescribed by such Statute; as where the Churchwardens of *Northampton* were committed on the 43 *Eliz. cap.* 2 and the Warrant concluded in the common Form, *viz. until they be duly discharged according to Law*; but the Statute appointing *that the Party*

stand

should there remain until he should account, for want of such Conclusion they were discharged. Commitment as a Criminal, and where one is committed for a Contumacy.

So where one *Bracey* was committed by the Commissioners of Bankrupts, for refusing to answer, and they concluded their Warrant, *viz. until he conform himself to our Authority, and be thence delivered by due Course of Law*; and upon the Return of a *Habeas Corpus* he was discharged; for the Statute only impowers them to commit until *he submit himself to be by them examined*. Salk. 348. pl. 3. Ld. Raym. 99, 153. Carth. 153. Comb. 390, 391. 2 Stra. 1005. Bracey's Case. 5 Mod. 308. S. C.

So where one *Yaxley* was committed by the Earl of *Nottingham*, *Secretary of State*, by Virtue of the 35 *Eliz.* for refusing to answer, whether he was a *Jesuit, Seminary or a Missing Priest*; and the Conclusion of the Warrant * was, *there to remain until he shall be from thence discharged by due Course of Law*; whereas the Words of the Statute are Special, *viz. until he shall answer unto the Question*; and he was discharged on being asked these Questions, and answering them openly and directly in the Negative. Carth. 291. pl. 3. Yaxley's Case. *Page 382

Mr. *Baxter* being committed, by two Justices of the Peace of *Middlesex*, to *Clerkenwell* Prison, was brought by *Habeas Corpus* to *C. B.* the Gaoler, returns that he keeps him by Virtue of a Warrant from the Justices of the Peace, in these Words, *Whereas it hath been proved unto us upon Oath, that* Richard Baxter, *Clerk, hath taken upon him to preach in an unlawful Assembly, Conventicle or Meeting, under Colour or Pretence of Exercise of Religion, contrary to the Laws and Statutes of this Realm, at* Acton, *where he now liveth, in the said County, not having subscribed the Oath by Act of Parliament in that Case appointed to be taken; and whereas we having tendered to him the Oath and Declaration appointed to be taken by such as shall offend against the said Statute, which he has refused to take; we therefore send you herewith the Body of the said* Richard Baxter, *strictly charging and commanding you, in his Majesty's Name, to receive him the said* Richard Baxter *into his Majesty's said Prison, and him there safely to keep six Months, without Bail or Mainprize; and hereof*, &c. This Return the Court held insufficient, the Warrant being vitious throughout. First, There is nothing in the Warrant to certify to the Court on what Statute the Justices proceeded. Secondly, Admit they did proceed on the Statute 17 *Car.* 2. (which they must intend, if any) yet the Commitment is ill, for several Reasons. First, It does not appear that *Baxter* was guilty of any Offence at all against this Act. This Law does not forbid Conventicles, nor enjoin the taking of any Oath, nor subscribing any Declaration, (nay, there is no such Thing as a Declaration in the Act); the Preaching at Conventicles is only one of the Descriptions that are there given of such Persons as are not to come within five Miles, &c. and the taking the Oath is only allowed them as a Remedy to secure themselves against the Penalty of the Law; the only Offence then, is of Persons so described, to come within five Miles of a Corporation, or the Place where they have taken upon them to preach, &c. Now it does not appear by the Warrant that Mr. *Baxter* did either of these, it is only said that he took upon him to preach at *Acton*, where he now liveth, which last Words are only the Suggestions of the Justices, and not any Part of that which is proved unto them, upon Oath, as the Crime intended to be punished by the Law must be. Secondly, It does not appear that he preached, &c. since the Act of Oblivion, neither is there any other Description given of him to make him the Person intended to be restrained by the Act; the Time should have been expressed. Thirdly, It is not said who made the Oath before the Justices; so that the Prisoner can have no Remedy Baxter's Case, Mich. 20 Car. 2. in *C. B.*

Remedy in Caſe the Oath were falſe. Fourthly, If his being at *Acton* were proved after, *&c.* yet it does not appear how long he continued there; poſſibly he might be ſent for before the Juſtices, and committed immediately after his Preaching, and then he could not be guilty of any Reſidence puniſhable within this Act; and for theſe Reaſons he was diſcharged.

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*Page 383 * (F) At whoſe Charges they are to be ſent to Priſon.

And by the Statute of 27 Geo. 2. c. 3. When any Perſon not having Goods or Money in the County where he is taken, ſufficient to bear the Charges of himſelf and of thoſe who convey him, is committed to Gaol, or the Houſe of Correction, by Warrant from a Juſtice, then on Application by the Conſtable or other Officer, who conveyed him to any Juſtice for ſuch County or Place, [ſuch Juſtice] ſhall upon Oath examine into and aſcertain the reaſonable Expences, and ſhall without Fee by his Warrant order the Treaſurer to pay the ſame; but in *Middleſex* the ſame ſhall be paid by the Overſeers of the Poor.

BY the 3 *Jac.* 1. *cap.* 10. it is enacted, "That every Perſon and Perſons that ſhall be committed to the common or uſual Gaol, within any County or Liberty within this Realm, by any Juſtice or Juſtices of the Peace, for any Offence or Miſdemeanor, having Means or Ability thereunto, ſhall bear their own reaſonable Charges for ſo conveying or ſending them to the ſaid Gaol; and the Charges alſo of ſuch as ſhall be appointed to guard them to ſuch Gaol, and ſhall ſo guard them thither; and if any ſuch Perſon or Perſons, ſo to be committed, ſhall refuſe, at the Time of their Commitment and Sending to the ſaid Gaol, to defray the ſaid Charges, or ſhall not then pay or bear the ſame, that then ſuch Juſtice or Juſtices of the Peace ſhall and may, by Writing under his or their Hand and Seal, or Hands and Seals, give Warrant to the Conſtable or Conſtables of the Hundred, or Conſtable or Tithingman of the Tithing or Townſhip where ſuch Perſon or Perſons ſhall be dwelling and inhabiting, or from whence he or they ſhall be committed, or where he or they ſhall have any Goods within the County or Liberty, to ſell ſuch and ſo much of the Goods and Chattels of the ſaid Perſon, as by the Diſcretion of the ſaid Juſtice or Juſtices of the Peace ſhall ſatisfy and pay the Charges of ſuch his or their conveying or ſending to the ſaid Gaol; the Appraiſement to be made by four of the honeſt Inhabitants of the Pariſh or Tithing where ſuch Goods or Chattels ſhall remain and be; and the Overplus of the Money which ſhall be made thereof, to be delivered to the Party to whom the ſaid Goods ſhall belong.

"And it is further enacted, That if the ſaid Perſons ſhall not have, or be known to have any Goods or Chattels which may be ſold for the Purpoſe aforeſaid, within the County or Liberty, an indifferent Aſſeſſment ſhall be made by the Conſtables and Churchwardens, and two or three other honeſt Inhabitants of the Pariſh or Tithing where ſuch Offenders ſhall be taken or apprehended, the ſaid Taxation being allowed under the Hand of one or more Juſtice or Juſtices of the Peace, if there be ſuch Conſtables or Churchwardens there inhabiting; and in Default of them, by four of the principal Inhabitants of the ſaid Pariſh, Townſhip or Tithing, where ſuch Offender ſhall be taken or apprehended; and if any ſo aſſeſſed ſhall refuſe to pay their ſaid Taxation, then the Juſtice or Juſtices of the Peace, by whom the ſaid Offenders ſhall be committed to Priſon, or any Juſtice of the Peace near adjoining, ſhall and may give Warrant as aforeſaid to the Conſtable, Tithingman or other Officer, there to diſtrain the Goods of any ſo aſſeſſed, which ſhall refuſe to pay the ſame, and to ſell the ſame; and that ſuch Perſon or Perſons ſo authorized, ſhall have full Power ſo to diſtrain; and by Appraiſement of four ſubſtantial Inhabitants of the ſaid Place, to ſell a ſufficient Quantity of the Goods and Chattels of the Perſon ſo refuſing, for the Levy

" in

" ing of the said Taxation; and if any Overplus of the Money come by " the Sale thereof, the same to be delivered to the Owner."

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* (G) To what Court the Commitment is to be certified.

* Page 384

BY the 3 *H.* 7. *cap.* 3. it is enacted, " That every Sheriff, Bailiff of " Franchise, and every other Person, having Authority or Power of " Keeping of Gaol, or of Prisoners for Felony, do certify the Names of " every such Prisoner in their keeping, and of every Prisoner to them com- " mitted for any such Cause, at the next General Gaol-Delivery, in every " County or Franchise where any such Gaol shall be, there to be calendred " before the Justices of the Deliverance of the same Gaol, whereby they " may, as well for the King as for the Party, proceed to make Deliverance " of such Prisoners according to Law, on Pain to forfeit to the King, for " every Default there recorded, one hundred Shillings."

Vide Title *Habeas Corpus.*

(H) By what Means the Party may be discharged from such Commitment.

A Person legally committed for a Crime, certainly appearing to have been done by some one or other, cannot be lawfully discharged by any other but by the King *, till he be acquitted on his Trial, or have an *Ignoramus* found by the Grand Jury, or none to prosecute him on a Proclamation for that Purpose, by the Justices of Gaol-Delivery.

Keilw. 34. 3 Inst. 209, 210. H. P. C. 94. 2 Hawk. P. C. 121.

* *i. e.* By some one of the King's Courts, or by some Magistrate duly authorized.

But if a Person be committed on a bare Suspicion, without any Appeal or Indictment for a supposed Crime, where afterwards it appears that there was none; as for the Murder of a Person thought to be dead, who afterwards is found to be alive, it hath been holden that he may be safely dismissed, without any farther Proceeding; for that he who suffers him to escape, is properly punishable only as an Accessary, where there can be no Principal; and it would be hard to punish one for a Contempt founded on a Suspicion appearing in so uncontested a Manner to be groundless.

Keilw. 34. H. P. C. 109, 110, 114. 2 Hawk. P. C. 121.

* COMMON.

COMMON is a Right or Privilege which one or more Perſons claim to take or uſe in ſome Part or Portion of that which another Man's Lands, Waters, Woods, *&c.* do naturally produce, without having an (*a*) abſolute Property in ſuch Lands, Waters, Woods, *&c.* it is called an incorporeal Right, which lies in Grant, as originally commencing on ſome Agreement between Lords and Tenants, for ſome valuable Purpoſes, which by Age being formed into a Preſcription continues good, although there be no Deed or Inſtrument in Writing which proves the original Contract or Agreement.

4 Co. 37. a. 2 Inſt. 65. Vent. 387.

(*a*) And therefore if I have a Right of Common in another Man's Soil, and I grant it to *A.* reſerving Rent, if the Rent be behind, I cannot diſtrain the Beaſts of *A.* becauſe the Right of Common, which every Man has, runs through the whole Common; and I cannot ſay that any particular Part of the Common is more mine than another. Co. Lit. 47. a. 142. a. 2 Rol. Abr. 446.

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(A) Of the ſeveral Kinds of Common.

THE general Diviſion of Common, according to ſome Books, is into, 1ſt, *Common of Paſture*, which is a Right or Liberty that one or more have to feed or fodder their Beaſt or Cattle in another Man's Lands; 2dly, (*a*) *Common of Turbary*, or a Liberty of cutting Turves in another's Sand

(*a*) Of the Nature of this Kind of Common, and that it can only be

Sand or Soil; 3dly, (*a*) *Common of Piſcary*, or a Right and Liberty of taking Fiſh in another's Fiſh-pond, Pool or River; 4thly, *Common of Eſtovers*, which is a Right of taking Trees or Loppings, Shrub, Underwood in another's Woods, Coppices, &c. and 5thly, (*b*) a Liberty, which in ſome Manors the Tenants have of digging and taking Sand, Gravel, Stone, &c. in the Lord's Soil.

Appendant to an Houſe. *Vide* 4 Co. 37. a. Of preſcribing for it. *vide* Lev. 231. Sid. 354. 2 Keb. 290. that an Aſſiſe lies of it. 8 Co. 48. That by a Grant of a Houſe *cum pertinentiis*, Common of Turbary paſſes, *vide* Cro. Jac. 179. 180. 3 Lev. 165. *Vide* Lev. 231. Sid. 354.

(*a*) That a Man may preſcribe to have *ſeparalem Piſcariam*, and exclude the Owner of the Soil wholly from Fiſhing; for he has ſtill the Profit of the Soil and the Water, &c. Co. Lit. 122. 8 Co. 98. Vent. 391. Sand. 251. 2 Sand. 326. How it muſt be preſcribed for, *vide* Hard. 497.

(*b*) For this *vide* Co. Lit. 41. b.

* But the Word *Common* is uſually underſtood of Common of Paſture, of which there are four (*c*) Kinds; firſt, *Common Appendant*; ſecondly, *Common Appurtenant*; thirdly, *Common in Groſs*; fourthly, *Common pur Cauſe de Vicinage*; and therefore, *Page 386 Co. Lit. 122. a. Vaugh. 355.

(*c*) For *Shack* in the County of *Norfolk*, which is a Sort of *Common per cauſe de Vicinage*; and the Commencement thereof, *vide* 7 Co. 5.

1. Of Common Appendant.

Common Appendant of Common Right belongs to Arable Land for Beaſts that ſerve for Maintenance of the Plough; as Horſes and Oxen to plough the Land, Kine and Sheep to compeſter it; and for ſuch Common there is (*d*) no Need to preſcribe *. Co. Lit. 122. a. 26 H. 8. 4. (*d*) But it muſt be ſaid to have been Time out of Mind. 4 Co. 37. Rol. Abr. 401. Cro. Car. 542. muſt be Appendant Time out of Mind. Keilw. 129. b. Rol. Abr. 396. Fitz. Iſſue 143. and cannot be created at this Day. 26 H. 8. 4. 5 Aſſ. 9. Fitz. Aſſiſe 134. Rol. Abr. 396.

* *Qu. de hoc*, For Lord *Coke* in his Commentary on the ſame Section, *ante* 121, b. ſays, "Appendants are ever by Preſcription."

As the Lords of ſeveral Manors, in which there were great Waſtes, uſed to portion out ſome Parts of the Arable Lands to their Tenants, which they were to till and plough, and were to hold in Nature of Socage, it was neceſſary, in Support of Tillage, which has always been greatly favoured in the Law, that the Cattle employed in this Service ſhould have Food and Provender in ſome other Parts of the Manor; and this was uſually aſſigned them in ſuch Waſtes as were leaſt fitted for Improvement or Cultivation. 4 Co. 97. 2 Inſt. 86.

Hence it is, that if before the Statute of *Quia Emptores Terrarum*, the Lord of the Manor had made a Foffment of Parcel of the Manor, to hold of him, the Feoffee, as incident to the Grant, ſhould have Common in the Waſtes of the Lord. Rol. Abr. 396. 4 Co. 37. a. S. P. 2 Inſt. 86. S. P.

This Kind of Common is regularly Appendant (*e*) only to Arable Land, yet it may be claimed by that Name, as Appendant to a Manor, Farm, a Plough-Land, or a Carve of Land, though it may contain Paſture, Meadow and Wood; for it ſhall be preſumed to have been all originally Arable Land, though afterwards converted into Meadow, Paſture, &c. 37 H. 6. 34. 26 H. 8. 4. 4 Co. 37. a. 11 H. 6. 12. Rol. Abr. 396. 2 Brownl. 298. 2 Inſt. 85, 474.

(*e*) It cannot be Appendant to Land which is approved within Time of Memory out of the Waſte of the Lord. 5 Aſſ. 2. Bro. Common 16. S. C. Bro. Aſſ. 116. S. C. Rol. Abr. 397. S. C.

(*d*) It

(d) 37 H. 6. 34. 10 E. 4. 10. b. Rol. Abr. 397. Co. Lit. 122. a. *(d)* It can only be for ſuch Cattle as are neceſſary in Tillage, as Oxen and Horſes to plough the Land, and Cows and Sheep to compeſter it; *(e)* and therefore a Preſcription to have Common Appendant for all Manner of Cattle, is not good, becauſe it comprehends, Goats, Geeſe, and ſuch like, which is more properly Common Appurtenant.

(e) 14 H. 6. 6. b. Bro. Common 15. S. C. 37 H. 6. 34. S. C. Rol. Abr. 397. S. C.

17 E. 3. 27. 34. Rol. Abr. 399. S. C. Common Appendant may by Uſage be limited to any certain Number of Cattle.

17 E. 3. 34. b. Rol. Abr. 397. S. C. A Man may have Common Appendant for thirty Cattle in one Place, and to the ſame Land Common Appendant alſo in another Place, for Part of his ſaid Cattle, and ſo may take it where he pleaſes.

27 E. 3. 86. Rol. Abr. 396. S. C. Common Appendant *(f)* may be through all the Year, ſaving at a certain Time, in which the Lord uſes it.

(f) May be on Condition or Limitation; as *quamdiu* he pays ſo much, ſo *tamdiu* as he ſhall be living in ſuch a Houſe to which the Common is appendant. 37 H. 6. 34. Fitz. Treſpaſs 85. S. C. Bro. Common 13. S. C. Rol. Abr. 397. S. C.

*Page 387 * *(g)* So it may be to Common in the Meadow, after the Hay carried off, till *Candlemas*.

17 E. 3. 26. 34. Rol. Abr. 397. *(g)* So to Common in the Paſture, from the Feaſt of *St. Auguſtin* till *All Saints*. 17 E. 3. 26, 34. Rol. Abr. 397. S. C.—So it may be to Common two Years after the Corn cut and carried away, till it is reſown, and every third Year *per totum Annum*. 22 Aſſ. 42. Rol. Abr. 397. S. C. Sand. 343. S. P. *Vide poſt* Letter (C) 390.

Salk. 169. pl. 1. If an Inhabitant of one Pariſh hath Common Appendant in certain waſte Grounds which lie in another Pariſh, he ſhall be aſſeſſed, and pay Taxes in that Pariſh, where his Farm lies, and not in that in which he hath Common; for the Common is only incident to it, and will paſs by a Grant of the Common; and is therefore to be conſidered as Part of the Farm, and the Farm to be taxed the higher.

2. Of Common Appurtenant.

Co. Lit. 122. a. Common Appurtenant can only be claimed by Preſcription, and is a Right of Commonage for Beaſts, not *(h)* only Commonable, *(i)* as Horſes, Oxen, Cows and Sheep, but likewiſe for Beaſts not Commonable, as Swine, Goats and Geeſe.

(h) A Man may preſcribe to have it for all Manner of Cattle. 15 E. 4. 33. Rol. Abr. 402. S. C. (i) Theſe are commonable and called *Magna Averia*, for which *vide* Cro. Jac. 580. 2 Rol. Rep. 173. Sand. 227.—If the Lord licenſes a Stranger *ad ponend' averia* into the Common, this ſhall be intended of Commonable Cattle only, and not of Hogs. 2 Mod. 7. *per North* Ch. Juſt.———But if the Licence be for a particular Time, it is otherwiſe. 2 Mod. 7. *per North*.

15 E. 3. 32. Rol. Abr. 398. He that claims Common by Force of a Preſcription, as an Inhabitant † of a Town, ſhall have no other Cattle to Common there, but what are *(k)* levant and couchant within the ſame Town.

(k) What Cattle ſhall be ſaid levant and couchant, *vide* Noy 30. where it is ſaid, that by *Coke* Ch. Juſt. ſo many Cattle as the Land, to which the Common is Appurtenant, may maintain in the Winter, ſo many ſhall be ſaid levant and couchant. *Vide* Vent. 54. And ſo many Beaſts may be ſaid levant and couchant upon

If

† None can have Intereſt in a Common, in reſpect of a Houſe in which he hath not any Intereſt. *Gateward's* Caſe. 6 Co. 60.

If a Man claims Common, by Preſcription, for all Manner of Commonable Cattle in the Land of another, as belonging to a Tenement, this is a void Preſcription; (*e*) becauſe he does not ſay that it is for Cattle levant and couchant upon the Land to which he claims it to be Appurtenant; for a Man cannot have Common *ſans* Number appurtenant to Land; and when he claims the Common for all Cattle Commonable, and does not ſay for Cattle levant and couchant upon the Tenement, this ſhall be intended Common *ſans* Number, according to the Words; (*f*) for there is not any Thing to limit it, when it does not ſay for Cattle levant and couchant. Rol. Abr. 398. (*e*) It is naught upon a general Demurrer, but is helped after Verdict. *Theadle* and *Miller*.

Lev. 196. Sid. 313, 314. 2 Keb. 108, 120. *Mellor* and *Spateman*. Sand. 346. 2 Mod. 6, 7. 12 Mod. 249. Ld. Raym. 406, 558. 2 Ld. Raym. 1188. and *vide* 3 Mod. 162. 2 Ld. Raym. 1015. 10 Mod. 145, 184, 210. Co. Ent. 656. Poph. 201. Vent. 164, 165. and ſo Sand. 227. adjudged. 2 Mod. 75. Cro. Jac. 44. Ld. Raym. 170, 276, 644. 2 Stra. 1011. (*f*) But if a Man preſcribes for Common for a certain Number of Cattle, as belonging to certain Land, he need not ſay levant and couchant. 2 Mod. 185. *Vide* the Diverſity adjudged, and Rol. Abr. 401. Vent. 163. 2 Mod. 75. Cro. Jac. 27.

It ſeems agreed, that if a Man has a Grant of Common for a (*g*) certain Number of Beaſts, that the Commoner may take the Beaſts of * a Stranger, and put them upon the Common, ſo that it exceed not the Number. *Page 388 22 Aſſ. pl. 84. 45 E. 325. b. 11 H. 6. 26. b. *Vide* Cro. Jac. 15, 575.

(*g*) *Secus* of Common *ſans* Number. Rol. Abr. 402. But he that claims the ſole Paſture of Land may licenſe a Stranger to put in his Beaſt. 2 Sand. 327.

Alſo in Caſe of a Common Appurtenant, it is ſaid, That where the Number of the Beaſts to be commoned is certain, the Commoner may grant over the Commonage of Part, and reſerve the Reſt to himſelf *. Jones 373. Cro. Car. 432. 2 Term Rep. 415.

* Letting Parcel of the Land with it.

It is clear, that if a Commoner borrows Cattle to manure his Land, he may uſe the Common with them; for by the Borrowing he has a ſpecial Property in them. 22 Aſſ. 84. Rol. Abr. 396, 402. S. C. Skin. 138. S. P. admitted.

3. Of Common in Groſs.

This is a Right of Commonage which muſt be claimed by Deed or Preſcription, and has no Relation to any Land belonging to the Commoner; it may be for a certain Number of Cattle, or *ſans* Number. Co. Lit. 122. a. 2 Inſt. 477. What ſhall be ſaid Common in Groſs, *vide* Rol. Abr. 402. 13 Co. 66.

He that hath Common in Groſs for a (*a*) certain Number of Cattle, may put in the Cattle of a Stranger, and uſe the Common with them. 1 H. 6. 22. b. Rol. Abr. 402. S. C.

(*a*) So may he who hath Common, *ſans* Number in Groſs. 11 H. 6. 22. b. Rol. Abr. 402. S. C.

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upon a Houſe, as may be tied there, and are uſually to be maintained in the Houſe. 2 Brownl. 101. —But *per* Vaugh. 253. Cattle cannot be levant on a Meſſuage only, yet *vide* Salk. 169. pl. 2. Preſcription to have Common for all Beaſts levant and couchant, as appendant to a Cottage, is good for a Cottage contains a curtilage at leaſt; and there is no Difference between a Meſſuage and Curtilage as to this. Alſo a cottage by ſtatute ought to have four Acres of Land. 6 Mod. 114. S. C. 11 Mod. 53. pl. 29, 72. pl. 3. 12 Mod. 35. Ld. Raym. 726. And *Holt* Ch. Juſt. ſaid that he remembered the Trial of an Iſſue, where it was ruled by *Hale* Ch. Juſt. that foddering cattle in the Yard was ſufficient Evidence of Levancy and Couchancy. Salk. 169. pl. 2. 6 Mod. 115. S. P. 2 Ld. Raym. 1015.

9 E. 4. 39. 26 H. 8. 3. Rol. Abr. 401. S. C. Cro. Car. 542. S. P.

Common Appendant cannot be made Common in Groſs, for this is for Cattle levant upon the Land, to which, &c. and therefore it cannot be ſevered without Extinguiſhment.

Rol. Abr. 402. Cro. Jac. 15. S. C.

So Common Appurtenant for Cattle levant and couchant upon the Land, cannot be made in Groſs.

But though it cannot by Grant be ſevered from the Soil, yet Common Appurtenant for a certain Number of Beaſts may be granted over, *per Cur'*.

Rol. Abr. 402. Cro. Car. 432. 433. S. C. adjudged, and ſtated, that it was granted over with Parcel of the Manor. Jones 375. S. C. adjudged. 2 Term Rep. 415.

If *A.* and all thoſe whoſe Eſtate he hath in the Manor of *D.* have had Time out of Mind a Fold-courſe, *ſſ.* Common of Paſture for any Number of Sheep, not exceeding 300, in a certain Field, as appurtenant to the ſaid Manor, he may grant over this Fold-courſe to another, and ſo make it in Groſs; becauſe the Common is for a certain Number, and by the Preſcription the Sheep are not to be levant and couchant upon the Manor, but it is a Common for ſo many Sheep appurtenant to the Manor, which may be ſevered upon the Manor as well as an Advowſon, without any Prejudice to the Owner of the Land where the Common is to be taken.

4 Of Common *pur cauſe de Vicinage*.

Co. Lit. 122. a.

Common *pur cauſe de Vicinage* is but an Excuſe for Treſpaſs, and no Man can put his Beaſts into the Land in which he has ſuch Common, but they muſt eſcape thither themſelves, and either of the Parties that has ſuch Neighbouring Grounds (*b*) may incloſe againſt the other.

(*b*) That by ſuch Incloſure the Common is gone. 4 Co. 38. Rol. Abr. 399. S. P.

Rol. Abr. 399.

But if there be Common *pur cauſe de Vicinage* between two Manors, and the Lord of one Manor incloſes, yet he ſhall not bind a Copyholder of the ſame Manor, but that he may have Common *pur cauſe de Vicinage* as he had before.

7 Co. 5. b. Reſolved *per Cur'*. *Page 389

If there be Common *pur cauſe de Vicinage* between the Towns of *A.* and *B.* and *A.* hath 50 Acres of Common, and *B.* hath 100 Acres of Common, the Inhabitants of *A.* cannot put more Cattle into their * Common than the 50 Acres will depaſture, without any Regard to the Common of *B.* for the original Cauſe of this Common was not the Profit of either Town, but to prevent Suits in open Countries for reciprocal Eſcapes from one Field into the other.

Vide 2 Bulſt. 87. Dyer 49. pl. 14.

If there are two Manors in one Vill, the Tenants of each may intercommon; and this is likewiſe called Common *pur cauſe de Vicinage*.

Rol. Abr. 399. But for this *vide* Poph. 201. Latch. 161. 3 Keb. 388.

Every Common *pur cauſe de Vicinage* is Common Appendant, and therefore a Man may not preſcribe in a Common *pur cauſe de Vicinage*; but it is ſufficient to ſay, that he and all thoſe whoſe Eſtate, &c. have uſed to intercommon *cauſa Vicinagii*.

(B) Of the Intereſt of him who is Owner of the Soil.

THE Lord of the Soil hath ſuch an Intereſt therein, that it ſeems agreed, That a Cuſtom or Preſcription (*a*) totally to exclude him from all manner of Profit is void, as unreaſonable and againſt Law. Co. Lit. 122. a.

(*a*) Therefore if the Owner of the Soil grants to another Common *ſans Number* there, yet the Grantee cannot uſe the Common with ſo many Cattle that the Grantor ſhall not have ſufficient Common for his Cattle. 12 H. 8. 2 Rol. Abr. 396, 399. Bridg. 5. Rol. Rep. 365. Sand. 245. S. P. admitted.——But where the Lord ſhall by Preſcription be reſtrained to a certain Number, *vide* 2 Rol. Abr. 267. pl. 2.

But one may preſcribe or alledge a Cuſtom to have *ſolam Veſturam terræ* from ſuch a Day to ſuch a Day, and exclude the Owner of the Soil. Co. Lit. 122. a. And may preſcribe to have *ſeparalem Paſturam*, and exclude the Owner of the Soil from feeding there. Co. Lit. 122. a.

Alſo it ſeems by the better Opinion, that a Preſcription for *ſol & ſeparal' Paſtur'* at all Times, ſo as to exclude the Lord from feeding there, is good; for this does not exclude the Lord of all the Profits, for he ſhall have the Mines, Trees, *&c.* and is not like a Preſcription for the whole Common to exclude the Lord, for that is repugnant. But for this *vide* Vent. 383. Vaugh. 251. Sand. 350. Lev. 268. *Potter* and *Hopkins* and *North*; and 2 Lev. 2. Vent. 123, 163. 2 Sand. 324. Mod. 74. 2 Keb. 758, 842. *Robinſon.*

The Lord without Preſcription cannot agiſt the Cattle of a Stranger in the Common. 30 E. 3. 27. Rol. Abr. 396.

But he may (*b*) licence a Stranger to put in his Cattle, if he leaves ſufficient Common for the Commoners. 2 Mod. 6, 7. Ld. Raym. 496. 2 Ld. Raym. 1134. 3 Will. Rep. 257. 2 Vern. 116. *& vide* 2 Mod. 275. (*b*) And if the Lord licenſes a Stranger *ad Ponend' averia* into the Common, this ſhall be intended of Commonable Cattle only, and not of Hogs; but if the Licence be for a particular Time, it is otherwiſe. 2 Mod. 7. *Per North*, That ſuch Licence muſt be by Deed. 2 Lev. 2.

If the Lord alien in Fee the Soil where the Common is taken, ſaving his Power of Paſture, as Lord, he ſhall have Common there as Lord; *aliter* without any ſaving; but the Alienee of the Soil may depaſture it, as the Lord had done before. 18 Aſſ. 56. pl. 4. 18 E. 3. 43. Rol. Abr. 396.

If *A.* grants Common to *B.* in a certain Place, *A.* cannot afterwards erect a Rick there; for by the Grant the Cattle of *B.* are to range over the whole Place without Reſtraint; and it ſhall not be in the Power of *A.* to defeat his own Grant. Cro. Jac. 271. *Farmer* and *Grant.* Yelv. 201. S. C. adjudged.

(C) Of

*Page 390 * (C) Of the Commoner's Intereſt in the Soil, and herein of the Remedies the Law gives him.

A Commoner hath only a (a) ſpecial and limited Intereſt in the Soil, but yet he ſhall have ſuch (b) Remedies as are commenſurate to his Right, and therefore may diſtrain Beaſts Damage-feaſant, bring an Action on the Caſe, &c. but not being abſolute Owner af the Soil, he cannot (c) bring a General Action of Treſpaſs for a Treſpaſs done upon the Common.

(a) For the Intereſt and Power of a Commoner and the general Learning thereof, *vide* Bridg. 10, 11. Godb. 123, 124. 2 Leon. 201, 202. (b) Where he may maintain an Aſſize, and what ſhall be a ſufficient Seiſin for that Purpoſe. Rol. Abr. 404. (c) 4 Mod. 387. Carth. 285. admitted. Fitzgib. 85. Ld. Raym. 239, 251, 274. 2 Ld. Raym. 1188, 1399. Vern. 308. 2 Vern. 116, 301, 356, 575. 8 Mod. 130, 272, 275, 278. 12 Mod. 25, 104. Gilb. Eq. Rep. 183. 3 Will. Rep. 257. Comyns 341. pl. 172, 578, pl. 250, Stra. 634. Forteſc. 212. 2 Stra. 777, 851.

12 H. 8. 2. 13 H. 8. 15. Sid. 251. A Commoner cannot regularly do any Thing on the Soil which tends to the Melioration or Improvement of the Common, as cutting down of Buſhes, Fern, &c.

Therefore if a Common every Year in a Flood is ſurrounded with Water, yet the Commoner (d) cannot (e) make a (f) Trench in the Soil to avoid the Water; becauſe he has nothing to do with the Soil, but only to take the Graſs with the Mouth of his Cattle.

Rol. Abr. 405. 2 Bulſt. 116. S. P. Godb. 52.

S. P. (d) So the Commoner cannot cut Buſhes, Fern, &c. which impair the Common. Bridg. 10. unleſs it be by Special Preſcription. Godb. 182. (e) Unleſs by Special Cuſtom. (f) For if he makes any Thing *de novo* in the Land, he is a Treſpaſſer; but may amend and reform a Thing abuſed; and therefore if the Land be full of Mole-hills, he may dig them down. Brownl. 228. So if there be Holes dug in the Common to the Damage of the Land, the Commoner may put again the Earth dug into its Place. Brownl. 228. ——Alſo a Commoner may ſcour a Trench, as has been uſed to be done Time out of Mind, and as is done in the Moors of *Somerſet*. Sid. 251.

Lit. Rep. 38. & *vide* 1 Rol. Abr. 406. Every Commoner may (g) break the Common if it be incloſed, and although he does not put his Cattle in at the Time, yet his Right of Commonage ſhall excuſe him from being a Treſpaſſer.

(g) Where he may make one or more Gaps to put in his Cattle, if the Common be incloſed, *vide* Goldſ. 117. 2 Inſt. 88.——May throw down the Hedges. 2 Mod. 65, 66. Brownl. 228.——If the Lord makes a Pond in the Common, the Commoners may let the Water out. Brownl. 228.*

* *Qu. de hoc*, If the Commoners have ſufficient Common left?

2 Leon. 202, 203. If a Tenant of the Freehold ploughs it, and ſows it with Corn, the Commoner may put in his Cattle, and therewith eat the Corn growing upon the Land; ſo if he lets his Corn lie in the Field beyond the uſual Time, the other Commoners may notwithſtanding put in their Beaſts.

But for the better underſtanding of the Commoner's Right and Intereſt in the Common, and of his Remedies when his Right is infringed, it may be neceſſary more particularly to conſider,

1. What Remedies he has againſt the Lord or Owner of the Soil.

Bur. 266, 268. Rol. Abr. If a Commoner find Conies on the Soil ſpoiling the Graſs, he cannot deſtroy or drive them off, nor conſequently can he deſtroy the Burrows, which

which is, in Effect, deſtroying the Conies; but to the Law the Commoner muſt reſort for his Remedy, if he is aggrieved. 405. pl. 2. Cro. Eliz. 876. Cro. Jac. 195, 229.

* It is (a) a general Rule, That a Commoner cannot diſtrain or chaſe out the Cattle of the Lord or Tertenant, Damage-feaſant; and (b) that if the Lord ſurcharges the Common, his (c) proper Remedy is an Action on the Caſe*. *Page 391

(a) For which *vide* 2 Leon. 203. Yelv. 164, 129. Cro. Jac. 208. Brownl. 187. Godb. 182. (b) That the Commoner may have an Action on the Caſe, F. N. B. 125. 9 Co. 112.—And how ſuch Action is to be laid. Lutw. 107. (c) And therefore there can be no Relief in Equity where the Lord ſurcharges. 2 Vern. 116. ‡

‡ See the next Caſe.

If there be a Cuſtom, that a Cloſe ought to lie freſh and hained every ſecond Year till *Lady-day* after the Corn cut and carried away; and *J. S.* hath uſed Time out of Mind to have Common in the ſaid Cloſe after *Lady-day*, till it is ſowed again with Corn, for his Cattle levant and couchant upon a certain Tenement as appurtenant thereto; in this Caſe, if the Lord of the Soil of the ſaid Cloſe puts in his Cattle into the ſaid Cloſe againſt the Cuſtom, when it ought to lie freſh and hained by Cuſtom, the ſaid *J. S.* tho' he be but a Commoner, (d) may take the Cattle of the Lord there Damage-feaſant, and juſtify in an Action of Treſpaſs brought againſt him by the Lord of the Cloſe where he took the Cattle; for if the Lord may eat the Graſs before the Common is to be taken purſuant to the Cuſtom, the Tenant would be defeated of all the Benefit of his Common. Rol. Abr. 405, 406. *Trulack* and *White*, adjudged.

(d) So where the Lord by Cuſtom is ſtinted to a certain Number of Cattle, and yet he puts in more, *Kenrick* and *Pargiter*, Yelv. 129. Adjudged by three Judges againſt two, who doubted, and inclined to think, that a Cuſtom and Uſage to diſtrain ought to have been alledged. Cro. Jac. 208. Brownl. 187.——But how far the Lord may be reſtrained to a certain Stint, *vide* 2 Rol. Abr. 267.

(e) If (f) I have (g) Common of Eſtovers in the Woods of *J. S.* and *J. S.* cuts Part, or all the Wood, yet I cannot take any Part of this which is cut, (h) but ſhall be put to my Aſſiſe, or Caſe, as my Eſtate is. (e) Rol. Abr. 406. Cro. Eliz. 826. S. P. *Per Cur'*. Cro. Jac. 257. S. P. *per Curiam*. Rol. Abr. 567. pl. 3. like Point. Yelv. 188. S. P. *per Curiam*. Brownl. 220. S. P. *per Cur'*. Bulſt. 93, 94. S. P. admitted *arguendo*. (f) So if one grants to me 1000 Cords of Wood, to be taken at my Election, and the Grantor, or a Stranger, cuts down all, or Part of the Wood, I can take no Part of that which is cut down. Sir *Thomas Palmer*'s Caſe, 5 Co. 25. Cro. Eliz. 820. Noy 32. Moor 692. pl. 955. Yelv. 188. cited. (g) But if a Man claims all the Thorns, *&c.* growing on ſuch a Place, he may take them, though cut down by another. *Douglas* and *Kendal*, Cro. Jac. 257. adjudged. Yelv. 188. adjudged. Brownl. 219, 220. adjudged. Bulſt. 93, 94. (h) For this *vide* 9 Co. 112. Brownl. 197. Rol. Abr. 108. pl. 22. F. N. B. 58. Hob. 43. Yelv. 188. 5 Co. 25.

2. Againſt the other Commoners; and herein of Admeaſurement.

The Writ of Admeaſurement lies by (i) one Commoner againſt (k) another; but if the Tenant ſurcharges the Common, the Lord ſhall not have a Writ of Admeaſurement againſt the Tenant. F.N.B. 125. (i) *Per* 2 Inſt. 86. it lies only for and againſt ſuch as have Common appendant; but Q. & *vide* F. N. B. 125. Rol. Rep. 365. (k) Yet upon this Suit all the Commoners ſhall be admeaſured. F. N. B. 125.

So if the Lord ſurcharge the Common, or approve without leaving ſufficient, the Tenant ſhall not have a Writ of Admeaſurement againſt him, but an Aſſiſe. F.N.B. 125.

No Writ of Admeaſurement lies againſt a Commoner *ſans Number*, nor ſhall his (l) Common be admeaſured. F.N.B. 125. (l) But the Tertenant may diſtrain his Cattle. Sand. 345.* * The Book ſays the Lord of the Soil may diſtrain.

One

*Page 392 22 Aſſ. pl. 65. Style 428. Yelv. 104. 2 Lutw. 1240.

* One Commoner (*a*) cannot diſtrain the Cattle of another; for the Right of Commonage, which every Commoner has, runs through the whole Land.

(*a*) But if a Man has Common for ten Beaſts, and he Puts in more, the Surpluſage beyond the Ten may be taken Damage-feaſant. 46 L. 3. 12. b. 2 Lutw. 1241. *Vide* 9 Co. 112. that an Action on the Caſe is his proper Remedy. ‡——Where one Commoner may have Relief in Equity againſt another for oppreſſing the Common. Vern. 308.

‡ But we conceive in ſuch Caſe either the Lord of the Soil, or another Commoner might diſtrain Damage-feaſant.

3 Againſt Strangers.

15 H. 7. 13. 14 H. 7. 3. 9 Co. 112. b. F. N. B. 128.

A Commoner may juſtify the Taking of the Cattle of a Stranger Damage feaſant upon the Common, in his own Name, for the Intereſt which he has in the Common.

Bridg. 10. Rol. Abr. 320, 405. Yelv. 130. Godb. 185. Jenk. 144. But can have no Action unleſs laid *per quod* his Common was impaired. Keilw. 47.

3 Lev. 104. *Wotton* and *Salter*, adjudged.

But in his Avowry he muſt alledge a particular Damage; as that he could not have Common *in tam amplo modo quo debuit & conſuevit*, for without a particular Damage, he can no more diſtrain the Beaſts of a Stranger, than bring an Action upon the Caſe*.

* A Commoner may maintain an Action on the Caſe againſt a Stranger for an Injury to the Common, whereby he is prevented from enjoying his Right, in ſo ample a Manner as he ought.

2 Mod. 6. *Smith* and *Fewerel*, adjudged.

If in an Action of Treſpaſs † brought by a Commoner againſt a Stranger, for putting his Cattle in the Common, *per quod Communiam in tam amplo modo habere non potuit*, the Defendant pleads a Licence from the Lord to put his Cattle there, but does not aver there is ſufficient Common left for the Commoners; this is a good Plea, for though it may be objected, the Plaintiff may reply thereto, yet being the very Giſt of the Action, the Defendant ſhould have pleaded thereto.

† This muſt mean Treſpaſs on the Caſe.

2 Mod. 7. *per Cur'*.

But in an Action againſt the Lord, the Plaintiff muſt particularly ſhew the Surcharge.

(D) Of Approvement and Incloſure.

2 Inſt. 85. (*c*) But by the Common Law the Lord might improve againſt any that had Common appendant, but not againſt a Commoner by Grant. 2 Inſt. 474.

BY the Order of the Common Law, there could be (*c*) no Approvement, becauſe the Common iſſued out of the whole Waſte.

(*d*) Which ſee explained. 2 Inſt. 85, 86. Vaugh. 257. (*e*) Made 20 H. 3. c. 4.

But now, by the (*d*) Statute of (*e*) *Merton*, *cap.* 4. "Becauſe great "Men, having (*f*) enfeoffed others of ſmall Tenements in their great "Manors, complained they could not make their Profit of the Reſidue "of their Manors, as Waſte, Woods, and Paſtures, it is provided, When "ſuch Feoffees bring an (*g*) Aſſiſe for their (*h*) Common of Paſture,

(*f*) So that it extends only to enable the Lord to approve againſt his Tenants. 2 Inſt. 85. (*g*) So it may be tried in an Action of Treſpaſs.* 2 Inſt. 88. Godb. 117. Or if the Lord incloſe any Part, and leave not ſufficient Common in the Reſidue, the Commoner may break down the whole Incloſure. 2 Inſt. 88. (*h*) It extends not to Common of Piſcary, Turbary, Eſtrovers, &c. 2 Inſt. 87.

* This muſt mean Treſpaſs on the Caſe.

"and

" and it is alledged they have not ſufficient Paſture (*i*) belonging to " their Tenements, Ingreſs or Regreſs, the Truth ſhall be inquired by " the Aſſiſe, and if found they have not ſufficient, they ſhall recover " Seiſin by the View of the Inqueſt, and by their (*k*) Diſcretion ſhall have " * ſufficient, &c. but if found they (*a*) have ſufficient, &c. the other *Page 393
" ſhall make (*b*) the Profit (*c*) of the (*d*) Reſidue, and be quit of the " Aſſiſe."

(*i*) So that it extends not to Common in Groſs. 2 Inſt. 86. (*k*) So that if found they have not ſufficient, the Inqueſt ſhall find what is ſufficient, that the Lord may approve the Reſidue. 2 Inſt. 88. (*a*) And tho' after it ſhould prove inſufficient, the Improvement continues. 2 Inſt. 87, 88. (*b*) By Incloſure. 2 Inſt. 87. And not by digging for Coals &c. Sid. 106. And if the Lord makes a Feoffment of Part, his Feoffee may incloſe, for the Feoffment in its Nature was an Improvement. 2 Inſt. 87. (*c*) And thereby it is diſcharged of the Common; and if the Tenant purchaſe it, his Common is not extinguiſhed. 2 Inſt. 87. (*d*) But the Lord cannot approve the Whole, leaving them ſufficient in other Lands. 2 Co. 25. b.

By the Statute of *Weſtm.* 2. *cap.* 46. " The Statute of *Merton* ſhall bind " (*e*) Neighbours, and ſuch as claim Common of Paſture appurtenant to " their Tenements, but not ſuch as claim Common by ſpecial Grant or " Feoffment for a certain Number, or otherwiſe.

(*e*) Though he dwells in another Town, for the Towns and Commons adjoin. 2 Inſt. 474.——And if the Lord hath Common in the Tenant's Ground, the Tenant may improve within this Act. 2 Inſt. 474.——Seems as if the Common of the Lord was reſerved upon the firſt Feoffment. 2 Inſt. 475.

" By Occaſion of (*f*) Wind-mill, Sheep-cote, Dairy, inlarging of a " Court (*g*) neceſſary, or (*h*) Curtilage, (*i*) none ſhall be grieved by Aſ- " ſiſe of *Novel Diſſeiſin* for common of Paſture."

(*f*) These are but for Example; for the Lord may erect an Houſe for the Habitation of a Beaſt-keeper. 2 Inſt. 476. Lev. 62. (*g*) It muſt be ſhewn that it was done for his neceſſary Reſidence. *Nevil* and *Hamerton*, Lev. 62. adjudged. Sid. 79. adjudged. Keb. 283, 314. (*h*) Whether neceſſary it ſhould be an antient one. Lev. 62. *dubitatur*. Sid. 79. *dubitatur*. And *vide* Keb. 283, 314. (*i*) Though there is not ſufficient Common left. 2 Inſt. 476. Lev. 62.

And where any (*k*) having Right to approve, levies Dike or Hedge, and (*l*) it is thrown down (*m*) in the Night or other Seaſon, &c. and it cannot be known (*n*) by Verdict of Aſſiſe or Jury by whom, and the Men of the Town near (*o*) will not indict ſuch as are guilty of the Fact, the Towns near adjoining (*p*) ſhall be diſtrained to levy the Hedge or Dike at their own Coſts, and to yield Damages.

(*k*) It is not neceſſary to ſet forth what Eſtate the Party has; for he that hath the Herbage only may incloſe. Carth. 114. and *vide* 241. (*l*) The cutting down of Timber is not within the Act. Raym. 487. (*m*) If the Proſternation in the Day or Night was before the Face of the Owners, or ſo publick that the Offenders might be known, it is not within the Act. Lev. 108. A Traverſe taken accordingly. (*n*) For the Inquiſition and other Proceedings on this Act, *vide* Cro. Car. 280, 440, 580. Jones 307. Sid. 107, 212. Lev. 108. Mod. 66. Carth. 241. 10 Mod. 157. Ld. Raym. 616. (*o*) No Time being appointed, it ſhall be intended within a Year and a Day. 2 Inſt. 476. Rol. Rep. 365. *Per* Cro. Car. 440. A convenient Time. (*p*) The Lord ſhall bring his Action upon this Statute, againſt the Towns bordering round about the Town where the Fact was done, and Judgment ſhall be given, That they ſhall at their proper Coſts make the Ditch, &c. 2 Inſt. 477. Rol. Rep. 365.

By the 3 *E.* 6. *cap.* 3. " The Statutes of *Merton* and *Weſtm.* are con- " firmed, and treble Damages given to the Commoners that recover in " ſuch Aſſiſe againſt the Lord."

It has been ruled in (*q*) Chancery, That a Common which has been incloſed for thirty Years, ſhall not afterwards be thrown open.

Vern. 32. (*q*) Where upon Suggeſtion that an Incloſure is an Improvement within the Statute of *Merton*, Chancery will grant an Injunction till it be determined at Law. 2 Vern. 301, 356.——Where it will decree an Incloſure purſuant to an Agreement, though oppoſed by two or three wilful Tenants. Chan. Ca. 48. Vern. 456. Chan. Rep. 259.—Where an Agreement to ſtint a Common. 2 Vern. 103.

(E) Of

*Page 394 * (E) Of Apportionment and Extinguiſhment.

Co. Lit. 122. Hob. 235. 8 Co. 178. Owen 122. 4 Co 37.

COmmon Appendant, becauſe it is of common Right, ſhall be apportioned by the Comoner's Purchaſe of Part of the Land in which he hath ſuch Common; but Common Appurtenant ſhall be extinct by the Commoner's Purchaſe of Part of the Land in which, &c. both Common appendant and appurtenant ſhall be apportioned by Alienation of Part of the Land to which the Common is appendant or appurtenant.

For this, and where the Unity of Poſſeſſion of the whole Land makes an Extinguiſhment. *vide* 4 Co. 37. 8 Co. 136. Show. 350. 4 Mod. 365. Carth. 342.

A Releaſe of Common in one Acre, is an Extinguiſhment of the whole Common.

Hob. 190. Cro. Jac. 253. Yelv. 189. Noy 136. 2 Rol. Abr. 61. 2 Brownl. 210. Moor 667. Cro. Eliz. 794.

A Copyholder had Common in his Lord's Waſte, the Lord grants and confirms the Copyhold Land and Meſſuage to him and his Heirs *cum pertinentiis*; it was reſolved the Common was extinct ‡, for it was annexed to his cuſtomary Eſtate by the Cuſtom; which Eſtate being determined, the Common is alſo gone, and cannot continue without Words to that Intent, and *cum pertinentiis* will not do, for the Common was no Appurtenant to the Freehold Eſtate granted by the Lord.

2 Term Rep. 421. ‡ But ſee *infra*.

Cro. Eliz. 570. *Bradſhaw* and *Eyre*. 4 Mod. 364. S. C. cited.

But if *A.* as Appurtenant to a certain Meſſuage and twenty Acres of Land, hath Common in the Lands of *B.* and after *B.* enfeoffs *A.* of the ſaid Lands in which *&c. per quod* the Common is extinguiſhed; and after *A.* leaſes to *B.* the ſaid Meſſuage and twenty Acres of Land, with all Commons, Profits and Commodities thereto appertaining, *vel occupat vel uſitat' cum præd' Meſſuagio*, this is a good Grant of a new Common for the Time; for though it were not common in the Hands of the Leſſor, yet it is *Quaſi* Common uſed therewith, and although (*a*) it be not the ſame Common as was uſed before, yet it is the like Common; but yet becauſe it was not there averred, that this Common was therewith uſed at the Time of the Leaſe, it was adjudged againſt the Defendant who claimed the Common.

(*a*) So if a Copyhold Meſſuage eſcheats, to which before Common in the Demeſnes of the Lord did belong, and the Lord by Deed grants it *per Nomina Meſſuag'. &c. & communiar' quatumcunque dicto Meſſuag' ſpectant', &c. vel cum eodem Meſſuag' uſitat'* Cro. Eliz. 794. 2 And. 168.

Salk. 170. pl. 3. 364. pl. 5. *Crowther* and *Oldfield*. 2 Ld. Raym. 1225. 6 Mod. 19. 2 Vern. 250.

A Copyholder, that has Common of Paſture in the Waſtes of the Lord out of the Manor, has the ſame, as belonging to his Land, and if he enfranchiſe the Copyhold Eſtate, ſtill his Common remains; but where a Copyholder has Common in the Waſtes within the Manor, that belongs to his Eſtate, and if the Eſtate be enfranchiſed, the Common is extinct.

Alſo it has been ruled in Equity, That if the Lord of the Manor enfranchiſes a Copyhold with all Commons thereunto belonging or appertaining, and afterwards buys in all the other Copyholds, and then diſputes the Right of Common with the Copyholders he had enfranchiſed, and recovers at Law; though the Common be extinct at Law, yet it ſhall ſubſiſt in Equity, and the ſame Right of Common as belonged to the Copyhold will be decreed.

CONDI-

* CONDITIONS. *Page 395

BY the Word *Condition*, is uſually underſtood ſome Quality annexed to a Real Eſtate, by Virtue of which it may be defeated, enlarged or created upon an uncertain Event. (a) Co. Lit. 201. (b)

(a) By expreſs Words, which is called a Condition in Fact; as where a Feoffment is made of Lands, reſerving Rent payable on a certain Day, upon Condition, that it be not paid on the Day, the Feoffor may re-enter, &c. Co. Lit. 201. Or implied by Law, which is called a Condition in Law; as if an Office be granted to one, the Law annexes, without expreſs Words, a Condition, That the Party ſhall duly and faithfully execute it, and that for Miſbehaviour the Grantor may diſcharge him. Co. Lit. 233. a. (b) And *note*, That it is a general Rule, that a Condition which deſtroys or defeats the Eſtate or Grant, is to be conſtrued ſtrictly. Rol. Abr. 438. Co. Lit. 220.

Alſo Qualities annexed to Perſonal Contracts and Agreements, are frequently called *Conditions*, and theſe muſt alſo be interpreted according to the (c) real Intention of the Parties, and are uſually taken moſt (d) ſtrongly againſt the Party to whom they are meant to extend, leſt by the obſcure Wording of his own Contract, he ſhould find Means to evade and elude it. *Vide* Heads of *Covenant* and *Obligations*. (c) If the Condition of an Obligation be,

That the Obligor ſhall make all the Linen the Obligee ſhall wear during his Life, the Obligee muſt deliver to the Obligor the Cloth of which it is to be made; for all Contracts are to be interpreted according to the Intent and Subject-Matter. Lev. 93. (d) If I Covenant to deliver ſo many Yards of Cloth, and I cut it in Pieces, and then deliver it. Raym. 464.——If the Condition of a Bond be to pay 50l. though it is not ſaid of Money, yet it muſt be ſo intended, and the Obligor cannot tender fifty Pounds weight of Stone. Sid. 151, &c.

(A) By what Words created in a Deed. 396.
(B) By what Words created in a Will. 398.
(C) Of the Manner of creating the Condition, and at what Time it muſt be annexed. 399.
(D) Where the Nature of the Thing will admit of no Condition, but muſt be abſolute. 400.
(E) To whom the Condition may be reſerved. 400.
(F) To whom it ſhall be ſaid to extend to be bound by it. 401.
(G) What ſhall be ſaid a Condition, and not a Covenant. 402.
(H) What ſhall be ſaid a Condition, and not a Limitation, and how they differ. 403.
(I) Of Conditions precedent and ſubſequent. 405.
(K) Of void Conditions, being againſt Law. 408.
(L) Of repugnant Conditions. 410.
(M) Of impoſſible Conditions. 412.
(N) Of the Effect of a void, illegal or impoſſible Condition. 413.

*Page 396 * (O) Of the Breach of the Condition: 414.

And herein,
1. What ſhall be a Breach thereof. 414.
2. What the Party muſt do to intitle him to the Advantage thereof; and herein of Notice, Requeſt, Tender, and Refuſal. 417.
3. What ſhall be a Diſpenſation therewith. 419.
4. How far he, who enters for a Condition broken, is reinſtated in his former Eſtate. 420.

(P) Of performing the Condition: 422.

And herein,
1. What Perſons may perform it. 422.
2. To whom it may be performed. 424.
3. At what Time it may be performed. 425.
4. At what Place it may be performed. 428.
5. What ſhall be ſaid a ſufficient Performance. 429.

(Q) What ſhall excuſe the Non-performance: 432.

And herein,
1. Of the Act of God. 432.
2. Of the Act of Law. 434.
3. Of the Act of the Party. 434.
4. Of the Act of a Stranger. 437.

(A) By what Words created in a Deed.

MY Lord *Coke* ſays, That by inſerting the very Word *Condition*, or *ſub Conditione*, Conditions are moſt properly created, but there are alſo (*a*) others, ſays he, that will do as effectually, as the Word (*b*) *Proviſo*, but then it muſt not depend upon another Sentence; alſo it muſt be the Words of the Grantor, and compulſory to enforce the Grantee to do ſome Act.

Co. Lit. 203. (*a*) *Ad effectum, ea intentione, ad ſolvendum* in the King's Grants make a Condition. Rol. Abr. 407. 10 Co. 42. Hob. 231. 4 Leon. 70. —— Where the Words *Si modo* by the Common Law make a Condition, though it is otherwiſe by the Civil Law, as in a Licence from the Archbiſhop to accept another Living, *modo ſit* within ten Miles of the former. *Vide* Jones 304. Cro. Car. 475. Owen 152. (*b*) 2 Co. 70. b.

Rol. Abr. 407. Co. Lit. 204. (*c*) A Man made a Feoffment *ea intentione* that his Wife ſhould have an Eſtate for Life, the Remainder to his youngeſt Son in Fee, and the Feoffee died without making ſuch Eſtate; it was reſolved the Heir of the Feoffor could

It is ſaid to have been adjudged, That a Feoffment (*c*) *ea intentione* does not make a Condition, and it is only a Confidence or Truſt, unleſs an expreſs Re-entry be limited.

Reco-

Recoverers to an Uſe before 27 *H.* 8. *cap.* 10. leaſed by Indenture for ninety-nine Years, and the Leſſee, by the ſame Deed, covenanted with the Recoverers to pay the Rent to *Ceſtui que Uſe*, his Heirs and Aſſigns; * *Proviſo ſemper*, that if *Ceſtui que Uſe* make not his Heir Male his Aſſignee, that then he ſhall pay his Rent to the Recoverers, their Heirs and Aſſigns; this (*a*) *Proviſo* makes not a Condition, but only abridges the Covenant.

*Page 397 Cro El. 73. 1 Wood's Conv. 370. adjudged.

2 Leon. 128. 3 Leon. 225. S. C. By the Report of which the *Proviſo* was, That if the Leſſee ſhould make his Heir Male his Aſſignee, *&c.* Moor 107. S. C. cited. (*a*) Where the Word *Proviſo* makes no Condition, but only a Qualification or Explication of a Covenant or Grant. *Vide* 2 Leon. 128. 3 Leon. 225, 226. Dyer 222. 4 Leon. 70. 3 Leon. 16. Poph. 119. Moor 707. Gouldſ. 131. 2 Co. 72. a. And. 71, 72.

If a Man leaſes to a Woman for forty Years, upon Condition that *ſi illa tam diu viveret & cuſtodiret ſe ipſam* a ſole Widow, and ſhould inhabit upon the Premiſſes; this is not any Condition, for the Word (*b*) *Si* makes the Intention uncertain, whether another Thing was intended beſides the Ceſſer of the Term, or the Re-entry.

Rol. Abr. 410. *Sayer* and *Hardy* adjudged. Poph. 99. S. C. adjudged, for

none can imagine what the Concluſion ſhould be; but it was agreed, That if the Leaſe had been for forty Years, *ſi tam diu ſola viveret & inhabitaret* upon the Premiſſes, the Leaſe had determined by her Marriage or Death. Cro. Eliz. 414. S. C. adjudged by three Judges againſt one, for every *Si* ought to be anſwered with a *Tunc*. Owen 107, 108. adjudged. Gouldſ. 179. S. C. adjudged. Moor 400. pl. 525. S. C. adjudged. (*b*) But if this Word had been omitted, it would have been a Condition; or if *ſub conditione quod* had been omitted, it would have been a Limitation. Gouldſ. 179.

So if a Man leaſes Lands to another, *Proviſo ſi* the Rent be arrear, this is not a Condition, becauſe the Word *Si* makes the Intention uncertain, for where the (*c*) *Proviſo* is hypothetical, it ought to be ſhewn what he would have.

Rol. Abr. 410. *Moody* and *Garnon*. Rol. Rep. 367. S. C.

Owen 107. S. P. by two Judges *arguendo*. Cro. Eliz. 414. S. P. by three Judges againſt one *arguendo*. (*c*) Where this being a proper Word of Condition, though put in an improper Place, ſhall make the Eſtate conditional. 2 Co. 72. b.

If a Man leaſes Land to another, *Proviſo if the Rent be behind, it ſhall be lawful for him to diſtrain, and not being ſufficient, the Ground to re-enter into the Premiſſes, and the ſame to have again in his former Eſtate*, this is no good Condition, for the Words are not, that he ſhall diſtrain the Goods upon the Tenement; nor is it known what is intended by the Word ſufficient, *ſcilicet*, ſufficient Reparation, Rent, *&c.* and the Words, *the Ground to re-enter into the Premiſſes*, are inſenſible.

Rol. Abr. 410. *Moody* and *Garnon*. Rol. Rep. 330, 367. S. C. adjudged. Bulſt. 153. 154. S. C.

adjudged. Moor 848. pl. 1551. S. C. adjudged, becauſe not ſaid what ſhall be reſtrained, nor who ſhall re-enter. Cro. Jac. 390. S. C. adjudged, and ſaid, *Coke* held *reſtrain* to be the ſame as *diſtrain*.

If *A.* infeoffs *B.* upon Condition that he ſhall render to *C.* and his Heirs an yearly Rent of 20*s.* and if *B.* and his Heirs fail of Payment thereof, that then *A.* and his Heirs may enter; this is a good Condition, for though a Rent cannot be reſerved to a Stranger, yet yearly Rent in this Caſe (*d*) ſhall be intended of a yearly Sum of 20*s.* in Groſs.

Lit. Sect. 345. Co. Lit. 213. a.

(*d*) If a Man grants a

Walk in a Foreſt, provided the Grantee ſhall not cut down any Trees *ſuper Præmiſſa*, though the Soil is not granted, and *Præmiſſa* hath properly a Relation to the Thing itſelf; yet ſince in this Caſe it cannot have ſuch Conſtruction, it ſhall be intended of Trees growing within the Walks. Cro. Eliz. 781. adjudged, & *vide* Moor 526. Dalſ. 54. Moor 52. 1 Wood's Conv. 372.

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could not enter, for that there was no Condition, but an Eſtate executed preſently according to the Intent. 4 Leon. 2.—If the King grants an Advowſon in Fee, and further *conceſſit* that the Grantee may amortize this for the Soul of the Progenitors of the King; this is but a Licence, and not a Condition. 43 E. 3. 34. Fitz. Condition 7. S. C. Rol. Abr. 407. S. C.

Poph. 102, 103. *Slaning*'s Case, certified to the Chancellor accordingly, as the Opinion of three Judges.

If *A.* being seised in Fee of the Manor of *B.* and of divers Lands in *C.* then in the Possession of *D.* for several Years to come, makes a Feoffment thereof to *E.* to the Use of himself in Tail Male, Remainder to *F.* in Tail Male, &c. Provided that *F.* or the Heirs Male of his Body in whomsoever of them the Inheritance in Tail *of all the Premisses* shall happen to be, shall pay to the Daughter of *A.* 200*l.* according to the last Will of *A.* and *A.* makes a Letter of Attorney to *J. S.* to enter into the Manor of *B.* and the Lands in *C.* and in his Name to take Possession and deliver it to *E.* whereupon Possession is given to *E.* of all but what was in the Possession of *D.* and *D.* never attorns, so that the Lands in *C.* passed not, and after *A.* by

*Page 398 * Will bequeaths 200*l.* to his Daughter, and dies without Issue, yet *F.* is not bound by this Condition, because he hath not (*a*) *all the Lands* according to the Purport of the Condition, which was, That he that had all should pay, &c. and a Condition ought to be taken strictly.

(*a*) If a Man makes a Deed of Feoffment of Lands in several Counties, upon Condition the Feoffee shall re-infeoff him of all the Land within twenty Days after the Date; if Livery is made but of Part within the twenty Days, the Condition is not broke, though all is not re-conveyed within the twenty Days, according to the Letter of the Condition, which is intire. Hob. 24.

2 Saund. 78. *Maleverer* and *Hawx by*, adjudged for the Plaintiff upon Demurrer, the Defendant having pleaded the Statute of 23 H. 6. c. 9. Sid. 456. Mod. 35. See Ld. Raym. 38. 2 Keb. 625. S. C. adjudged.

If the Condition of an Obligation be in this Manner, *viz. The Condition of this Obligation is such, That if the Obligor shall appear* coram Domino Rege apud Westmon' *such a Day*, ad Respond', &c. *then the Condition of this Obligation shall be void, or else the same shall be in full Power and Virtue*; yet this is a good Condition, for the Sense is perfect without these last Words, and they shall be rejected for their Absurdity and Repugnancy.

(B) By what Words created in a Will.

Vide Tit. *Devises.* Co. Lit. 204. a. Dalf. 58.

AS the Intent of the Testator chiefly governs in Wills, such Construction is always made of the Words as will best support his Intent, and therefore these Words *ad faciendum, faciendo ea intentione, ad effectum*, &c. in a Will create a Condition.

Moor 57. pl. 162. Poph. 8. Cro. Eliz. 454. Owen 92. Gouldf. 75.

Rol. Abr. 410, 411. Cro. Eliz. 146. S. C. adjudged. Leon. 174. S. C. adjudged.

So if a Man seised of Socage Lands, having two daughters, devises it to one of the Daughters, To have and to hold to her and her Heirs, to pay to her Sister a certain Sum of Money at a certain Day; these Words make a Condition; so that the other Sister, if the Money is not paid, may enter into a Moiety for the Condition broken, because otherwise she would be Remediless.

Gouldf. 134. Co. Lit. 236. S. C. cited. 2 Com. Dig. 439. Cowp. 841.

Rol. Abr. 411. and Lane 56. S. C. *dubitatur, & vide* Lane 78.

But if a Man devises Lands to *B.* for Life, paying to *C.* 6*l.* Rent yearly, which he wills to be paid at two Feasts Half-yearly, and if it be arrear, that then it shall be lawful to *C.* to distrain; it seems this Word *Paying* makes not any Condition, in as much as a Distress is limited for Non-payment thereof.

38 Ass. 3. Rol. Abr. 410. S. C.

If a Man devises Lands to his (*b*) Executor to sell, and (*c*) to make Distribution of the Money for his Soul, and dies; if the Executor does not sell it, the Heir may enter, for this creates a Condition.

(*b*) For Devises to Executors for Payment of Debts, *vide* Titles *Devises* and *Uses and Trusts.* (*c*) A Man devises 5*l.* yearly out of his Land to his younger Son, towards his Education in Learning; this creates no Condition, so that he shall have the Rent, though not educated in Learning. 2 Leon. 154. 3 Leon. 65. and *vide Dalf.* 116.

(C) Of

(C) Of the Manner of creating the Condition, and at what Time it muſt be annexed.

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CONditions cannot be annexed to Eſtates of Inheritance, or Freehold Eſtates, without (*a*) Deed. Rol. Abr. 413, 414.

(*a*) Cannot regularly be reſerved but by Deed indented. Rol. Abr. 413.——But if by Deed Poll, and the Feoffer, &c. gets it into his Cuſtody, he may plead the Condition againſt the Feoffee, &c. Lit. Sect. 375. Co. Lit. 231.

If a Feoffment be made of two Acres upon Condition, and for Breach, that he may re-enter but in one, this is good. Rol. Abr. 412.

If a Man agrees with me to make a Feoffment to me upon Condition, and after makes a Charter of Feoffment without any Condition, and after makes Livery *ſecundum formam Chartæ* without any Condition, this is abſolute without any Condition, for the Livery is not made according to the Agreement, but according to the Charter. 31 Aſſ. 1. Rol. Abr. 413.

But if *A.* agrees to infeoff *B.* in Surety of Payment of certain Money, and after makes Livery to him and his Heirs generally, the Eſtate is holden by ſome to be on Condition, in as much as the Intent of the Parties was not changed, but continued at the Time of the Livery. Co. Lit. 222. b.

If a Man makes a Charter of Feoffment to another, and in the Deed there is no Condition, but when the Feoffor would make Livery of Seiſin to him by Force of the Deed, he expreſſing the Eſtate, makes Livery and Seiſin to him upon Condition, the Feoffment is of like Force as if no ſuch Deed had been made. Lit. Sect. 359. Co. Lit. 222. b.

If a Diſſeiſee releaſes to his Diſſeiſor all his Right, and at a Day after, the Diſſeiſor by Indenture grants, that if he pays ſo much at a Day certain, the Releaſe ſhall be void; this is a void Condition, (*b*) as to revive the Right to the Diſſeiſee. 43 Aſſ. 12. Rol. Abr. 414. Co. Lit. 236. S. P.

(*b*) For Inheritances executed cannot be defeated by ſubſequent Defeaſance. Co. Lit. 236.——But a Releaſe, Feoffment, &c. may be defeated by Indenture of Defeaſance made at the ſame Time. Co. Lit. 236. 2 Co. 71. b.

Rents, Annuities, Warranties, &c. (being Inheritances (*c*) Executory) may be defeated by a Defeaſance made at the Time, (*d*) or at any Time after. Co. Lit. 237. a.

(*c*) But in Caſe of a Feoffment, &c. where the Eſtate is executed, it is not to be defeated by Condition or Defeaſance, unleſs contained in the ſame Deed, or in another executed at the ſame Time. 2 Sand. 48. (*d*) Cro. Eliz. 623. adjudged in Caſe of a Defeaſance to a Bond; for the Law is clear, that an Obligation, Judgment, &c. may be defeated by a ſubſequent Defeaſance, and ſo is the common Practice; for this *vide* Rol. Abr. 590.

If the Condition of an Obligation be to ſave harmleſs certain Lands from all Incumbrances made by the Obligor; and upon the Back thereof there is a *Memorandum* wrote, That the Condition ſhall not extend to the Extent upon a certain Statute acknowledged by the Obligor; (*e*) this being wrote before the Sealing of the Obligation, is an Explanation thereof. Moor 679. *Broke* and *Smith*.

(*e*) Where a Condition wrote on the Back of a Leaſe before the Execution thereof, was held good. Cro. Jac. 456. But for this *vide* 2 Rol. Abr. 22, 23. And where a *Proviſo*, inſerted in an improper Place, ſhall have Reference to the Eſtate and make it conditional. 2 Co. 72. b.

(D) Where

Page400 (D) Where the Nature of the Thing will admit of no Condition, but muſt be abſolute.

Owen 12. *Gayton's* Caſe.

A Parſon cannot reſign upon Condition, becauſe it is a judicial Act, to which no Condition can be annexed, any more than an Ordinary can admit, or a Judgment be confeſſed upon Condition.

Rol. Abr. 412. Co.Lit. 300.

The Tenant cannot (*a*) attorn to the Grant of a Seignory (*b*) upon Condition, becauſe this is but a Conſent, and no Intereſt paſſes from him.

S. P. So Executors cannot agree upon Condition to a Legacy. 4 Co. 28. b. (*a*) Becauſe a bare Aſſent without any Intereſt. Co. Lit. 300. b. But a Patron, in reſpect of his Intereſt, may aſſent upon Condition to charge the Glebe of the Parſon. Co. Lit. 300. (*b*) *Viz.* Upon Condition ſubſequent; *ſecus* upon a Condition precedent. Co. Lit. 274. So a Licence to alien cannot be upon Condition ſubſequent; *ſecus* as to a Condition precedent, becauſe in ſuch Caſe it is no Licence till the Condition be performed. Poph. 106.

Co.Lit. 274. b. Kelw. 88. S. P.

A Diſſeiſee may releaſe his Right to the Diſſeiſor upon Condition.

Co.Lit. 274. b. 9 Co. 85. b. S. P.

But a Condition cannot be releaſed upon Condition.

Co.Lit. 274. b.

An expreſs Manumiſſion of a Villein cannot be upon Condition, for once Free and for ever Free.

Co.Lit. 274. But a Naturalization by Parliament

Letters Patent of Denization of an Alien may be upon Condition precedent or ſubſequent.

cannot be upon Condition, for it is againſt the Abſoluteneſs, Purity, and Indelibility of natural Allegiance. Co. Lit. 129. a.

Rol. Abr. 412. and *vide* Rol. Abr. 940.

A Man cannot releaſe a Perſonal Thing, as an Obligation upon a Condition ſubſequent, but the Condition will be void, becauſe a Perſonal Thing being once ſuſpended, is perpetually extinguiſhed.

Rol. Abr. 412. *Barkley* and *Parkes* adjudged.

But a Man my releaſe a Perſonal Thing, as an Obligation, or ſuch like, upon a Condition precedent; for there the action is not ſuſpended till the Condition performed; as where the Releaſe was of an Obligation with a *Proviſo*, That he who releaſed might enjoy 120*l.* due by *J. S.* at a Day then to come, which being a Condition precedent was adjudged good.

(E) To whom the Condition may be reſerved.

Lit. Sect. 347. Co.Lit. 214. Rol. Abr. 407, 472. *Vide* Title *Heir and Anceſtor.* 8 Co. 43, 440.

COnditions can only be reſerved to the Feoffor, Donor or Leſſor, and their Heirs, but not to any Stranger.

Alſo by Implication, without expreſs Words, the Law reſerves the Condition to the Heir of the Feoffor, *&c.* for, as he is prejudiced by the Diſpoſition, it is but reaſonable that he ſhould take the ſame Advantages that his Anceſtor, whom he repreſents, might.

Co.Lit. 202. a. S. P. 336. b. S. P.

If a Man ſeiſed of Lands in the Right of his Wife, makes a Feoffment in Fee upon Condition, and dies, and after the Condition is broken, the (*c*) Heir of the Huſband ſhall enter; for though no right deſcended

(*c*) So if a Man makes a Feoffment in Fee of Lands in *Borough Engliſh*, the Heir at Common Law ſhall enter, but the younger Son ſhall after enter upon him and enjoy, &c. Godb. 3.——By Act in Law a Condition may be apportioned, in the Caſe of a common Perſon, as, If a Man leaſes two Acres, one of the Nature of *Borough Engliſh*, and the other at the Common Law, upon Condition, &c. and the Leſſor having two Sons dies, each of them ſhall enter for Breach of the Condition. Co. Lit. 215. a.

* to him, yet the Title of Entry by Force of the Condition, which was created upon the Feoffment, and reſerved to the Feoffor and his Heirs, deſcended. *Page 401

If a Condition annexed to Gavelkind Lands be broken, the Heir at Common Law ſhall enter; but when the eldeſt Son enters for the Condition broken, the younger Children ſhall enjoy the Land with him. Co. Lit. 11, 12. Lamb. 608.

If *Ceſtui que Uſe*, after the Statute of 1 *Rich.* 3. *c.* 1. and before the Statute 27 *H.* 8. *c.* 10. had made a Feoffment in fee upon Condition, the Feoffee ſhould not have entered for the Condition broken, but the *Ceſtui que Uſe*. Co. Lit. 202. a. 215. a. Moor 212. pl. 353. Leon. 298.

If a Man ſeiſed in Fee makes a Leaſe for Life, rendering Rent, and for Default of Payment a Re-entry, *&c.* and after dies without Heir, living the Tenant for Life, though the Lord by Eſcheat ſhall have the Rent as incident to the Reverſion, and may diſtrain for it, yet he cannot enter. Sav. 76. Lit. ſ. 348. Co. Lit. 215. b.

Guardian in Chivalry or Socage, in the Right of the Heir, may take Benefit of a Condition by Entry, or Re-entry by the Common Law. Co. Lit. 215. b.

If Tenant for Life and the Reverſioner join in a Feoffment, the Condition may be reſerved to the Leſſee only, and by his Re-entry he ſhall deveſt but his Eſtate. Rol. Abr. 407.

If *A.* enfeoff *B.* upon Condition, that if the Heir of *A.* pays to *B.* *&c.* 20*s.* then he and his Heirs may re-enter, this is a good Condition, of which the Heir of *A.* may take Advantage, and yet *A.* himſelf never can. Co. Lit. 214. b.

If a Man gives Lands to his eldeſt Son in Tail, Remainder to his ſecond Son in Tail, *&c.* upon Condition, that if the eldeſt Son, or any of his Iſſue aliens, the Land ſhall remain to the Second, *&c.* the Conſequence of the Condition that the Land ſhould remain to another, is void, though upon ſuch Alienation the Donor himſelf might enter.* Co. Lit. 379. a.

Vide Lit. ſ. 723. and Ld. *Coke*'s Commentary thereon, 379. a.

(F) To whom it ſhall be ſaid to extend to be bound by it.

IF an Eſtate be made to a Feme Covert, ſhe ſhall be bound by the Condition, becauſe this does not charge her Perſon, but the Land. Rol. Abr. 421. Moor 92.

So if an Eſtate be made to an Infant upon an (*a*) expreſs Condition, the Infant ſhall be bound to perform it. pl. 229. S. P. Rol. Abr. 421.

8 Co. 44. b. S. P. (*a*) But where an Infant ſhall be bound by a Condition in Law, or not, *vide* Co. Lit. 233. b. 234. a. 8 Co. 44. b. Hard. 11. Carth. 42. *Vide* Head of *Infants*. (*b*) So where an Eſtate is deviſed to an Infant, on Condition, he is bound to take Notice thereof, and perform the Condition. 2 Lev. 21, 22. Mod. 86. Vent. 200.

So if an Eſtate be made to another in Fee, upon Condition, his Heir, after his Death, though he be within Age, ſhall be bound by the Condition. Rol. Abr. 421. Jones 390. Cro. Jac. 374.

If a Man deviſes Land to *H.* his Son, and to the Heirs of his Body, the Remainder to *T.* and the Heirs Male of his Body, upon Condition that he or they, or any of them, ſhall not Alien, Diſcontinue, *&c.* this Condition ſhall extend only to reſtrain *T.* and the Heirs Male of his Body, and not *H.* or his Heirs. 3 Bulſt. 58. 5 Co. 68. Ld. *Cheney*'s Caſe. Rol. Abr. 422. S. C. Moor 727. S. C.

If a Man leaſes Lands for Years, upon Condition that the Leſſee, nor his Aſſigns, ſhall not alien the Term to any but to one of his Brothers, and Rol. Abr. 422. Cro. Jac. 398. 1 Com. Dig. 473. 3 Wilſ. 33. 2 Term Rep. 425.

after

S. C. adjudged. Dyer 152. after the Leſſee aliens to one of his Brothers; this Aſſignee is not within the Condition, but he may alien to whom he pleaſes.

S. P. 2 Bulſt. 290. Rol. Rep. 68, 389. S. C. adjudged.

*Page402 * If a Man deviſes Part of his Lands to his eldeſt Son in Tail, and the reſt of his Land to his younger Son in Fee; provided that neither of his

2 Leon. 38. Owen 8, 55. Moor 271. S. C. Sons ſhould ſell or leaſe, before he comes to the Age of thirty Years; and that if either of the Sons ſhould, &c. the other Son ſhould have his Lands, &c. the eldeſt Son before his Age of thirty, leaſes, and the younger enters upon him, he ſhall hold the Lands diſcharged of the Proviſo; for that extends only to the immediate Eſtate expreſly deviſed, and not to the new Eſtate ariſing upon the Limitation.

2 Leon. 35. *Cob* and *Prior*, adjudged. Latch 20. If a Man deviſes Land to his Wife, during the Minority of his Son, upon Condition that ſhe ſhall not do Waſte, and dies, and the Wife marries again, and dies, and after the Huſband commits Waſte, the Condition is not broken.

S. C. adjudged, becauſe a Condition to avoid an Eſtate ſhall be taken ſtrictly.—And *per* Moor 11. pl. 40. Dyer 65. A Proviſo that the Leſſee ſhall not alien, extends not to his Executors.

Vaugh. 31, 32. *Triſtram* and Counteſs of *Baltinglaſs*. If *A.* is Tenant for Life, with Power by a Marriage-Settlement, to make Leaſes for Twenty-one Years, ſo long as the Leſſee, his Executors or Aſſigns ſhall duly pay the Rent reſerved, and he makes a Leaſe purſuant to the Power, the Tenant is at his Peril obliged to pay the Rent, without any Demand of the Leſſor, becauſe the Eſtate is limited to continue only ſo long as the Rent is paid.

Co. Lit. 163. b. If a Gift be made in Tail, on Condition that the Donee ſhould not diſcontinue, and the Donee has Iſſue two Daughters, and one of them diſcontinues, the Donor ſhall enter and evict them both, becauſe it was the original Condition annexed to the whole Eſtate, that no Part of it ſhould be diſcontinued.‖

‖ See *ante* 397, 398.

(G) What ſhall be ſaid a Condition, and not a Covenant.

Co. Lit. 203. b. Rol. Abr. 408. IF a Man makes a Leaſe for Years, by (*a*) Indenture, (*b*) provided always, and it is covenanted and agreed between the Parties, that the Leſſee ſhall not alien, this is both a Condition and Covenant.

(*a*) That the Leſſor may take it as a Covenant or Condition, but not as both. Dalſ. 8. (*b*) The Word *Proviſo* ſometimes amounts to a Limitation, and ſometimes to a Covenant. Co. Lit. 204. a.

Rol. Abr. 408. If a Man leaſes for Years, and in the Indenture there is (*d*) ſuch a Clauſe, *Et non licebit* to the Leſſee *dare, vendere vel concedere ſtatum &*

*Page403 * *terminum ſuum alicui perſonæ ſine licentia* of the Leſſor, *ſub pœna forif-*

Leon. 246. S. C. cited. *facturæ termini prædict'*, this is good Condition.

(*d*) So that the Leſſee ſhall continually dwell upon the Houſe, upon Pain of Forfeiture of the ſaid Term and Intereſt. Rol. Abr. 409. Co. Lit. 204. Godb. 99. So that neither he, nor his Aſſigns, grant, aſſign or ſell the Land to any *prætor*, &c. upon Pain or Forfeiture of the Term. Rol. Rep. 68, 69. 2 Bulſt. 290.—For being by Indenture, they are the Words of both Parties. Cro. Eliz. 202.

Cro. Eliz. 604. Wood's Conv. 432. But if a Man leaſes for Years, and the Leſſor covenants that the Leſſee ſhall have Houſe-Boot, Hay-Boot, and Plough-Boot, without committing Waſte, upon Pain of Forfeiture of the Leaſe, this is a Covenant on the

Doug. 27, 766. 2 Term Rep. 746.

Part

Part of the Leſſor, and therefore no Condition; and by *Anderſon* and *Beamond* the Covenant is no more than the Law appoints; therefore that, and (*a*) all that is ſubſequent to it, is void.

(*a*) Where a *Proviſo* was void, becauſe no more was to be done by it than what might be done without. *Vide* Poph. 116.

If a Man leaſes Lands for Years, rendering Rent, and the Leſſee covenants to pay the Rent, and not to do Waſte, and the Leſſor binds himſelf in an Obligation that the Leſſee ſhall enjoy the Lands for the ſaid Rent, and doing according to the Covenants of the ſaid Indenture, theſe Words, (*b*) *for the Rent*, make not a Condition, becauſe he hath other Remedy for the Rent *ſcilicet*, upon the Indenture of Covenants.

Rol. Abr. 410. Rol. Rep. 367. S. C. (*b*) The Leſſor covenanted that the Leſſee, paying his Rent, ſhould enjoy the Land. 4 Leon. 50. By two Judges againſt one, the Covenant is Conditional.—But Sid. 280. it is held contrary *per Cur'*; and 2 Mod. 34, 35. it is adjudged *cont.*—So if a Man leaſes for Years, excepting the Trees and Liberty to fell and carry them away, *reparando ſepes & implendo foveas*, the Repairing the Ditches, &c. is no Condition, but a Covenant upon which the Leſſee hath Remedy by Action. 2 Jones 206. and *vide* March 9. 2 Rol. Rep. 466.

If a Man leaſes for Years, rendering Rent, and the Leſſee covenants to repair, &c. and after the Leſſor deviſes to the Leſſee for more Years, yielding the like Rent, and under ſuch Covenants as were in the firſt Leaſe, yet this makes no Condition; for though, after the firſt Leaſe is ended, the Leſſee ſhall not be bound by the Covenants, yet the Will expreſſing that the Leſſee ſhould have the Lands, obſerving the firſt Covenants, it ſhall not be taken to be a Condition, by any Intent to be collected out of the Will; for Covenants and Conditions differ much.

Owen 54, 92. 3 Leon. 33. And. 230. S. C. adjudged. Goulſ. 74. S. C. Godb. 99. S. C. Poph. 8.

S. C. cited. Cro. El. 288. S. C. cited. 1 Brown's Ca. Chanc. 13, 61, 271, 444.

(H) What ſhall be ſaid a Condition, and not a Limitation; and how they differ.

WORDS which properly create a *Condition*, (*c*) are *Sub conditione, ita quod, ſi contingat, proviſo*, &c. for the Non-performance of which, none but the *Heir* at Law can enter; and regularly, in Caſe of a *Condition*, the Eſtate of the Party is not determined without Entry or Claim.

Co. Lit. 203. 2 Co. 70. 2 Sid. 152. 2 Brownl. 68. Goulſ. 134.

(*c*) *Per* Lord *Coke*, 10 Co. 35. *Mary Portington*'s Caſe, if there be expreſs Words of Condition annexed to the Eſtate, it cannot be conſtrued a Limitation, but this Opinion has been denied to be Law*; and *per Hale*, C. B. Vent. 200. Mod. 86. There is no other Authority to ſupport it; for firſt, Though the Words be proper to create a Condition; yet, if, upon the Non-performance thereof, the Eſtate be limited over to another Perſon, this ſhall be a Limitation; for it ſhall not be in the Power of the Heir, by his not claiming, or entering, to defeat the Intereſt of ſuch Perſon. Brownl. 65. Rol. Abr. 412. and Vent. 200. *per Hale*, it may properly be called a conditional Limitation; ſecondly, if Lands are given to the Heir, upon Condition, this upon Non-performance ſhall be conſtrued a Limitation; otherwiſe no Advantage could be taken of it; the Benefit of Conditions annexed to real Eſtates belonging to the Heir, as thoſe to the Perſonal Eſtate do to the Executor. Cro. Eliz. 204. Owen 112. 2 Mod. 7. Eq. Caſ. Abr. 206. Comyns 72. pl. 45. 123. pl. 86. 2 Ld. Raym. 829. Salk. 242. pl. 3. 2 Salk. 423. pl. 10. 2 Vern. 519. Stra. 129. 2 Stra. 1086. Andr. 125. Hardw. 98, 99. 2 Barnard. K. B. 217. 2 Stra. 1128. Lutw. 809. 3 Mod. 32. 10 Mod. 419.

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* (See *poſt* 404.)

* Proper Words of *Limitation* are, *Dum, dummodo, quamdiu, donec, quouſque, ubicunque, uſque ad, tamdiu*, or ſo long as he ſhall pay ſuch Rent, or be Abbot or Parſon, &c. and in theſe Caſes the Law (*d*) veſts the Eſtate in the *Party*, without Entry or Claim; but he cannot bring a Poſſeſſory Action, as Treſpaſs, &c. without an actual Entry.

* Page 404 Co. Lit. 236. b. (*d*) 2 Mod. 7. 2 Ld. Raym. 750.

So

Co. Lit. 236. b. Vaugh. 32.

So if an Eſtate be made to a Woman (*b*) *dum ſola fuerit*, this is a *Limitation* which determines her Eſtate upon Marriage.

(*b*) If a Leaſe be made to a Woman for thirty Years, *ſi tamdiu viveret, & cuſtodiret ſe ipſam* a Widow, it determines by her Death or Marriage. Cro. Eliz. 414. Poph. 99. Moor 400. Goulſ. 179. *& vid.* Rol. Abr. 411, 843. Owen 107.

Rol. Abr. 411. *Hainſworth* and *Pretty*. Cro. Eliz. 833, 919. Moor 644.

If a Man, having three Sons, deviſes his Lands to the eldeſt, upon Condition that he ſhall pay 20*l.* to each of the other two Sons; and that if he fails in Payment thereof to either of the Sons, that then they may enter and have the Land; this is a *Limitation*; ſo that if the eldeſt does not pay the Money, the two Sons may enter into the Land.

Noy 51. S. C. adjudged, and Owen 8. 2 Leon. 38. Cro. Jac. 56, 592. Carter 93. S. P. adjudged between *Spittle* and *Davis*. 1 Bl. Rep. 22.

Rol. Abr. 411, 412. *Wiſeman* and *Baldwin*. Cro. Eliz. 376. Goulſ. 152. *Owen* 112. S.C. adjudged, and the Judgment in C. B. reverſed accordingly. Cowp. 841. Doug. 63, 75, 689.

If a Man hath Iſſue two Sons, *ſſ. R.* the eldeſt, and *H.* the youngeſt, and alſo two Daughters, and deviſes certain Lands thus, *viz.* to *H.* in Tail, when he comes to Twenty-four Years of Age, upon Condition that he ſhall pay to my two Daughters 20*l.* a Year, at their full Age; and if the ſaid *H.* dies before Twenty-four, then I will, that *R.* my Son and Heir, ſhall have the ſaid Land to him and to his Heirs, he giving and paying to my ſaid Daughters the ſaid Money, in ſuch Manner as *H.* ſhould have done, if he had lived. And if my ſaid Sons *H.* and *R.* (if the ſaid Lands come to the ſaid *R.* by the Death of *H.*) do not pay the ſaid Money to my ſaid Daughters, as aforeſaid, then I will my ſaid Land ſhall remain to my Daughters and their Heirs for ever; and after the Deviſor dies, this is a *Limitation* upon the Eſtate of *H.* and not a Condition; ſo that if *H.* does not pay the Money to the two Daughters, after his Age of Twenty-four Years, and at the full Age of the Daughters, *R.* ſhall have it by way of *Limitation*, and cannot enter as for a Condition broken; becauſe otherwiſe, if this ſhould be a Condition, it would defeat the Portions given to the Daughters, and the future Deviſe to them, which is againſt the Intent of the Deviſor; adjudged in a Writ of Error, *per totam Curiam*, and the Judgment given to the contrary *in Banco* reverſed.

Rol. Abr. 412. *Skirne* and *Bond*, by two Judges; but *Quære*.

If a Man deviſes Lands to another in Tail, upon Condition that he ſhall not alien; and that if he dies without Iſſue, it ſhall remain over to another in Fee; and after the Deviſee aliens, yet he in the Remainder cannot enter for the Condition broken, but the Heir at Common Law; for this is not a Limitation, but a *Condition*.

Cro. Eliz. 204, 205. *Wellock* and *Hammond*, adjudged. 2 Leon. 114. S. C.

If a Copyholder in *Borough Engliſh* ſurrenders to the Uſe of his Will, and after deviſes to his Wife for Life, Remainder to his eldeſt Son, (*c*) paying 40*s.* to each of his Brothers and Siſters, within two Years after the Death of his Wife, *&c.* this is a *Limitation*, and not a Condition; for if it ſhould be a Condition, it would extinguiſh in the Heir, and there would be no Remedy for the Money.

Cro. Jac. 592. 3 Co. 21. 2 Brownl. 68. S. C. cited. (*c*) For this *vide* Stile 294. 2 Sid. 152. 3 Wilſ. 348. Powell on Dev. 263. Cowp. 836. 1 Bro. Caſ. Ch. 194.

Cro. Jac. 56. *Curtis* and *Woolverſton*, adjudged, *per totam Curiam præter Williams*,

If a Copyholder in Fee, in *Borough Engliſh*, having three Sons, ſurrenders to the Uſe of his Will, and deviſes to his ſecond Son, upon Condition to pay 20*l.* a-piece to his Daughters, and dies, this is a *Condition*, and not a Limitation; for there is no neceſſity to expound it otherwiſe, as where a Man deviſes to his eldeſt Son.

who held it was a Limitation, and that the Land ſhould go to the youngeſt Brother, who is inheritable by the Cuſtom; for that otherwiſe he would be prejudiced; *& vide* Carter 171.

If

* If *A.* deviſes Lands to *B.* provided that if *B.* marries without the Conſent of *C.* and others. or dies without Iſſue, then to *D.* &c. this is a *Limitation*, and not a Condition, in reſpect the Remainder is limited over to a Stranger, and not to the Heir; for though the Words *Proviſo* & *ſi* (*a*) are expreſs Words of Condition, it would be an unreaſonable Conſtruction of the Intent of the Deviſor, that *B.* ſhould do an Act by which the Eſtate of *D.* ſhould be forfeited. *Page 405

2 Lev. 21, 22. *Williams* and *Fry* adjudged. Vent. 199. S. C. adjudged, by the Name of *Fry* and *Porter*. Raym. 236. Mod. 86. S. C. adjudged. (*a*) Dyer 316. S. P. *dubitatur*. Leon. 283. S. P. *dubitatur*. 10 Co. 41. a. S. P. *cont.* but in 1 Vent. 203, (as in ſeveral other Books) this Opinion of *Coke* is taken Notice of, and denied to be Law.

If a Man deviſes certain Lands to *A.* his Heir at Law, and deviſes other Lands to *B.* in Fee; *and if* A. *moleſt* B. *by Suit or otherwiſe, he ſhall loſe* what *is deviſed to him, and it ſhall go to* B. theſe Words make a *Limitation*, and not a Condition; for if it were a Condition, it would deſcend on the Heir, and then *B.* would receive no Benefit by the Breach of it. 2 Mod. 7. agreed by *Curiam*. Eq. Caſ. Abr. 206. Comyns 72. pl. 45. 123. Stra. 129.

pl. 86. 2 Ld. Raym. 829. Salk. 242. pl. 3. 2 Salk. 423. pl. 10. 2 Vern. 519. 2 Stra. 1086. Andr. 125. Hard. 98, 99. 2 Barnard. K. B. 217. 2 Stra. 1128.

(I) Of Conditions precedent and ſubſequent.

See ſome Caſes which ſeem to belong to this Title in Salk. 171, 172. and 1 Ld. Raym. 662. a Caſe in Salk. much fuller reported.

CONditions precedent are ſuch as muſt be punctually performed before the Eſtate can veſt; but on a Condition ſubſequent, the Eſtate is immediately executed; yet the Continuance of ſuch Eſtate dependeth on the Breach or Performance of the Condition. Co. Lit. 218. Eq. Abr. 108.

As if I grant, that if *A.* will go to ſuch a Place about my Buſineſs, that he ſhall have ſuch an Eſtate, or that he ſhall have 10*l.* &c. this is a Condition precedent. 3 H. 6. 7 b. Rol. Abr. 414.

So if I retain a Man for 40*s.* to go with me to *Rome*, this is a Condition precedent, for the Duty commences by going to *Rome*. 3 H. 6. 33. b. Rol. Abr. 414.

So if a Man by Will, deviſes certain Legacies, and then deviſes all the Reſidue of his Eſtate to his Executor, after Debts, Legacies, &c. paid and diſcharged; this is a Condition precedent, ſo that the Executor cannot have the Reſidue of the Eſtate before the Debts and Legacies are diſcharged. Rol. Abr. 415. Jones 327. Cro. Car. 335. Cowp. 43.

But if a Man deviſes a Term to *A.* and that if his Wife ſuffers the Deviſee to enjoy it for three Years, that ſhe ſhall have all his Goods as Executrix; but if ſhe diſturbs *A.* then he makes *B.* Executor, and dies, his Wife is Executrix preſently; for though in Grants the Eſtate ſhall not veſt till the Condition precedent is performed, yet it is otherwiſe in a Will, which muſt be guided by the Intent of the Parties; and this ſhall not be conſtrued as a Condition precedent, but only as a Condition to abridge the Power of being Executrix, if ſhe perform it not. Cro. Eliz. 219. *Jennings* and *Gore*, adjudged *per totam Curiam*, tho' *Anderſon* at firſt inclined *cont.* Leon. 229.

S. C. adjudged *per totam Curiam*, *Anderſon* changing his Opinion. Winch 115, 116. 2 Ld. Raym. 765. Doug. 63, 689. 1 Term Rep. 645.

If *A.* Tenant for Life, and *R.* in Reverſion in Fee, covenant to levy a Fine, and that it ſhall be to the Uſe of *A.* and his Heirs, *ſi R.* does not pay 10*s.* to *A.* the tenth of *September* after; and if he does pay, then to the Uſe of *A.* for Life, and after to the Uſe of *R.* in Fee; in this Caſe, this Word *ſi*, &c. is a Condition ſubſequent, and not precedent; ſo that *A.* hath an Eſtate in Fee till *R.* pays the 10*s.* becauſe there is a Day limited for the Payment of the 10*s.* and the ſubſequent Words Rol. Abr. 415, 416. *Spring* and *Ceſar* adjudged. Jones 389. Winch. 103. S. C.

Words explain the Intent to be a ſubſequent Condition, &c. And if he pays it, then it ſhall be to *A.* for Life, and after to the Uſe of *R.* in
*Page 406 * Fee, which ſhews the Intent to be that *A.* ſhall have an Eſtate in Fee till the 10*s.* paid.

3 Lev. 132. adjudged. A Copyholder in *Borough Engliſh* ſurrenders to the Uſe of himſelf for Life, and after to the Uſe of his eldeſt Son and his Heirs, if he lives to Twenty-one; provided and upon Condition, that if he dies before Twenty-one, that it ſhall remain to the Surrenderer and his Heirs; though by the firſt Words it ſeems to be a Condition precedent, yet upon all the Words taken together it is not, but a Surrender to the Uſe of the eldeſt Son, to be defeated upon a Condition ſubſequent.

Lit. ſ. 350. Co. Lit. 216, 217. If *A.* makes a Leaſe for five Years to *B.* upon Condition, that if *B.* pays him 10*l.* within two Years, that then he ſhall have a Fee-ſimple in the Lands, and makes Livery and Seiſin to *B.* (*a*) this paſſes the Freehold immediately, and *B.* has a Fee conditional; becauſe if the Freehold was not to veſt in *B.* till the Condition performed, it would be difficult to determine in whom the Freehold lay; for Conditions may be inſerted in ſuch Deeds as are perfected privately, which might prove greatly prejudicial to Strangers.

(*a*) But if *A.* leaſes Land to *B.* for five Years, and *B.* enters, and after *A.* by Deed grants to *B.* that if he pays to *A.* 10*l.* during the Term, that then he ſhall have the land to him and his Heirs; this enures as an executory Grant, by increaſing the Eſtate, but the Fee-ſimple paſſes not before the Condition performed. Co. Lit. 217. b.

Co. Lit. 217. b. But in Caſe of a Leaſe for Life, with ſuch a Condition, the Freehold paſſes not before the Condition performed, becauſe the Livery may preſently work upon the Freehold.

Co. Lit. 217. So if a Man grants an Advowſon, &c. (which lie in Grant) for Years, upon ſuch Condition, the Grantee ſhall have no Fee till the Condition performed.

Co. Lit. 210. b. If *A.* leaſes to *B.* for Years, upon Condition, that if *B.* pays Money to *A.* or his Heirs at a Day, that *B.* ſhall have the Fee, and before the Day *A.* is attainted of Treaſon and executed, now though the Condition became impoſſible by the Act and Offence of *A.* yet *B.* ſhall not have a Fee, becauſe a precedent Condition to increaſe an Eſtate muſt be performed; and (*b*) if it becomes impoſſible, no Eſtate ſhall ariſe.

(*b*) But it has been ruled in Equity, where the Condition of a Bond was to ſettle certain Lands, in ſuch a Manor, by ſuch a Day, though the Obligor died before the Day, and ſo the Bond ſaved at Law, and yet the Agreement ſhould be executed in *Specie*, and ſo decreed in Chancery, between *Hotham* and *Ryland*, Eq. Abr. 18.

Vern. 79, 167. Alſo in Equity, with reſpect to Conditions precedent and ſubſequent, the prevailing Diſtinction ſeems to be, to relieve againſt the Breach or Non-performance, whether the Condition be precedent or ſubſequent, where a Compenſation can be made.

Chan. Ca. 89. *Wallis* and *Crimes*. Mod. 307. S. C. cited. As if *A.* conveys Lands to *B.* &c. and their heirs upon Truſt that if *C.* the Son of *A.* within ſix Months after the Death of *A.* ſhould ſecure to Truſtees 500*l.* for the younger Children of *C.* then after ſuch Security given, to convey to *C.* and his Heirs, and until the Time for giving ſuch Security, in Truſt for the eldeſt Son of *C.* and in Default of ſuch Security to convey to ſuch eldeſt Son and his Heirs, if *C.* dies before any ſuch Security given, yet this Condition, though precedent, being only in Nature of a Penalty, the Intent of the Truſt ſhall be regarded, which was to ſecure 500*l.* for the younger Children.

The Teſtator deviſed his Eſtate to the Defendants, in Truſt for the Uſe and Benefit of the Plaintiff; but declared his Will to be, that the Plaintiff ſhould have no Benefit of the Deviſe, unleſs the Plaintiff's Father ſhould ſettle on the Plaintiff two full Thirds of the Eſtate ſettled on the Father on his

his Marriage; and in Default thereof, the Eſtate to the Defendants; the * Father made no Settlement on the Plaintiff, but deviſed all his Eſtate to him for Life, but ſubject to the Payment of Debts; it was admitted, and ſo adjudged by the Court, that this Eſtate was executed in the Plaintiff by the Statute of Uſes, and conſequently that this is a Condition ſubſequent; yet the Court declared, that though Conditions ſubſequent, which are to deveſt an Eſtate, need not be literally performed; yet, even in ſuch Caſe, if the Party cannot be compenſated in Damages, it would be againſt Conſcience to relieve; and therefore ordered the Maſter to examine the Value of the Eſtate deviſed, and the Amount of the Debts which that Eſtate was charged with, and to report to the Court, whether after Debts paid there would be two full Thirds of the Father's Eſtate, which was ſettled on him in Marriage, left to the Plaintiff; and upon a Re-hearing, would not vary the former Order, declaring that the Difference was, whether this Caſe lay in Compenſation or not; and if a Compenſation was made, he would relieve againſt the Breach of the Condition; but in Caſe (*a*) a ſufficient Compenſation was not made, he would then conſider farther of it.

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Vern. 79. 167. *Popham* and *Bamfield*. 2 Vern. 222. S.C. cited, as a Caſe in which there was Relief. 2 Vern. 338. S. C. cited as a Condition which was relieved againſt.

(*a*) That in all caſes of Forfeitures and Breaches of a Condition, ſome Kind of a Compenſation may be made; therefore this rule is to be extended no farther than where Compenſations have been allowed, and not to the Forfeitures by a Tenant for Life, making a Feoffment, levying a Fine, ſuffering a Recovery, wilful Forfeitures by Copyholders, &c. Preced. Chan. 570.

If a Feme Covert, having Power by Will to deviſe Lands, deviſes them to her Executors, to pay 500*l.* out of them to her Son, provided that if the Father gives not a ſufficient Releaſe of certain Goods to her Executors, that then the Deviſe of the 500*l.* ſhould be void, and go to the Executors, and after her Death a Releaſe is tendered to the Father, and he refuſes, yet upon making the Releaſe after, the Money ſhould be paid to the Son; for it was ſaid to be the ſtanding Rule of the Court, that a Forfeiture ſhould not bind where a Thing may be done after, or a Compenſation made for it; as where the Condition is to pay Money, &c. and though it is generally binding, where there is a Deviſe over, yet here, it being to go to the Executors, it is no more than the Law implies.

2 Vent. 352. *Cage* and *Ruſſel* adjudged in Canc.

If a Man deviſes Lands to *J. S.* upon Condition to pay 20,000*l.* to his Heir at Law, *viz.* 1000*l. per Ann.* for the firſt ſixteen Years, and 2000*l. per Ann.* after, till the whole ſhould be paid, and the Heir enters for the Non-payment of one of the 1000*l. per Ann. J. S.* ſhall be relieved upon Payment of the 1000*l.* together with the Intereſt, from the Time it became payable, without any Deduction for Taxes; the Court declaring, that where-ever they can give Satisfaction or Compenſation for the Breach of a Condition, they can relieve.

Salk. 156. pl. 7. *Grimſton* and Lord *Bruce*. 2 Vern. 594. S. C.

If one having three Daughters, deviſes Lands to the eldeſt, upon Condition that ſhe, within ſix Months after his Death, pay certain Sums of Money to her two other Siſters; and if ſhe failed, then he deviſed the Land to his ſecond Daughter, on the like Condition, &c. the Court may inlarge the Time for Payment, tho' the Lands are deviſed over; and in all Caſes that lie in Compenſation, the Court may diſpenſe with the Time, though even in Caſe of Condition precedent.

2 Vern. 222. *Woodman* and *Blake*.

So where one deviſed Lands to *J. S.* his Kinſman, paying 1000*l.* a-piece to his two Daughters, who were his Heirs at Law, and *J. S*, made Default, and the Daughters recovered in Ejectment, yet *J. S.* was relieved on Payment of Principal, Intereſt, and Coſts, though it was inſiſted, that this was a Condition precedent, and to the Diſinheriſon of the Heir at Law, and in Favour of (*b*) a voluntary Deviſee.

2 Vern. 366. *Barnardiſton* and *Fane*

(*b*) *Vide* Vern. 456. where it was given as one Reaſon, why the Court refuſed to relieve, that the Party, who had not performed the Condition, was a voluntary Deviſee.

A Man

*Page 408 Skin. 285. *The Earl of Salisbury* and *Bennet* decreed *Hil.* 2. W. & M. by the Lords Commissioners.

*A Man having two Daughters, devised to each of them 20,000*l.* payable at the Age of Twenty-five Years; but if they, or either of them, married before the Age of Sixteen; or if the Marriage were without the Consent of their Mother and Trustees, then they should loose 1000*l* of the Portion, which should go to his other Children; one of them married before the Age of Sixteen but with the Consent of all the Parties; and it was held, that the Time, being only a Circumstance, might be dispensed with.

2 Vern. 223. S. C. where it is said that the Father treated with the Lord *Salisbury* about the Marriage, though he died before it was had, and there decreed that both Parts of the Condition need not have been performed, the Father by such Treaty having himself dispensed with it. But in 2 Vent. 365. S. C. which came on *Pasch.* 36 Ca. 2. it is said that my Lord Keeper was of Opinion that both Parts ought to be observed.

3 Chan. Ca. 129. *Bertie* and Lord *Faulkland.* Salk. 231. pl. 9. S. C. where it is said, that the Decree was reversed in the House of Lords. 2 Vern. 333. S. C. where it is said that the Matter was ended there by compromise. *Vide* Title *Marriage*, what Conditions relating thereto shall be void; and Vern. 20, 83, 223, 354, 412. 2 Vern. 223, 293, 333, 357, 452, 572, 573, 580, 721. Prec. Chan. 227, 348, 562. 12 Mod. 182. Gilb. Eq. Rep. 26, 27. Will. Rep. 284. pl. 67. 2 Will. Rep. (626.) (628.) 3 Will. Rep. 65. pl. 16. Comyns 726. pl. 281, &c. Cases Temp. Talb. 214, &c.

A. devised his Lands to Trustees for three Years, and if within the three Years there happened a Marriage between *G.* who was a distant Relation, and of the same Blood with the Testator, and *W.* his Niece, and Heir at Law, then to *W.* for Life, Remainder to her first Son, &c. in Tail Male, by *G.* to be begotten; but if the Marriage should not take Effect within the three Years, or if the Marriage should be before the Years of Consent, and not ratified when of competent Age, then to *F.* in Tail, who was likewise a remote Relation of the Testator, but not of the same Blood; the Marriage between *G.* and *W.* did not take Effect, though several Proposals were within the Time made by her Friends to his Guardians, but not accepted by them; and though she herself had pressed the Match as far as the Modesty of her Sex would permit. She afterwards married the plaintiff, and by her Bill prayed the Benefit of the Devise; the Condition being answered by her, to what she was capable of doing, having married a Person, as was urged, equal in Circumstances, &c. to *G.* but her Bill was dismissed by the Advice of *Holt* and *Treby* Ch. Justices.

(K) Of void Conditions, being against Law.

2 H. 4. 9. Co. Lit. 206. b. Rol. Abr. 418. (*a*) 2 Vent. 109. Rol. Abr. 417. Cro. Jac. 248, 274. Cro. Car. 180. Lit. Rep. 135.

IF a Feoffment be made, on Condition to do a Thing that is *malum in se*, as to kill or rob *J. S.* the Estate of the Feoffee is absolute, and a Bond made on such Condition is void; for the Estate settled in the Feoffee shall not be defeated, nor shall a Bond be forfeited for the Forbearance of such an Action; and (*a*) an Obligee is punishable for taking such a Bond to do a Thing against Law.

If a Parson, on his being presented to a Living, gives a Bond, conditioned to resign, such Condition may be lawful, and not against 31 *Eliz. cap.* 6. of Simony; as (*b*) if the Condition be to restrain the Incumbent from Non-residence, a vicious Life, or that he shall resign when the Patron's Son, Kinsman or Friend, become qualified to take the Living.

Hutton 111. Jones 220. 2 Keb. 445. Sid. 389. Raym. 175. Comp. Incumb. 40, 41. Stra. 227, 534. Prec. in Chanc. 182. Sayer 141. 4 Term Rep. 78. 4 Term Rep. 359. (*b*) So a Bond conditioned for the Payment of Money to the Son of the last Incumbent, so long as he should continue a Student in *Cambridge* unpreferred, &c. is good. Noy 142.——So where a Patron took Bond of his Presentee, to pay 5*l.* Yearly to the Wife and Children of the last Incumbent. Earl of *Sussex*'s Case cited by *Foster* Judge. Noy 142.——But Comp. Incumb. 39. These Charitable Resolutions, if any such there were, do not seem to be Law.‖

‖ We should conceive, if such Bonds were to be given, by Agreement between the Patron and Parson, before Presentation, they would be void in Law. *Aliter*, if voluntarily given after Presentation, Institution and Induction.

But

* But if the Condition be for a Leaſe of the Glebe or Tithes, or a Sum of Money, this is clearly Simony within the Statute; and therefore the Condition void, being againſt Law. *Page 409

Vide the Authorities *ſupra*, and Comp. Incumb. 39, 40. Comb. 394.—That the Condition muſt be averred to have been entered into for a ſimoniacal Purpoſe. *Vide* Cro. Jac. 274. Hutt. 110. Moor 64.—And where a ſpecial Averment may be, that an Obligation was made for a Matter againſt Law. Leon. 73, 203. Godb. 29. Moor 158.

Alſo in Equity it has been ruled, that where a Bond of Reſignation is general, as to reſign upon Requeſt, ſome ſpecial Reaſon muſt be ſhewn to require a Reſignation; for though ſuch Bonds may in Strictneſs of Law be good, yet if they are made an ill Uſe of, as by extorting Money from the Incumbent, &c. (*a*) Equity will grant a perpetual Injunction againſt them. 2 Chan. Ca. 399. Vern. 411, 131. Eq. Abr. 86, 87.

(*a*) That the Ordinary may refuſe to accept of a Reſignation made by the Reſtraint of ſuch Bonds. Comp. Incumb. 31.

If the Sheriff of a County makes *B.* his Under-Sheriff, and takes a Bond or Covenant from him, that he will not ſerve Executions above 20*l.* without his ſpecial Warrant, this is a void Covenant, becauſe it is againſt Law and Juſtice, inaſmuch as when he is made Under-Sheriff, he is liable by the Law to execute all Proceſs, as well as the ſheriff is. Rol. Abr. 417. Hob. 12. S. C. Moor 856. pl. 1175. Godb. 212.

Brownl. 65. S. C. in which laſt Book it is ſaid to be otherwiſe, where he voluntarily covenanted; & *vide* Title *Sheriff*. and 2 Brownl. 282.*

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* *Sed qu.* If even this is Law?

But if an Under-Sheriff covenants with the High-Sheriff to diſcharge and ſave him harmleſs from all Eſcapes of Priſoners arreſted by the Under-Sheriff, or any by him appointed, this is a good Covenant; for ſince the High-Sheriff transfers his Authority, it is but reaſonable he ſhould take Security for the faithful Execution of it; and there is nothing intended againſt Law, but rather to prevent than connive at Eſcapes. Hob. 12, 13. Moor 856. pl. 1175. Godb. 212. Brownl. 65. reſolved *per Curiam*.

If the Condition of an Obligation be, that if the Son of the Obligor, before a certain Time, do as Apprentice, Servant or Maſter, or otherwiſe, uſe the trade of an Haberdaſher within the County of *K.* then if the Obligor do, upon Requeſt, pay 10*l.* to the Obligee, the Bond ſhall be void; this Condition is againſt Law, for a Man (*b*) ought not to be reſtrained (*c*) from his Trade and Livelihood; and if he might be reſtrained for a certain Time or (*d*) Place, he might be reſtrained for longer Time or more Places. Cro. El. 872. *Colgat* and *Batchelor* adjudged. Owen 143. S. C. adjudged, and ſaid by *Anderſon*, that he might as

well bind himſelf that he would not go to Church. Noy. 98. S. C. cited. Moor 115. pl. 259. S. P. adjudged 242. pl. 379. S. P. adjudged. 2 Leon. 210. S. P. adjudged. 3 Leon. 217. S. P. adjudged. March 191. S. P. 3 Lev. 241. 2 Show. 345. S. P. adjudged, *cont.* in *B.* where the Condition was that he ſhould not uſe the Trade of a Taylor in *Exeter*; but after, upon a Writ of *Error*, *in Cam. Scacc.* reverſed by the unanimous Conſent of all the Juſtices; becauſe this being a penal Obligation to prevent the Exerciſe of a Trade, though in a particular Place only, it is void; otherwiſe of an *Aſſumpſit*, in which Damages only are to be recovered. (*b*) For this *vide* 11 Co. 53. b. Dan. 42. and Title *Trade*. (*c*) But where a Man may, upon a Conſideration, be reſtrained by Covenant or *Aſſumpſit*, becauſe all being to be recovered in Damages, the Jury may aſſeſs them, with regard to the Conſideration. *Vide* 3 Lev. 242.——But *ſecus* of a Bond, Covenant or *Aſſumpſit* to pay Money, if he trades, &c. becauſe then the whole Sum muſt be recovered, be the Damage or Conſideration never ſo ſmall. 3 Lev. 242. and *vide* Allen 67. March 103 †. (*d*) That a Man may reſtrain himſelf by Bond, from trading in a particular Shop or Street. Comb. 122.

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† Yet *qu.* If there was a valuable Conſideration paſſed from the Plaintiff to the Defendant?

So

Show. 2. Comb. 121. *Thompſon* and *Harvey* adjudged. Holt 674.

So if the Condition of a Bond is, that the Obligor ſhall not buy any Sheeps-Trotters of any Perſon of whom the Obligee had or ſhould buy, this is void, being a Reſtraint of Trade, and tending to a Monopoly.

Cro. Eliz. 705. *Debſon* and *Crew* adjudged upon Demurrer, without Argument. 1 Term Rep. 671. *Page 410

If the Condition of an Obligation be, that the Obligor ſhall be always ready to give Evidence, and to teſtify the Truth in any of the King's Courts, in all things which ſhall be demanded of him, &c. and that he ſhall not hurt, endanger or moleſt the Obligee in his Lands or Goods, *ratione alicujus rei*, this is a Good Condition, and not againſt Law; for as to the firſt Part, * if he had not been obliged thereto, he had been compellable by Law; and by the laſt Part it ſhall be intended that he ſhall not hurt, &c. tortiouſly, but not to reſtrain him from purſuing the Obligee for Felony, or other juſt Cauſe.

Vent. 109. *Maſon* and *Watkin*, adjudged upon the firſt Opening; and the court recommended it to Serjeant *Paulet*, who was a Judge in *Wales*, where the Plaintiff lived, to have him proſecuted for making ſuch Bond.

If *A.* is impriſoned for Felony, and *B.* bound by Recognizance to proſecute, if *B.* after gives Bond to *C.* conditioned that *B.* will not give Evidence againſt *A.* the Condition is againſt Law, and the Bond void.

18 E. 4. 28. Rol. Abr. 417. Carter 229. Allen 60. S. P.

Condition to do a Thing which will be Maintenance, is void; as to ſave harmleſs from ſuch an Appeal of Robbery, as *B.* hath againſt him.

43 E. 3. 6. Rol. Abr. 418.

Leaſe for Life, upon Condition, that if the Leſſee marries without Licence, he ſhall re-enter, is (*a*) good Condition.

(*a*) So is a Condition to renounce an Adminiſtration. 15 E. 4. 30. Rol. Abr. 417.

Rol. Rep. 334. *per* Coke.

If the Condition of an Obligation be, not to ſell the Apparel of the Wife, this is good; though it was objected it was againſt Law, becauſe againſt the Liberty of the Baron.

Rol. Rep. 334. Co. Lit. 206.

So if a Man gives Bond to a Stranger, conditioned for the Payment of (*b*) 20*l.* yearly to his Wife, this is good.

(*b*) But if the Condition be to enfeoff his Wife, it is void, becauſe againſt a Maxim in Law, and yet the Bond is good. Co. Lit. 206. b.

(L) Of repugnant Conditions.

Co. Lit. 223. 10 Co. 38. b.

A Condition upon a (*c*) Feoffment in Fee not to (*d*) alien, is void, becauſe it is repugnant to the Eſtate.

(*c*) So on a Grant or Deviſe. Co. Lit. 223.——But he may be reſtrained for a particular Time, or from alienating to a particular perſon. 2 Leon. 82. 3 Leon. 182. (*d*) So a Condition that the Wife ſhall not be endowed, or the Huſband be Tenant by the Courteſy is good. 22 E. 3. 19 b. Rol. Abr. 418. 6 Co. 41. S. P.

Dav. 34. Rol. Abr. 418.

So of a Condition, upon a Feoffment in Fee, that his Daughter ſhall not inherit; for this is repugnant to the Eſtate, and an Attempt to eſtabliſh a different Kind of Inheritance than is allowed of by Law.

But a Gift in Tail, on Condition that the Donee ſhall not diſcontinue or alien in Fee-tail, or for (*e*) Life, is good; for theſe are tortious Acts, which may well be reſtrained by Condition. 10 Co. 39. Lit. Sect. 362. Co. Lit. 223.

Moor 39. pl. 126. Vent. 322. Cro. Eliz. 35. Leon. 292. (*e*) Either for the Life of another or his own Life; for though an Eſtate for his own Life be Law, yet the Condition is good, becauſe the Reverſion is in the Donor. Co. Litt. 223.

But (*f*) a Liberty inſeparable from the Eſtate cannot be reſtrained by Proviſo. Hence it is, that an Eſtate-tail hath (*g*) five eſſential Incidents, none of which can be taken away by any Condition. 1ſt, To be diſpuniſhable of Waſte. 2dly, That the Wife ſhall be endowed. 3dly, That the Huſband ſhall be Tenant by the Courteſy. 4thly, That *Tenant in Tail (*h*) may ſuffer a common Recovery. 5thly, That collateral Warranty, (whether with or without Aſſets, if made before 4 *Ann. cap.* 16.) or lineal with Aſſets, may bar it. (*f*) Hob. 170. (*g*) For which *vide* Co. Lit. 224. *Page 411 6 Co. 41. 1 Co. 86. 9 Co. 128. b.

Moor 601, 633. 1 Co. 14. a. 85. a. 10 Co. 38. b. Cro. Jac. 697. Jones 58. Vent. 322. (*h*) And according to 10 Co. 38. b. Rol. Abr. 418. cannot be reſtrained from making a Leaſe, within 32 H. 8. c. 28. or levying a Fine, within 4 H. 7. c. 24. But Co. Lit. 223. b. cont. For the Power of making Leaſes is not incident to his Eſtate, but given to him collaterally by the Statute.

A. made a Settlement of his Lands on his Son in Tail, but took a Bond from him not to dock the Entail; on a Bill to be relieved, it was ruled in Equity, that the Bond was good, and the Bill diſmiſſed with Coſts, though the Alienation was made by the Iſſue; for if the Son had not agreed to give the Bond, the Father might have made him only Tenant for Life. 2 Vern. 233. *Freeman* and *Freeman*.

But where *A.* gave Lands to *B.* in Tail, Remainder to *C.* his Brother in like Manner, and made them enter into Recognizances to each other not to alien; and it was decreed in Chancery, that theſe Recognizances ſhould be delivered up and cancelled, as creating a Perpetuity. Moor 809, 810. Pool's Caſe adjudged, by the Advice of *Coke* Ch. Juſt.

So where *A.* ſettled his Land upon his Daughter in Tail, and took a Bond from her not to commit Waſte, the Daughter levied a Fine, and committed Waſte, and the Bond being put in Suit, Equity relieved againſt it. 2 Vern. 351. *Jervis* and *Bruton*.

A Gift in Tail, upon Condition that the Donee may alien for the Profit of the Iſſue, is a good Condition. 46 E. 3. 4. b. Co. Lit. 224. S. P.

If a Feoffment be made upon Condition that the Feoffee ſhall not alien in Mortmain, this is a good Condition, (*i*) becauſe ſuch Alienation is prohibited by Law, and regularly (*k*) what is prohibited by Law, may be prohibited by Condition. Co. Lit. 223. b. (*i*) So if a Feoffment be made to Baron and Feme, upon Condition that they ſhall not alien, this is good to reſtrain any Alienation by Deed, becauſe ſuch Alienation is tortious and voidable; but to reſtrain their Alienation by Fine, is repugnant and void. Co. Lit. 224. a. (*k*) As the Alienation of an Infant, or of a Biſhop without his Chapter. Co. Lit. 224. a.

(*l*) If *A.* hath Iſſue two Sons *B.* and *C.* and (*m*) covenants to ſtand ſeiſed to the Uſe of himſelf for Life, Remainder to *B.* in Tail, Remainder 1 Co. 84. a. *Corbet*'s Caſe

adjudged, though *B.* had no Iſſue at the Time of the Breach of the Condition. Moor 601. pl. 831. S. C. 2 And. 134. S. C. adjudged. (*l*) Sir *Anthony Mildmay*'s Caſe, S. P. 6 Co. 40. adjudged. Moor 632. pl. 868. the Court divided. Hob. 170. cited *Cholmley* and *Humble*, S. P. Cro. Eliz. 379. adjudged. Moor 592. pl. 799. adjudged. And. 346. adjudged. 1 Co. 86. a. cited. (*m*) So in Caſe of a Deviſe, *Germin* and *Aſtcot*, Moor 364. pl. 495. adjudged, and agreed by all the Judges of *England*, that the Proviſo was repugnant. And. 186. debated, but no Judgment. 2 And. 7. adjudged by all the Juſtices. 4 Leon. 83. adjudged *cont.* But 1 Co. 85. cited to have been adjudged, as in Moor and And. & *vide* Cro. Jac. 696. Jones 58. Godb. 102. Moor 543. pl. 721. and *vide* Poph. 71. Brownl. 45. Godb. 351. 2 Rol. Rep. 467, 477, 484.

to *C.* in Tail, *&c.* provided that if *B. &c.* or any of the Heirs Male of his Body ſhall alien, *&c.* the Uſes to him limited ſhall ceaſe only in reſpect of him, as if dead, *&c.* this *Proviſo* is repugnant, impoſſible, and againſt Law; for the Eſtate of the Tenant in Tail does not ceaſe by his Death, but by his Death without Iſſue.

7 H. 6. 43. b. Co. Lit. 206. S. P. *& vide* Cro. Eliz. 35, 107.

If a Man makes a Feoffment in Fee, provided that the Feoffor ſhall have the Profits, this Condition is void, *(f)* becauſe it is repugnant to the Grant.

(f) So if there be a Leaſe to three during their Lives, provided that one ſhall not take the Profits during the Life of the other two. 2 Leon. 132. adjudged, *& vide* Hob. 170. Bulſt. 42.

*Page 412

Co. Lit. 146. a.

If a Man grants a Rent-charge out of the Manor of *D.* (in which the Grantor hath nothing) with a *Proviſo* that it ſhall not charge his Perſon (*g*) * though the Repugnancy does not appear in the Deed, yet the *Proviſo* is void, elſe it would take away the whole Effect of the Grant.

(*g*) So if he grants a Rent out of Land to which he hath Title, without a Clauſe of Diſtreſs provided that it ſhall not charge his Perſon, this is void and repugnant, if he gives not Seiſin upon the Grant. 6 Co. 58. b.

Co. Lit. 146. a.

If a Man grants a Rent-charge out of Land to another for Life, provided it ſhall not charge the Land, though the Grantee might notwithſtanding charge his Perſon, yet the *Proviſo* is repugnant, becauſe the Land is expreſsly charged.

Co. Lit. 146. b. 6 Co. 41. b. S. P. (*b*) This muſt be underſtood a Caſe put at Common Law, for the Executors of ſuch Tenant for Life may at this Day diſtrain, *per* 32 H. 8. c. 37.

If a Man grants a Rent-charge out of Land to another for Life, provided it ſhall not charge his Perſon, and the Grantee dies, his Executors may bring Debt for the Arrears; (*b*) for they cannot diſtrain, becauſe the Eſtate in the Rent is determined, and the *Proviſo* cannot leave the Executors without Remedy.

Co. Lit. 378. b. 1 Co. 84. Jones 59. *& vide* Moor 450. Lev. 77. *Vernon* and *Alſop*, adjudged upon Demurrer to the Defendant's Plea, that he did not pay 2*s.* at one of the Days.

If a Man makes a Leaſe for Years, upon Condition, that if the Leſſor grants over his Reverſion, the Leſſee ſhall have a Fee, if the Leſſor grants his Reverſion by Fine, the Leſſee ſhall not have a Fee; for when the Fine transfers the Fee to the Conuzee, it would be abſurd and againſt Reaſon, that the ſame Fine ſhould work an Eſtate in the Leſſee.

If an Obligation is conditioned for the Payment of 7*l.* by 2*s. per* Week till 7*l.* is paid, and that if he fails of Payment of the 2*s.* at any of the Days on which it ought to be paid, that the Obligation ſhall be void, or elſe remain in Force; this Condition ſhall be taken diſtributively *reddendo ſingula ſingulis, viz.* that if he pays the 7*l.* the Obligation ſhall be void, but that if he fails in Payment of the 2*s.* at any of the Days, it ſhall be in full Force; for the Obligation ſhall not be taken to be of no Effect, if by any Means it may be made good.

Raym. 68. S. C. adjudged, becauſe the Condition is ſenſeleſs, and therefore the Obligation is ſingle.
Sid. 105. S. C. adjudged, and that the Obligation was ſingle, and the Condition repugnant and void.

Jones 180. *Eaton* and *Butler*, adjudged *per totam Curiam, cont' Dodderidge.* Palm. 553. S. C.

If the Condition of an Obligation be, *That if the Obligor ſhall die without Iſſue, that then if he by his laſt Will, or otherwiſe in his Life time, ſhall lawfully aſſure and convey certain Lands to the Obligee and his Heirs, that then the Obligation ſhall be void,* &c. This Condition is not repugnant, but ſhall be conſtrued according to the Intention of the Parties, to be collected out of the Words of the Condition*.

* See alſo *ante* 398. a.

(M) Of impossible Conditions.

IF the Condition of a Bond be impossible at the Time of the Making thereof, as for the Obligor to go to *Rome* the next Day, the Bond is single, for it is the same as if there were no Condition at all; and a Feoffment on Condition that the Feoffee go to *Rome* on a Day, is absolute, for the Condition is repugnant to the Feoffment; but (*a*) if an Estate be * to arise, or a Duty to commence on a precedent Condition that is impossible, they can never have effect. Co. Lit. 206. Sav. 96. Leon. 189. 14 E. 4. 3. Bro. 155. *Page 413

(*a*) As if a Man leases for Life upon Condition, that if he goes from the Church of *St. Peter* in *Westminster*, to the Church of *St. Peter* in *Rome*, within three Hours, to have a Fee, which is impossible; yet because it is precedent no Fee can accrue. Co. Lit. 206. Rol. Abr. 420.

If a Woman makes a Feoffment to a Man that is married to another, upon Condition that he shall marry her, this is a good Condition; for his Wife may die, and then he may marry her. Bro. Tit. Condition 119.

If the Condition of an Obligation be, That the Obligor shall assign to the Obligee a Commission of Bankrupts, this is an impossible Condition, and therefore void, and the Obligation single, for it is impossible to assign the Commission. But *Quære.* Rol. Abr. 419.

If the Condition be *quod debet plure cras*, this is a good Condition; for though the Obligor is not certain thereof, yet if he will take this upon himself, and run the Hazard, he may at his Peril, for this is not impossible of itself. 22 E. 4. 26. Rol. Abr. 420.

So for the same Reason, if the Condition be, That the *Pope* shall be at *Westminster* To-morrow, this is a good Condition. 22 E. 4. 26. Rol. Abr. 420.

If the Condition of an Obligation be to sustain and maintain an House in sufficient Repair, and so to leave it at the End of the Term; if at the Time of the Entry into the Bond the Timber was so rotten that it was impossible to sustain and maintain it in Repair, yet the Obligation is good. Sav. 96. *Wood* and *Avery* adjudged. 2 Leon. 189. S. C. adjudged, because tried by his own Act, but the Law never binds Men to Impossibilities.

(N) Of the Effect of a void, illegal or impossible Condition.

IF a Feoffment be made, on Condition that the Feoffee shall (*b*) go to *Rome* on a Day, the Estate of the Feoffee is absolute, and the Condition void and repugnant. Co. Lit. 206.

(*b*) Where the Condition must be performed as near the Intent of the Parties as may be. Co. Lit. 219.

So if the Condition of a Feoffment, &c. be possible at the making thereof, and afterwards becomes impossible by the Act of God, yet the Estate of the Feoffee shall remain. Co. Lit. 206. a.

As if the Condition of a Feoffment, &c. be, that the Feoffor, &c. shall appear in such a Court next Term, and the Feoffor dies before, the Estate of Co. Lit. 206. a.

(*b*) If the Condition be, That the Feoffee before such a Day shall reinfeoff the Feoffor, and before the Day the Feoffee dies, his Estate is absolute, because when the Condition becomes impossible by the Act of God, within the Time limited by the mutual Agreement of the Parties, the Feoffee is discharged; but *Quære* of this Case, for by the express Intent of the Feoffment, the Feoffee is but an Instrument to re-convey the Land of the Feoffor. *Vide* Co. Lit. 219. a.

of the Feoffee, &c. (*b*) is absolute because executed, and not to be redeemed back but by Matter subsequent.*

* *Viz.* The Performance of the Condition.

Co. Lit. 206. If the Condition of a Bond be impossible at the Time of the making thereof, as for the Obligor to go to *Rome* the next Day, the Bond is single, for it is the same as if there were no Condition at all.

Co. Lit. 206. a. But if the Condition of a Bond, Recognizance, &c. is possible at the making, but, before it can be performed, becomes impossible by the Act of (*c*) God, of the Law, or of the Obligee, &c. the Obligation is saved.

(*c*) Where the Condition of a Bond was to settle certain Lands in such a Manor by such a Day, and the Obligor died before the Day; though the Bond was saved at Law, yet Chancery decreed an Execution *in Specie*. Eq. Abr. 18.

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*Page 414 * (O) **Of the Breach of the Condition:** And herein,

1. What shall be a Breach thereof.

Hob. 24. IF a Man makes a Deed of Feoffment of Lands in several Counties, upon Condition the Feoffee shall reinfeoff him of all the Land within twenty Days after the Date, if Livery is made but of Part within the twenty Days, the Condition is not broken, though all is not conveyed within the twenty Days, according to the Letter of the Condition, which is intire ‡

‡ Yet see *post* the next Case but one.

Rol. Abr. 427. *Curtis* and *Marsh*. And. 42, 90. S. C. Moor 425. S. C. adjudged, That the first Grant was a Breach of the Condition, because every Division and Severance of the House and Land is within the Words and Intent of the Condition. If a Man leases an House and Land, upon Condition that the Lessee shall not Parcel out the Land, nor any Part thereof from the House, and after the Lessee leases the House and Part of the Land to *A.* and after leases the Residue of the Land to *C.* this is a Breach of the Condition; for by the Word *Parcelling*, is intended a Division or Separation of the Land from the House; and if the first Grant be not a Forfeiture, the second is.

Rol. Abr. 427. adjudged. If a Lessee of a House covenants not to lease the Shop, Yard, or other Thing belonging to the House, to one who sells Coals, nor that he himself will sell Coals there, and after he leases all the House to one who sells Coals he hath broken the Condition.

Moor. 823. If a Man makes a Feoffment in Fee of Lands in five Counties, upon Condition to re-assure, if the Re-assurance is made of the Lands in four Counties, but not in the fifth, the Condition is broken for the Lands in that County only.

Lit. Rep. 94, 105, 128. King *Henry* VIII. granted Lands to *A.* and his Heirs, provided that he and they *perpetuis futuris temporibus invenirent & sustinerent duos Capellanos in Ecclesia parochiali de* W. *ad orandum pro anima* H. 8. his Heirs and Successors, & *ad celebranda divina servitia & curam animarum Parochianorum*, and *A.* conveyed the Lands to *B.* and his Heirs, who appointed two Chaplains, one of which was not Resident, but neglected his Duty; this is a Breach

Breach, for the Eſtate was tied with the Condition, into whoſe Hands ſoever it came, and *B.* ought not only to have found Chaplains, but alſo to have taken Care that they had been ſuch as would have done their Duty.

If two Men, upon Sale of their Wives Lands, covenant that they and their Wives have good Right to convey Lands, and to make further Aſſurance; if one of the Women is under Age, this is a Breach, for ſhe hath not Power to convey the Eſtate according to the Covenant. 2 Jones 195. *Naſh* and *Aſhton* adjudged.

If a Man leaſes for Life, upon Condition that the Leſſee ſhall not do any Waſte, and after the Leſſee ſuffers the Houſe to fall for want of Covering and Reparation, which is not any Act of doing, but a Permiſſion; yet it ſeems that the Condition is broken, for the Words are, *any Waſte*, and ſuch Waſte is within the Statute of *Glouceſter*, which ſpeaks of doing Waſte; and it ſeems that the Permiſſion of the Houſe to fall, may properly be called doing of Waſte. Rol. Abr. 428. 2 Inſt. 145. Owen 92. S. P. adjudged.

But if a Man leaſe Land, upon Condition that the Leſſee ſhall not do Waſte, and after a (z) Stranger does Waſte, yet this is not any Forfeiture, becauſe a Condition ſhall be taken ſtrictly. Rol. Abr. 428. *Baſpoole* and *Long*, adjudged by three Judges. Leon. 64. S. P. 4 Leon. 39. S. P. (z) So if the Condition of an Obligation be, That I ſhall not continue ſuch an Action, and my Attorney without my Privity continues it, this is no Breach. Cro. Jac. 525. *per Dodderidge* and *Houghton*. 2 Rol. Rep. 63. By *Montague* and *Houghton*, *cont' Dodderidge*, who ſaid, The Act of my Attorney is my own Act.*

* Beſides he might have releaſed the Action.

* If a Man makes a Feoffment in Fee, reſerving Rent upon Condition that if the Rent be behind, and no Diſtreſs to be found upon the Premiſſes, to re-enter; if the Rent be behind, and no Diſtreſs but a Cupboard in a Houſe locked, ſo that the Feoffor cannot come at it, this is a Forfeiture, for when the Place is not open to the Diſtreſs, it is all one as if there had been no Diſtreſs there. *Page 415 Rol. Abr. 428. adjudged upon a ſpecial Verdict.

A. made a Feoffment in Fee to the Uſe of himſelf and his Heirs, and 21 *H.* 8. deviſed the Uſe to *B.* his younger Son, and the Heirs Male of his Body, Remainder to *C.* his eldeſt Son in Fee, provided *B.* or any of his Iſſue ſhould not diſcontinue or (a) alien, but only to make a Jointure for a Wife; and *B.* after the Statute of 27 *H.* 8. *c.* 10. leaſed for three Lives, purſuant to the Statute of 32 *H.* 8. *c.* 28. and after levied a Fine *ſur Conuzance de Droit come ceo, &c.* with Proclamations, to the Uſe of himſelf and his Wife, and the Heirs Male of their two Bodies, the Remainder to himſelf in Tail Male, the Remainder to the right Heir of *A.* this was a Breach of the Condition, for he might have made an indefeaſible Jointure by Fine *ſur Grant & Render*; but by this Fine the Tail created by the Deviſe is docked; and if he had Iſſue by a former Wife, they ſhould not inherit. Leon. 298. *Rudiard* and *Miller* adjudged, tho' it was averred this Fine was levied to make a Jointure to his Wife. Sav. 76, 77. S.C. adjudged, becauſe other Uſes are limited by the Fine than what were before, *viz.* the Fee is limited to the Heirs of *A.* whereas it was before limited to *C.*

(a) What ſhall be ſaid an Alienation. 2 Leon. 82. 3 Leon. 182.

If there be Leſſee for Years, upon Condition not to deviſe it to any Body but only to his Sons or Daughters, and he deviſes it to (b) a Stranger, and dies, and his Executor never conſents to the Deviſe, yet (c) this is no Forfeiture, becauſe he hath (d) done all (e) that was in his Power to paſs it by the Will, and this puts it in the Power of an Executor to execute it. Rol. Abr. 428. Cro. Jac. 74, 75. S. C. and S. P. by three Judges againſt one.

(b) So if he deviſes it to his Executors, and they accept the ſame only as Executors. 3 Leon. 67. 4 Leon. 5.—So if he deviſes it to his Executors for Payment of Debts. Rol. Abr. 428, 429. (c) A Woman covenants not to do any Act to diſcontinue or countermand an Action, and after ſhe marries, *per quod*, &c. this is a Breach. Gouldſ. 59. (d) Q. If extended upon a Judgment or Recognizance againſt him. And. 124. 3 Leon. 3. (e) *Secus* if he deviſes it, if the Leſſor will aſſent; for there nothing paſſes till the Aſſent of the Leſſor obtained. Cro. Eliz. 60.

If

Rol. Abr. 429. Cro. Eliz. 215. S. C. (a) But *per* Stile 483. A Deviſe is no

If Leſſee for Years, (*a*) upon Condition not to alien without the Aſſent of the Leſſor, makes his Executor, and (*b*) deviſes it to him, and the Executor enters generally, the Teſtator not being indebted to any Body, this is a Forfeiture of the Condition.

Breach of ſuch Covenant. (*b*) Where a Deviſe ſhall be a Breach of a Condition not to alien. Dyer 45. b. *Taunton*'s Caſe. Owen 14. Cro. Eliz. 330. Gouldſ. 49, 184. Poph. 106. & *vide* Cro. Eliz. 60. So where the Condition is, That the Leſſee ſhall not alien during his Life, and he deviſes it, for the Deviſee ſhall be ſaid to be in by Aſſignment made by the Deviſor in his Life-time. Dyer 45. 4 Co. 119.

Rol. Abr. 429.

If there be a Grantee of a Reverſion upon Condition not to grant it over to *J. S.* by his Deed, and he grants the Reverſion to *J. S.* by his Deed, though the Leſſee never attorns, yet this is a Forfeiture, becauſe he hath done his endeavour to grant it, and put it in the power of a Stranger to perfect it.

Hob. 304. Hut. 40. Rol. Abr. 429. S. C. adjudged.

If the Condition of an Obligation be, That he ſhall not be aiding and aſſiſting to *E.* in any Action to be proſecuted againſt *L.* the Obligee, and after the Obligor joins in a Writ of Error with *E.* and another againſt *L.* upon a Judgment in Treſpaſs againſt them three, which is apparently erroneous; this is not any Breach of the Condition, for this is not properly an Action, but a Suit to diſcharge himſelf of a tortious Judgment, in which they ought all to join.

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* If a Man deviſes Lands, upon Condition that if he does not (*c*) permit the Executors of *F.* to take the Goods that then were in the Houſe, the Eſtate ſhould be void, *&c.* (*d*) a Denial by Parol is not any Breach of the *Proviſo*, but it ought to be an Act done, as the ſhutting the Door againſt the Executors, or laying his Hands on them to reſiſt them, or ſuch like Acts; ſo that by Reaſon of any ſuch Act he did not permit them to take or carry the ſaid Goods according to the *Proviſo*.

2 Co. 91. Rol. Abr. 430, 431. 2 Brownl. 277. S. C. adjudged.

(*c*) But the Condition of a Bond being to permit the Obligee quietly to take, reap, and carry away Corn, coming upon the Land with Staves, and prohibiting the Obligee by Word, And. 131. was adjudged a Breach. (*d*) Jones 169. & *vide* Rol. Abr. 434. pl. 12. Buſt. 139.

Leon. 92. *Hanington* and *Rider*. And. 162. Owen 6, 7. Gouldſ. 59. S. C. adjudged.

If *A.* leaſes Lands to *B.* for Years, and deviſes it to his Wife ſo long as ſhe continues a Widow, and if ſhe marries, that her Son ſhall have it, and *B.* dies, and *A.* by (*e*) Feoffment conveys the Land to the Wife, and covenants, that from thence it ſhall be clearly exonerated *de omnibus prioribus bargainis, &c. & aliis oneribus quibuſcunque*, and after the Wife marries, and the Son enters; this is a Breach, for the Term not being extinct by the Acceptance of the Feoffment, the Land continues charged with this (*f*) Poſſibility.

(*e*) By Fine, according to the Report of the Caſe in *Owen* and *Gouldſ.* (*f*) Tenant in Tail of a Rent, purchaſes the Land out of which it iſſues, and makes a Feoffment thereof, and covenants that it is free from all former Incumbrances; this is a Charge though not *in eſſe*, but in ſuſpenſe; for if Tenant in Tail dies, his Iſſue may diſtrain, and then the Covenant is broken. Owen 7. But *vide* Co. Lit. 389. a.

† *Qu.* As to maintaining Covenant?

Co. Lit. 221, 222. Poph. 110. Co. 25. a. Rol. Abr. 447. 5 Co. 21. a. (*g*) Though the Grantee bring a Writ of Annuity, by which the

If the Party who is bound to perform a Condition diſables himſelf, this is a Breach; as where the Condition is, That the Feoffee ſhall reinfeoff or make a Gift in Tail, *&c.* to the Feoffor, and the Feoffee, before he performs it, makes a Feoffment or Gift in Tail, or Leaſe for Life or Years *in præſenti* or *futuro* to another Perſon, or marry, or grant (*g*) Rent-charge, or be bound in a Statute or Recognizance, or become profeſſed; in all theſe Caſes the Condition is broken, for the Feoffee has either diſabled himſelf to make any Eſtate, or to make it in the ſame Plight or Freedom in which he received it, and being once diſabled he is ever diſabled, though his Wife ſhould die, or the Rent, *&c.* ſhould be diſcharged.

charged, or he ſhould de deraigned, &c. before the Time of the Re-conveyance.

Land is diſcharged *ab initio*. Co. Lit. 222. a.

But if Feoffee, upon Condition to reinfeoff, is diſſeiſed, and after takes (*f*) Wife, binds himſelf in a Statute, &c. this is no Diſability, for that during the Diſſeiſin the Land is not charged with it; ſo that if the Wife die, or the Conuzee releaſe, &c. and after the Diſſeiſee enters, he may perform the Condition.

Co. Lit. 222. a. 2 Co. 59. b. S. P.

(*f*) A Feme Sole enters into a Bond, conditioned that ſhe would from Time to Time, and at all Times, upon Requeſt, do all ſuch Acts for the Aſſuring of Lands, &c. at the Charge of the Obligee, and after marries; and whether this was a Breach, Hard. 463. *dubitator*. It was ſaid, that by the Marriage her Huſband had a Poſſibility of being Tenant by the Courteſy, and that now an Aſſurance could not be made without Fine, and ſo the Obligee muſt be at a greater Charge than intended. †

† Q. If an Action would not lie on the Bond, againſt Huſband and Wife, after Demand of further Aſſurance, and Refuſal?

If there be Feoffee upon Condition to reinfeoff, or to infeoff a Stranger, and after another recovers the Land againſt him by (*g*) Default, yet till Execution ſued the Condition is not broken, as before Execution he is not diſabled, for perhaps he will never ſue Execution; and if he ſued Execution after he has made the Feoffment, according to the Condition, the Feoffor may re-enter for the Condition broken.

Rol. Abr. 447. S. P. Bro. Condition 26.

(*g*) *Secus* if upon a feigned Title. Co. Lit. 222. b.

If a Man makes a Feoffment upon Condition, if the Feoffor or his Heir pay Money before a certain Day, &c. and the Feoffor is (*h*) attainted of Treaſon, and executed before the Day, yet if his Heir is reſtored before the Day, he may perform the Condition, for that the Condition may be performed at any Time before the Day.

Co. Lit. 221. a.

(*h*) So if the Feoffor enters into Religion, and before the Day is deraigned. Co. Lit. 221. b.

* If *A.* leaſes to *B.* for twenty-one Years, and covenants at any Time during the Life of *B.* (*i*) upon Surrender of the old Leaſe, to make a new Leaſe, and after *A.* leaſes to a Stranger, he hath diſabled himſelf and broken his Covenant.

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5 Co. 20, 21. Sir *Anthony Sur* and *Main*, adjudged. 2 And. 18. S. C. Moor 452. pl. 619. S. C. Cro. Eliz. 450, 479. S. C. 2 Com. Dig. 466. Cowp. 125. Doug. 272. 1 Term Rep. 22. adjudged; and after affirmed upon a Writ of Error. Poph. 109, 110. S. C. adjudged; and ſaid, That admit the Leaſe to the Stranger was to begin at a Day to come, yet the Obligation is preſently forfeited. (*i*) So if the Leſſee aſſign his old Leaſe, he diſables himſelf from taking Benefit of the Covenant. Bulſt. 22.

2. What the Party muſt do to intitle him to the Advantage thereof; and herein of Notice, Requeſt, Tender and Refuſal.

If a Leaſe be made reſerving Rent, and that for the Non-payment the Leſſor may re-enter, there muſt be an actual Demand made previous to the Entry, otherwiſe it is tortious; becauſe ſuch Condition of Re-enty is in Derogation of the Grant; and the Eſtate at Law being once defeated, cannot be reſtored by any ſubſequent Payment*.

Co. Lit. 201. b. 202. a. Hob. 207. 5 Co. 56. Dyer 51. Hob. 331. Plow. 70. 7 Co. 56. Vaugh. 32.

* But now, on an Ejectment brought in ſuch Caſe, an actual Entry is not neceſſary, the Defendant in Ejectment entering into a Rule to confeſs Leaſe, Entry, and Ouſter. But Tenants may be relieved on paying all Rent in Arrear and Coſts, by Motion. See 4 Geo. 2. c. 28. and 11 Geo. 2. c. 19.

So it is if there be a *Nomine Pœnæ* given to the Leſſor for Non-payment, the Leſſor muſt demand the Rent before he can be intitled to the Penalty; Hutt. 42, 114.

or

Hob. 207, 331. 7 Co. 56. b. or if the Clauſe had been, That if the Rent were behind, that the Eſtate of the Leſſee ſhould ceaſe and be void; in theſe Caſes there muſt be an actual Demand made; becauſe the Preſumption is, that the Leſſee is attendant on the Land, to ſave his Penalty, and preſerve his Eſtate, and therefore ſhall not be puniſhed without a wilful Default; and that cannot be made appear without a Demand be proved, and that it was not anſwered; (*b*) and the Demand in theſe Caſes muſt be made at the Day prefixed for the Payment, and alledged expreſsly to have been made in the Pleading†.

(*b*) 20 H. 6. 30, 31. Rol. Abr. 458.

† An Ejectment is now the uſual Mode, for taking Advantage of the Tenant's Default, in which he can only plead the general Iſſue, but the Leſſor of the Plaintiff muſt be prepared to prove a *Demand*, where a Demand is abſolutely neceſſary.

Hob. 207. Hutt. 13, 23. 2 Rol. Abr. 426. Moor 883. But where the Remedy for Recovery of the Rent is by Diſtreſs, there needs no Demand previous to the Diſtreſs, though the Deed ſays, That if the Rent be behind, being lawfully demanded, that the Leſſor may diſtrain; but the Leſſor, notwithſtanding ſuch Clauſe, may diſtrain when the Rent becomes due; ſo it is if a Rent-charge be granted to *A.* and if it be behind, being lawfully demanded, that then *A.* ſhall diſtrain, he may diſtrain without any previous Demand; becauſe this Remedy is not in Deſtruction of the Eſtate, for the Diſtreſs is only a Pledge for the Payment of it, and the very taking of the Diſtreſs is a legal Demand ‡.

‡ But in ſuch Caſe it is more eligible for the Leſſor to demand the Rent previous to the Diſtreſs, and that in the Preſence of a Witneſs, that he may, if required, prove it.

(*c*) Plow. 70. *Kidwelly's* Caſe. (*d*) 4 Co. 73. Moor 408. Cro. El. 415, 435, 536. 1 Wood's Conv. 283. Doug. 483. Dyer 686. Where the Remedy for Non-payment of Rent was by Way of Entry, it was (*c*) formerly held, That if the Rent was made payable at any Place off the Land, no Demand was neceſſary; becauſe the Money being to be paid off the Land, was looked upon as a Sum in Groſs, which the Tenant had at his own Peril undertaken to pay; but (*d*) this opinion has been intirely exploded; for the Place of Payment does not change or alter the Nature of the Service, but it remains in its Nature a Rent, as much as if it had been made payable upon the Land.

But where the Power of Re-entry is given to the Leſſor for Non-payment; without any further Demand, there it ſeems that the Leſſee has undertaken to pay it, whether it be demanded or not; and there can be no Preſumption in his Favour in this Caſe, becauſe by diſpenſing with the Demand, he has put himſelf under the Neceſſity of making an actual Proof that he was ready to tender and pay the Rent*.

* Even in this Caſe, it would be better for the Leſſor, to demand the Rent, as, if no Place is fixed for the Payment of the Rent, the Payment ſhould be on the Land, and a Tenant may be prepared to prove he was on the Land the Day the Rent became due, ready to pay.

Vaugh. 31, 32. Alſo as to the Neceſſity of a Demand of the Rent, there is a Difference between a Condition and a Limitation; for Inſtance, If Tenant for Life (as the Caſe was by Marriage-Settlement, with Power to make Leaſes for twenty-one Years, ſo long as the Leſſee, his Executors or Aſſigns ſhall duly pay the Rent reſerved) makes a Leaſe purſuant to the Power, the Tenant is at his Peril obliged to pay the Rent without any Demand of the *Page 418 * Leſſor; becauſe the Eſtate is limited to continue only ſo long as the Rent is paid; and therefore, for the Non-performance according to the Limitation, the Eſtate muſt determine‖.

‖ The Note on the laſt preceding Caſe may be applid to this.

Rol. Abr. 449. adjudg- If *A.* levies a Fine of Lands to *B.* to the Uſes of a certain Indenture, in which is contained this Proviſo, that if *A.* pays or tenders 20*l.* during his Life,

Life, at the Font-ſtone in the Church of *S.* to *B.* that then it ſhould be to the Uſe of *A.* in Fee, a Tender of the ſaid Sum at the ſaid Place is void, if he (*a*) gives not Notice to *B.* that he or his Deputy may be there to receive it, (*b*) becauſe no Day certain was appointed.

ed by three Juſtices. Moor 602. Like Point certified by the Judges to the Chancellor for Law. 8 Co. 92. S. C. cited. 2 Bulſt. 144. S. C. cited. (*a*) But if at any Time he meets him at the Place, he may tender the Money. Co. Lit. 211. Cro. Eliz. 14. (*b*) Yelv. 37. Cro. Jac. 9, 10. Co. Lit. 211. a. Cro. Eliz. 298. 13 Co. 2. Like Point, & *vide* Rol. Rep. 373.

If *A.* is bound to *B.* upon Condition that *C.* ſhall infeoff *D.* on ſuch a Day, *C.* muſt ſeek *D.* and give him Notice thereof, and requeſt him to be upon the Land at the Day, to receive the Feoffment. Co. Lit. 211. a. 220. S. P.

If *A.* leaſes his Lands for forty Years, rendering Rent, and deviſes the Reverſion to *J. S.* in Tail, &c. provided that *B.* and his Wife ſhall have the Rent to their own Uſe till *J. S.* comes of Age, upon Condition that *B.* and his Wife, within three Months after his Death, enter into a Bond to his Overſeers for the Payment of 34*l. per Annum*, in ſuch Penalty as his Overſeers ſhall adviſe; and *A.* dies, *B.* and his Wife muſt give Notice of this to the Overſeers, and at their Peril procure them to adviſe, &c. Winch 26. *Trebern* and *Claybrook*.

A. made a Deed of Feoffment of Lands in ſeveral Counties, dated the 15th of *October*, 4 *Mar.* upon Condition the Feoffee ſhould reinfeoff him of all the Lands within twenty Days after the Date of that Deed; and yet becauſe *A.* made his Feoffment but of Part, within the twenty Days, it was held, the Condition was not broken, though all was not re-conveyed within the twenty Days, according to the Letter of the Condition, which is intire; for it was the Fault of *A.* it was not conveyed, without which it could not be reconveyed. Hob. 24. cited to have been reſolved 26 Eliz.

If *A.* leaſes to *B.* for twenty-one Years and covenants, at any Time during the Life of *B.* upon Surrender of the old Leaſe, to make a new Leaſe for the Reſidue of the Term; and after *A.* leaſes to a Stranger; though *B.* by the Words of the Indenture ought to do the firſt Act, *viz.* make a Surrender, yet becauſe *A.* hath diſabled himſelf to make a new Leaſe, *B.* ſhall not be obliged to ſurrender his old Leaſe without Poſſibility of a new Leaſe, but may bring Covenant without making any Surrender. 5 Co. 20, 21. adjudged. Moor 452. S. C. adjudged that Covenant lay without making any Requeſt, though by the Covenant the new Leaſe was to be made upon Requeſt. Cro. Eliz. 450. Poph. 109. S. C. adjudged. 2 Bl. Rep. 1190. Doug. 50. ‡

‡ But in ſuch Caſe it would be more eligible to make *Requeſt*, before Action brought, as proving ſuch Requeſt and Refuſal, would be ſufficient, and render the Proof of the Leaſes to the Stranger, which might be attended with great Difficulty, totally unneceſſary.

So if a Man covenants to infeoff *J. S.* upon Requeſt, and after infeoffs another, *J. S.* may have Covenant, without making any Requeſt †. 5 Co. 52. reſolved *per Cur'*.

† See the preceding Note.

If the Condition of an Obligation be (*c*) to levy a Fine to the Obligee, he is not (*d*) bound to levy it if the Obligee (*e*) does not ſue a Writ of Covenant againſt him. 18 E. 3. 27. Rol. Abr. 458. 5 Co. 21 & *vide* Rol. Abr. 422. S. P. *cont'*.

(*c*) So if the Condition be, That the Stranger ſhall levy a Fine to the Obligee. Hutt. 48. Winch 30.——So if the Condition be to acknowledge a Judgment to *J. S.* he muſt ſue out an Original. Winch 30. Hutt. 48. (*d*) Where the Obligor or Covenantor hath diſabled himſelf, the Obligee, &c. may bring an Action without, &c. 5 Co. 21. Moor 452. Cro. Eliz. 450, 479. Poph. 109. (*e*) Where the Condition is to pay all Coſts that ſhall be ſtated by two Arbitrators, by the Obligor and Obligee to be choſen, the Obligee muſt chuſe an Arbitrator before he can ſhew any Fault in the Obligor. Vent. 71.

If

*Page 419 * If the Condition of an Obligation be, That the Obligor ſhall make all the Linen the Obligee ſhall wear during his Life, the Obligee muſt deliver to the Obligor the Cloth of which it is to be made; for all Contracts are to be interpreted (*a*) according to the Intent and Subject Matter.

Lev. 93. *Oles* and *Thornbill*, adjudged, it not appearing the Obligor was a Sempſtreſs, or ſuch Perſon that uſed to make Linen and find the Materials.

(*a*) As if a Taylor is bound, or promiſes to make a Suit of Clothes for me, I ought to deliver him the Cloth, becauſe this is uſual, and not for him to provide it. Lev. 93. *per Curiam.*— But if a Shoe-maker is bound to make me a Pair of Shoes, he is alſo bound to find the Leather, becauſe that is uſual. 1 Lev. 93. *per Cur'.*

Rol. Abr. 461. Lane 78. If a Man deviſes Land to another, upon Condition, that if he pays 4*l.* yearly out of the Land to the Wife of the Deviſor for her Life; adding over and above, that his full Intent and Will was, that ſhe ſhould be yearly paid the ſaid Rent accordingly; the Deviſee ought to pay this Rent to his Wife (*b*) at his Peril, without any Demand of the Wife; otherwiſe the Condition is broken.

(*b*) But if a Man deviſes Lands to his Wife for Life, ſo long as ſhe ſhall be effectually ready to demiſe it to his Heir at 50*l.* paid yearly, when ſhe ſhall not dwell on it herſelf; yet if ſhe goes and lives at another Place, the Condition is not broken without a Tender and Refuſal to leaſe. Moor 626. pl. 860.

Poph. 102. If *A.* conveys Lands to *B.* in Tail, upon Condition that *B.* and the Heirs of his Body, ſhall pay to the Daughter of *A.* 200*l.* or ſo much thereof as ſhall be unpaid at the Death of *A.* according to the Intent of the Will of *A.* and after *A.* by Will deviſes to his Daughter 200*l. viz.* 100*l.* to be paid that Day Twelve-month next after his Death, and the other 100*l.* that Day Twelve-month next after, *&c.* and dies; *B.* is not bound to pay the 200*l.* without Demand; for the Payment, by the Indenture, is referred to be according to the Will, and the 200*l.* was deviſed as a Legacy, which ought to be paid upon Demand, and not at the Peril of the Executor; and therefore the Nature of the Payment is altered by the Will.

3. What ſhall be a Diſpenſation therewith.

Co. Lit. 52. b. Rol. Abr. 453. If a Leaſe for Years be made upon Condition not to alien without Licence, and after the Leſſor licenſes the Leſſee to alien, and dies before any Alienation, yet the Leſſee may alien; for the Death of the Leſſor is not any Countermand; for this was executed on the Part of the Leſſor as much as it could be.

Rol. Abr. 471. 4 Co. 120. a. So if a Man leaſes Land upon Condition that he ſhall not alien the Land, nor any Part thereof, and after he aliens Part, with the Aſſent of the Leſſor, he may after alien the Reſidue without his Aſſent; for all the Condition is gone by this; for it cannot be divided or apportioned.

4 Co. 120. a. Noy 32. Cro. El. 816. Rol. Abr. 471. So if *A.* leaſes Land to three, upon Condition, that they, or any of them, ſhall not alien without Licence of the Leſſor; and afterwards one aliens with his Aſſent, this diſcharges all the Condition as to the other two.

Moor 22. pl. 75. adjudged. If (*c*) Leſſee for Years hath Execution by *Elegit* of a Moiety of the Rent and Reverſion againſt the Leſſor, where the Leaſe is upon Condition, this is a Suſpenſion of all the Condition during the Time of the Extent; and tho' but a Moiety of the Rent is extended, yet the intire Condition is ſuſpended.

(*c*) So if a Stranger hath Execution by *Elegit*. Moor 71. pl. 193. Dalſ. 72. Moor 91. *& vide* 4 Leon. 28.

2 Co. 59. adjudged. If a Man makes a Feoffment in Fee upon Condition to reinfeoff, and the Feoffor after diſſeiſes the Feoffee, and leaſes for Years, this is a Diſpenſation with the Condition during the Term.

* If a Man leaſes for Years, upon Condition to be performed on the Part of the Leſſor, and before the Time of the Performance of the Condition he leaſes to a Stranger for Years, by Indenture, the Condition is not ſuſpended or deſtroyed, but may be performed notwithſtanding; for it is an Eſtoppel only between the Leſſor and the ſecond Leſſee. *Page 420 Cro. Eliz. 665. Owen 116. S. C.

But if a Man makes a Feoffment upon ſuch Condition, and after levies a Fine to a Stranger, the Condition is gone. Cro. Eliz. 665. *per Cur'*.

If a Condition be to recover certain Land of *J. S.* and thereof to enfeoff another who is Party to the Obligation, if he to whom the Feoffment is to be made, accepts a Feoffment of the Land before any Recovery had by the other, he had diſpenſed with the Condition. Rol. Abr. 453.

4. How far he, who enters for a Condition broken, ſhall be re-inſtated in his former Eſtate.

It is laid down as a Rule, That he who (*a*) enters for a Condition broken, ſhall be in of the ſame (*b*) Eſtate he was before; and therefore ſhall avoid all meſne Charges and Incumbrances. Co. Lit. 202. Rol. Abr. 474. ſame Rule.

(*a*) He that will take Advantage of a Condition, muſt enter if he can; if he cannot, he muſt claim; for a Freehold, whether it lie in Grant or Livery, cannot ceaſe by Condition without Entry or Claim though the Words are, Proviſo that if he do not pay, *&c.* that then the Eſtate ſhall ceaſe and be void, whether the Conveyance were by Feoffment, Bargain and Sale, or Deviſe, *&c.* Co. Lit. 218. ‡ (*b*) A Remainder is granted upon Condition, and after the particular Eſtate determines, and the Condition is broken, the Grantor ſhall have the Land in Poſſeſſion. 2 Rol. Rep. 60.——A Condition or Limitation annexed to an Eſtate, ought to deſtroy the whole Eſtate. 1 Co. 86. b. 6 Co. 40. b.

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‡ See Note, as to proceedings in Ejectment, *ante* 417.

As if a Feoffment be made to *A.* upon Condition for the Non-payment of certain Rent to re-enter, and *A.* dies, leaving a Wife; after which the Condition is broken by the Heir of *A.* the Feoffor ſhall re-enter, and defeat the Title of Dower that accrued to the Wife of the Feoffee. 22 E. 3. 19. Fitz. Condition 12. S. C. Rol. Abr. 474.

If a Man makes a Feoffment, Gift or Leaſe, reſerving Rent, with a Condition that, if the Rent be behind, it ſhall be lawful for the Feoffor, *&c.* and his Heirs into the Land to re-enter; in theſe Caſes, if the Rent be not paid according to the Deed, the Feoffor or Leſſor may enter into the Lands, and hold them in his former Eſtate, becauſe the Feoffment or Leaſe was not abſolute, but defeaſable by the Non-performance of the Condition. Lit. ſ. 325. Co. Lit. 201. 202.

But where a Feoffment is made of Land, reſerving Rent, upon Condition that, if the Rent be behind, it ſhall be lawful for the Feoffor and his Heirs to enter and hold the Land, and take the Profits till he be ſatisfied and paid the Rent behind; this is not a Condition abſolutely to defeat the Eſtate; but the Feoffor in this Caſe ſhall, upon his Entry, only hold the Land as a Pledge, or in the Nature of a Diſtreſs, till the Rent be paid him, and the Profits ſhall not go into the Account of the Rent, but ſhall be applied to his own Uſe, that by ſuch Perception the Tenant may be obliged the ſooner to pay the Arrears of Rent. Lit. ſ. 327.

But if the Condition had been, that, if the Rent be behind, the Leſſor ſhall re-enter, and take the Profits thereof until he be ſatisfied; there the Profits ſhall go into the Account of the Rent; and conſequently, when the Profits received are equivalent to the Arrear of Rent, the Leſſee may re-enter, and hold it under the former Leaſe. Co. Lit. 203.

And though Part of the Rent be paid him before Re-entry, yet if the whole be not ſatisfied he may enter for any Part that is Arrear; becauſe the Condition is to inforce the Payment of the whole Rent; and therefore he may take Advantage for Non-payment of any Part thereof. Cro. Jac. 511. Co. Lit. 203.

Leſſee

Rol. Abr. 474. Leſſee for Life, and the Reverſioner, join in a Feoffment upon Condition reſerved to the Leſſee, if he enter for Breach thereof, this ſhall not defeat the entire Eſtate.

*Page 421 * If a Man ſeiſed of Lands in right of his Wife, makes a Feoffment in Fee upon Condition, and dies; and after the Condition is broken, and the Heir of the Feoffor enters, (*a*) it is impoſſible he ſhould have the ſame Eſtate which the Feoffor had at the Time of the Condition made; for that was in the Right of his Wife, which was diſſolved with the Coverture, and therefore when the Heir hath entered for the Condition broken, and defeated the Feoffment, his Eſtate vaniſhes, and preſently the Eſtate is veſted in the Wife.

Co. Lit. 202. a. 336. b. 8 Co. 44. a. S. P.

(*a*) So if a Man ſeiſed of Lands as Heir, on the Part of his Mother, makes a Feoffment in Fee upon Condition, and dies, the Heir of the Part of the Father, who is Heir at Common Law, ſhall enter for the Condition broken, but the Heir of the Part of the Mother ſhall enter upon him, and enjoy the Land. Co. Lit. 12. b.

Co. Lit. 202. a. 1 Co. 133. b. S. P. If *Ceſtui que Uſe* after the Statute of 1 *R.* 3. *c.* 1. and before the Statute 27 *H.* 8. *c.* 10. had made a Feoffment in Fee upon Condition, and had after entered for the Condition broken, though at the Time of the Condition made he had but a bare Uſe, yet by his Feoffment the whole Eſtate and Right being deveſted out of the Feoffees, he ſhould have been ſeiſed of the whole Eſtate in the Land.

Co. Lit. 202. a. Tenant in Special Tail hath Iſſue, his Wife dies, and he makes a Feoffment in Fee upon Condition; the Iſſue dies, the Condition is broken, the Feoffor re-enters, he ſhall be only Tenant in Tail after Poſſibility of Iſſue extinct, though when he made a Feoffment he had an Eſtate-tail.

Co. Lit. 224. a. If a Man makes a Gift in Tail to *A.* the Remainder to *A.* and his Heirs, upon Condition that he ſhall not alien, the Condition is good, as to reſtrain any Diſcontinuance of the Eſtate-tail, but as to the Fee-ſimple it is void and repugnant; and therefore ſome are of Opinion that this is a good Condition, and that it ſhall defeat the Alienation (*b*) for the Eſtate-tail only, and leave a Fee-ſimple in the Alienee.

(*b*) By ſpecial Words the Condition may extend to the particular Eſtate, or to the Remainder only. Co. Lit. 230. a.

Cro. Eliz. 239. adjudged. 1 Term Rep. 600. If the Father ſurrenders Copyhold Lands to the Uſe of the Son in Fee, upon Condition that he ſhall perform certain Covenants, and the Son after Admittance ſurrenders to the Uſe of *A.* in Fee, upon Condition that if the Son pays ten Pounds the Surrender ſhall be void; and the Son pays not the 10*l.* nor performs the Covenants, and the Father enters, and dies ſeiſed, and it deſcends to the Son, yet *A.* cannot enter upon him, for by the Entry of the Father both the Surrenders were defeated, and the Son may confeſs and avoid the Eſtate of *A.*

Co. Lit. 30. b. A Man being intitled to be Tenant by the Courteſy, makes a Feoffment in Fee upon Condition, and enters for the Condition broken, and then his Wife dies, he ſhall not be Tenant by the Courteſy; for though the Eſtate given by the Feoffment was conditional, yet his Title to be Tenant by the Courteſy was abſolutely extinct by the Feoffment.

Co. Lit. 206. b. Tenant by Homage Anceſtrel makes a Feoffment in Fee upon Condition, and enters for the Condition broken, it ſhall not be holden by Homage Anceſtrel again, for the Right of the Preſcription and Privity of Eſtate were interrupted for the Time; ſo (*c*) if a Copyhold eſcheats, (*d*) and the Lord makes a Feoffment in Fee upon Condition.

(*c*) Co. Lit. 103. a. 202. b.

(*d*) For notwithſtanding the Entry for the Condition broken, the Seigniory is extinct, for that was excluſively extinct by the Feoffment. Co. Lit. 30. b.

Co. Lit. 202. 252. a. Rol. Abr. 856. If Tenant for Life makes a Feoffment in Fee upon Condition, and enters for the Condition broken, he ſhall be Tenant for Life again, but ſubject

ſubject to the Forfeiture; for though the Eſtate is reduced, yet the Forfeiture is not purged.

If the Conuzee of a Statute, &c. or he that hath Lands till ſuch a Sum levied, ſurrenders to the Reverſioner upon Condition, and after enters for the Condition broken, and performs the firſt Condition, he ſhall not hold over after the Extent incurred, or ſuch Time as the Money might have been levied. 4 Co. 82. 2 Rol. Abr. 479. *Page 422

If Leſſee for Life or Years, upon Condition to have a Fee if, &c. grants his Eſtate upon Condition, and after enters for the Condition broken, and performs the firſt Condition, perhaps the Fee will accrue, for the Poſſibility was not abſolutely deſtroyed; and when he enters for the Condition broken, he is in of his old Eſtate. 8 Co. 75. b.

If a Man makes a Feoffment in Fee of a Manor upon Condition, and the Feoffee grants Eſtates by Copy, and then the Condition is broken, yet the Grants by Copy ſhall ſtand good, for he was *Legitimus Dominus pro tempore*, and the Copyholder doth not claim his Eſtate out of the Lord's but by Cuſtom; and if the Grants were made after the Condition broken, yet it is all one, for till Entry the Feoffee hath a lawful Eſtate, and the Feoffor may wave the Advantage of the Condition broken; but if a Leaſe be made of a Manor for Years, on Condition to be void upon the Breach of a certain Condition, and the Condition is broken, no voluntary Grants made afterwards ſhall bind the Leſſor, becauſe the Eſtate of the Leſſee is void; but if it were for Life, &c. then the Grants were good. Dyer 344. a. 4 Co. 24. a. Co. Cop. 82, 88.

(P) Of performing the Condition: And herein,

1. What Perſons may perform the Condition.

IF a Man makes a Feoffment in Fee, upon Condition to be void if the Feoffor pays a certain Sum of Money to the Feoffee, and the Feoffor dies before Payment, his Heir cannot pay it, becauſe the Time of Payment is paſt, for the Condition being general, if the Feoffor pays, &c. it is as much as to ſay, if the Feoffor during his Life pays. Lit. Sect. 337. Co. Lit. 208. a.

But when a Day of Payment is limited, and the Feoffor dies before the Day, his (*a*) Heir may tender the Money, becauſe the Time of Payment was not paſt by the Death of the Feoffor. Lit. Sect. 337. Co. Lit. 208. b. 209. a.

(*a*) So may his Executors or Adminiſtrators, becauſe they repreſent the Perſon of their Teſtator. Lit. Sect. 337. Co. Lit. 208, 209. a.

J. S. having Iſſue three Sons, *A. B.* and *C. A.* dying in his Life-time, leaving Iſſue only a Daughter; *J. S.* deviſed certain Lands to his Wife for Life, and after her Death to his Son *C.* and his Heirs; provided that if *B.* do, within three Months after the Death of my Wife, pay to *C.* his Executors or Adminiſtrators, the Sum of 500*l.* then the ſaid Lands ſhall come to my Son *B.* and his Heirs; the Wife lived ſeveral Years, and during her Life *B.* died, leaving *J. D.* his Heir, who not being Heir at Law to the Teſtator, the Queſtion was, Whether he could now, after the Death of the Wife, perform the Condition? And though it was objected, that this being a Condition precedent and merely Perſonal in *B.* who had neither *jus in re*, nor *ad rem*, and could (*b*) not therefore deviſe, releaſe or extinguiſh the Condition, and conſequently that his Heir could not perform it after his Death; yet it was held, and ſo decreed, that the Poſſibility of performing this Condition was an Intereſt or Right, or *Scintilla Juris*, which veſted in *B.* himſelf, and conſequently ſuch Right, Poſſibility or Intereſt deſcended on Eq. Abr. 106, 107. *Marks* and *Marks*.

(*b*) Though a Condition in ſtrictneſs of Law is not deviſable, yet

since the Statute of *Uses*, the Devisee on his Heir, and, according to *Littleton supra*, may be performed by him.

may take Benefit of it by an equitable Construction; and in this Case *B.* might have released or extinguished the Condition. Eq. Abr. 107. *per* Ld. Chancellor.

*Page 423 Co. Lit. 219. b. (a) So if *C.* dies before the Day, *A.* may pay it. Co. Lit. 219.

* If *A.* mortgages his Lands to *B.* upon Condition that if *A.* and *C.* pay 20*s.* at a Day to *B.* that then he shall re-enter; (*a*) *A.* dies before the Day, *C.* may pay the Money, &c. and yet the Letter of the Condition is not performed.

Co. Lit. 219. b. * Ld. *Coke* states it. "If "the Mortgagor had been alive at the Day, and he would not pay the Money, but refused to pay "the same."—This, I think, varies the Case much, as it shews the Inclination of the Morgagor, not to redeem, but to let the Estate absolutely vest in the Mortgagee.

But if *A.* had been living at the Day, and could * not have paid the Money, but had refused to pay it, and *C.* had tendered it, *B.* might have refused it.

Rol. Abr. 420. The Court divided, *viz. Croke* and *Jones*, That it was Personal; but *Brampston* and *Berkley cont'*. Jones 390. S. C. and the Court divided accordingly. Winch 103. 104, 116, 118, 119. with the Arguments at large, but no Judgment, & *vide* Co. Lit. 205. That the Heir may perform it.

If *A.* and *B.* levy a Fine to the Use of *A.* in Fee, if *B.* does not pay 10*s.* at *Michaelmas* after, and that if he doth then pay the said 10*s.* that then it shall be to the Use of *A.* for Life, and after to *B.* in Fee, and after *B.* dies before *Mich.* it seems the Heir of *B.* may pay the 10*s.* for this is not more Personal, being the Payment of Money, than in the Case of *Littleton* upon a Mortgage.

Hob. 285. adjudged. Hutton 36. S. C. adjudged.

If a Man devises Land to his Daughter at her Age of eighteen Years, and that his Wife shall take the Profits to her own Use till his Daughter comes to eighteen, provided she shall keep and bring up his Daughter at School, &c. and dies; and the Wife marries again, and dies, the Interest in the Lands accrues to the Husband, for the Keeping and Education of the Child is not of such particular Privity, but it may be effectually performed by another.

49 E. 3. 16. b. Rol. Abr. 421. S. C.

If two are enfeoffed to reinfeoff, if one refuses to reinfeoff, the other cannot perform the Condition by a Feoffment of the Whole.

2 H. 6. 3. b. Rol. Abr. 421. S. C.

If the Condition of an Obligation be to pay a less Sum, if (*b*) my Servant, by my Command, tenders it to the Obligee, this is sufficient.

(*b*) So if a Stranger tenders for and by the Assent of an Infant above fourteen. Moor 222. pl. 137. *per Curiam.*

Co. Lit. 206. a. b. *Watkin* and *Astwick* S. P. though tendered for an Infant.

If a Man makes a Feoffment in Fee by way of Mortgage, upon Condition to be void upon Payment of Money by the Feoffor at a Day, if a Stranger of his own Head tenders the Money, the Feoffee is not bound to receive it.

Leon. 34 agreed *per Curiam.* Moor 222. pl. 3. 61. admitted *per Curiam.* Cro. Eliz. 132. said by *Coke* to be adjourned. Owen 34. S. P. *per Coke.*

Co. Lit. 206. b. 207. a.

But if the Feoffee accepteth it, this is a good Satisfaction, and the Mortgagor or his Heirs, agreeing thereto afterwards, may re-enter, but the Mortgagor may disagree thereto if he will.

Guardian

Guardian (*b*) in Socage, or by Knight-Service, may upon such Mortgage tender Money in the Name of the (*c*) Heir.

(*b*) Co. Lit. 206. b. *Watkin* and *Aſtwick* S. P. 1 Leon. 34. agreed *per Curiam*; but it being found that the Tender was made by his Mother, and that he was within Age generally, it was preſumed he was above fourteen, and out of her Cuſtody. Owen 137. agreed, but found as before, Moor 222. pl. 361. admitted, *per Curiam*, but found the Mother was not Guardian in Socage. Owen 34. S. C. cited to have been adjudged, That the Tender of the Mother was not good, becauſe it did not appear within the Verdict of what Age the Infant was; (*c*) But if the Heir be an Ideot, a Stranger of his own Head may tender the Money for him. Co. Lit. 206. b.

If *A.* infeoffs *B.* upon Condition that *B.* ſhall pay Money at a Day, and *B.* before the Day enfeoffs *C.* now *C.* hath an Intereſt in the Condition, and may tender the Money at the Day for the Safeguard of his Eſtate. Lit. Sect. 336. Co. Lit. 207. b.

And ſo alſo may *B.* being Party and Privy to the Condition. 5 Co. 96. b. S. P. cited.

* 2. To whom the Condition is to be performed.

Lit. Sect. 336. Co. Lit. 207. b. *Page 424

If a Man bargains and ſells Lands, with a *Proviſo*, that if the *Vendor*, before ſuch a Day, pay ſo much Money *to the Vendee*, his Heirs or Aſſigns, that the Sale ſhall be void; the Vendee before the Day makes his Executors, and dies, and the Vendor tenders the Money to the Executors, this is not good, becauſe the Word *Aſſigns* muſt be underſtood to be Aſſigns of the Land in its primary and original Signification; and where there is an expreſs Proviſion, to whom the Tender and Payment is to be made, the Executor is excluded; for *Expreſſum facit ceſſare tacitum**. Co. Lit. 210. Dyer 180, 181. 5 Co. 96.

* See *infra*.

But if a Man makes a Feoffment in Fee, upon Condition that the *Feoffee* ſhall pay 20*l.* to the *Feoffor*, his Heirs or Aſſigns, here the primary Signification of the Word *Aſſigns* fails, becauſe there can be no Aſſignment of the Land of which he hath enfeoffed another; and ſince the original Senſe of the Word fails, leſt it ſhould be wholly inſignificant, the ſecondary Senſe of the Word is to be taken, *viz.* the Aſſignees in Law, which the Executors are *quoad* the Perſonal Eſtate; and therefore the Payment is good either to the Executor or Heir. Co. Lit. 210. 5 Co. 96, 97.

If the Condition be to pay the Money to the *Feoffee*, his Heirs or Aſſigns, and he makes a Feoffment over, it is in the Election of the Feoffor to pay the Money to the firſt or ſecond Feoffee, becauſe by the Words he may pay it either to him or the Aſſignee; ſo if the firſt Feoffee dies, in this Caſe he may pay it to his (*d*) Heir, or the Aſſignee for the ſame Reaſon; nor is he obliged to take Notice of the Validity of the ſecond Feoffment, to which he is a Stranger. 5 Co. 96. Cro. Eliz. 384. Moor 708. pl. 989. Goulſ. 177. Poph. 100.

(*d*) If the Condition be to pay to the Feoffee, his Executors or Aſſigns, and the Feoffee makes his Sons Executors, and dies, and Adminiſtration is committed during their Minority, it is the ſafeſt Way to pay the Money to the Executors, or one of them, for the Adminiſtrator is but a Bailiff to them. 3 Leon. 103.

If a Man makes a Feoffment in Fee by way of Mortgage, upon Condition to be void upon Payment of the Money by the Feoffor at a Day, if the Feoffee dies before the Day, the Money ſhall be paid to the Executors, and not to the Heirs of the Feoffee, becauſe it ſhall be intended the Eſtate was made by Reaſon of the Loan of the Money, or for ſome other Duty. Lit. Sect. 339. Co. Lit. 209. b. *Vide* for this Title *Mortgage*.

But if the Condition be, that if the Feoffor pays, *&c.* to the Feoffee or his Heirs, if he dies before the Day, the Payment ought to be made to his Heir, and not to his Executors; for *deſignatio unius eſt excluſio alterius*. Lit. Sect. 339. Co. Lit. 209. b. 5. Co. 97. Brownl. 66. S. P. adjudged.

If

Hetl. 115. Lit. Rep. 156. S. C. For this *vide* Rol. Abr. 916.

If the Condition of an Obligation be to pay 10*l.* *per Annum*, after the Death of the Obligee, to the Executors of the Obligee, for the Uſe of his Children, and he dies without making any Executors, the Money ſhall be paid to his Adminiſtrators.

Cro. Jac. 244. Sir *John Ratcliff* and *Davis*, adjudged. Yelv. 178. S. C. adjudged; and ſaid, It would be ſo though, if he delivered over upon a Conſideration; and that it was not like a Mortgage, for that there he that hath the Intereſt ought to have the Money. Bulſt. 29, 30. S. C. adjudged, though it appears that *B.* wiſhed *C.* to keep it ſafely till the Money was paid; but 31. by *Fleming* Ch. Juſt. It had been otherwiſe if *C.* had paid the Money, *&c.* Noy 137. S. C.

If *A.* pawns a Jewel to *B.* for 25*l.* but no certain Time is appointed for the Redemption thereof, and after *B.* being ſick, his Wife in his Preſence, and with his Aſſent, delivers it to *C.* and *B.* dies, the Money muſt be paid to the Executors of *B.* and not to *C.* becauſe by the Delivery of the Feme, with the Aſſent of the Baron, there paſſed no Intereſt, but a Cuſtody only.

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Rol. Abr. 421. Rol. Rep. 373. 3 Bulſt. 168. Bridg. 39. S. C. and S. P.

* If the Condition be to leaſe certain Lands for three Lives to the Obligee or his Aſſigns, and after the Obligee demands a Leaſe to be made to three Strangers for their Lives, he ought to make it them accordingly, or otherwiſe the Condition is broken; for here, by the Word *Aſſigns*, is intended *Aſſigns by Nomination*, for he cannot have other Aſſigns, in as much as the Eſtate is not aſſignable before he hath it.

Rol. Abr. 421. Lit. Rep. 173. Hob. 9. Godb. 192. S. C. adjudged; and *per Coke*, There is a Diverſity where the Condition is to pay 10*l.* to the Aſſignee of the Obligee, and where to the Obligee or his Aſſigns; for in the laſt Caſe it veſts as a Duty in the Obligee, and ſhall go to his Executors. Moor 855. adjudged.

If a Man be bound in 20*l.* upon Condition to pay 10*l.* to ſuch Perſon as the Obligee ſhall name by his laſt Will, and after the Obligee names no Perſon by his Will, the Obligor is not bound to pay it to his Executors, becauſe the Condition hath Reference to his Nomination.

5 Co. 97. Leon. 252.

If *A.* ſeiſed in Fee by Indenture inrolled, covenants with *B.* that if *B.* pays to *A.* his Heirs or Aſſigns, 400*l.* at a Day, that then *A.* and his Heirs ſhall ſtand ſeiſed to the Uſe of *B.* and his Heirs, and *A.* deviſes to his Wife during the Minority of his Son, and dies, the Money ſhall not be paid to the Wife, for ſhe is not Aſſignee; the Reverſion being in the Heirs of *A.*

5 Co. 97.

But if *A.* had made a Leaſe for Life, the Remainder to another in Fee, the Leſſee for Life had been an Aſſignee.

5 Co. 97. a.

And it was ſaid, That if *A.* had conveyed over his whole Eſtate in Part, yet ſo long as *A.* had any Part remaining, the Tender ought to be made to him.

42E. 3. 13. b. Rol. Abr. 421.

If the Condition of an Obligation be to pay 10*l.* *&c.* it is a good Performance if he pays it to his (*a*) Deputy.

(*a*) A Bond was conditioned for the Delivery of forty Pair of Shoes at *Holbourn-Bridge*, within a Month, to *J. S.* a common Carrier, for the Uſe of the Obligee, and *J. S.* did not come to *London* within the Month, but the Obligor delivered them to his Porter; and it was adjudged a good Performance, for that the Delivery to the Man was a Delivery to the Maſter, within the Intent of the Condition. 2 Mod. 309. Eq. Caſ. Abr. 308, 309. 10 Mod. 110, 111, 423. 11 Mod. 87. pl. 7. 88, 267. 12 Mod. 488, 564. 2 Ld. Raym. 792. Stra. 480, 505, 653. Sel. Caſ. Evid. 81, 89.

Moor 68. pl. 183.

If the Condition of an Obligation is to pay 20*l.* to the Obligee, and other the Pariſhioners of *D.* it (*b*) may be paid to any two of them.

(*b*) Where the Condition is to pay Money to Baron and Feme, it may be pleaded to have been paid to the Baron only. Goulſ. 73. & *vide* 2 Sid. 41.

3. At what Time it may be performed.

If a Man makes a Feoffment in Fee, upon Condition that the Feoffor upon Payment of such a Sum of Money to the Feoffee without Limitation of Time should re-enter, the Feoffor hath Time during Life to pay the Money to the Feoffee during his Life; but if either die before that Time is elapsed, which is set by the Parties for the Performance of the Condition, the Feoffment is absolute; but if the Payment were to be made to the Feoffee, his Heirs or Executors, then the Feoffor hath Time during Life. Lit. Sect. 337. Co. Lit. 208.

But if the Condition be, That the Feoffee shall pay Money to the Feoffor, it must be paid in convenient Time, for it is not reasonable the Feoffee should have the Benefit of the Land without Payment. 2 And. 73.

If the Condition of an Obligation be to do a local Act to the Obligee, to which the Concurrence of the Obligor and Obligee is necessary, as to make a Feoffment, &c. (no Time being limited) the Obligor hath Time during his Life to perform it, if not hastened by Request. Co. Lit. 208. b. 6 Co. 30. b.

But though the Condition is local, yet if it may be performed for the Benefit of the Obligee in his Absence, as the Acknowledgment of Satisfaction upon Record, &c. it ought to be done in convenient Time. Co. Lit. 208. a. 6 Co. 30. b. Hard. 10. S. C. and S. P. cited.

*When by the Condition the Obligor, Feoffor, Feoffee or Stranger, are to do a sole (a) Act or Labour, as to go to *Rome*, &c. they shall have Time during Life, and cannot be hastened by Request. *Page 426 Co. Lit. 208. a. 209. b.

(a) Which in no Manner concerns the Obligee, Feoffor, &c. nor their Benefit. 6 Co. 31. a. b. Leon. 125.

The Lord *Clifford* held, &c. *in Capite*, and the King licensed him to alien to *B.* and *C.* so that they should give the same to my Lord *Clifford* and the Heirs of his Body, the Remainder over; and the Lord *Clifford*, according to the Licence, enfeoffed *B.* and *C.* and before any Reconveyance the Lord *Clifford* died; and it was adjudged his Heir might enter; for if they should make the Estate to the Issue of the Lord *Clifford*, the King might seize for want of a Licence, and that in Default of the Feoffees. Co. Lit. 222. 2 Co. 80. a. S. C. cited.

When the Act, by the Condition of an Obligation to be done to the Obligee, is of its own Nature transitory, as Payment of Money, Delivery of Charters, and the like, and no Time limited, it ought to be performed in (b) convenient Time. 6 Co. 31. Co. Lit. 208. (b) Rol. Abr. 436. S. C. and several Cases there cited to this Purpose.

So if the Condition of an Obligation be to pay a less Sum, and no Day of Payment limited, he ought to pay it presently, *scilicet*, within a convenient Time. Rol. Abr. 436. Cro. Eliz. 798. 1 Wood's Conv. 392.

If the Condition of an Obligation be to pay a certain Sum to a Stranger, without limiting any Time, this ought to be done (c) in convenient Time. Rol. Abr. 437. (c) So where Condition was, in convenient Time to assure the Land for the Maintenance of a School, and the Feoffee did not do it in eight Years, Co. 25. b. it was adjudged a Breach.

If the Condition of an Obligation be to pay so much to a Stranger such Day, if he pays it before the Day, (d) this is a good Performance, (e) because Payment before contains Payment at the Day. Rol. Abr. 440. (d) Co. Lit. 212. a. Cr. Car. 284. Cro. Jac. 435. Moor 367. pl. 502. & *vide* 2 Sid. 78. (e) And upon *solvit ad*, such Payment may be given in Evidence. Moor 267. Cro. Eliz. 142. And. 198. Sav. 96. en 45. Dyer 222. Godb. 10. Moor 47. adjudged. Doug. 49. 2 Term Rep. 388. 3 Term 374.

Hetl. 115. Lit. Rep. 156. S. C. For this *vide* Rol. Abr. 916.

If the Condition of an Obligation be to pay 10*l.* *per Annum*, after the Death of the Obligee, to the Executors of the Obligee, for the Uſe of his Children, and he dies without making any Executors, the Money ſhall be paid to his Adminiſtrators.

Cro. Jac. 244. Sir *John Ratcliff* and *Davis*, adjudged. Yelv. 178. S.C. adjudged; and ſaid, It would be ſo though, if he delivered over upon a Conſideration; and that it was not like a Mortgage, for that there he that hath the Intereſt ought to have the Money. Bulſt. 29, 30. S. C. adjudged, though it appears that *B.* wiſhed *C.* to keep it ſafely till the Money was paid; but 31. by *Fleming* Ch. Juſt. It had been otherwiſe if *C.* had paid the Money, *&c.* Noy 137. S. C.

If *A.* pawns a Jewel to *B.* for 25*l.* but no certain Time is appointed for the Redemption thereof, and after *B.* being ſick, his Wife in his Preſence, and with his Aſſent, delivers it to *C.* and *B.* dies, the Money muſt be paid to the Executors of *B.* and not to *C.* becauſe by the Delivery of the Feme, with the Aſſent of the Baron, there paſſed no Intereſt, but a Cuſtody only.

*Page 425

Rol. Abr. 421. Rol. Rep. 373. 3 Bulſt. 168. Bridg. 39. S. C. and S. P.

* If the Condition be to leaſe certain Lands for three Lives to the Obligee or his Aſſigns, and after the Obligee demands a Leaſe to be made to three Strangers for their Lives, he ought to make it them accordingly, or otherwiſe the Condition is broken; for here, by the Word *Aſſigns*, is intended *Aſſigns by Nomination*, for he cannot have other Aſſigns, in as much as the Eſtate is not aſſignable before he hath it.

Rol. Abr. 421. Lit. Rep. 173. Hob. 9. Godb. 192. S. C. adjudged; and *per Coke*, There is a Diverſity where the Condition is to pay 10*l.* to the Aſſignee of the Obligee, and where to the Obligee or his Aſſigns; for in the laſt Caſe it veſts as a Duty in the Obligee, and ſhall go to his Executors. Moor 855. adjudged.

If a Man be bound in 20*l.* upon Condition to pay 10*l.* to ſuch Perſon as the Obligee ſhall name by his laſt Will, and after the Obligee names no Perſon by his Will, the Obligor is not bound to pay it to his Executors, becauſe the Condition hath Reference to his Nomination.

5 Co. 97. Leon. 252.

If *A.* ſeiſed in Fee by Indenture inrolled, covenants with *B.* that if *B.* pays to *A.* his Heirs or Aſſigns, 400*l.* at a Day, that then *A.* and his Heirs ſhall ſtand ſeiſed to the Uſe of *B.* and his Heirs, and *A.* deviſes to his Wife during the Minority of his Son, and dies, the Money ſhall not be paid to the Wife, for ſhe is not Aſſignee; the Reverſion being in the Heirs of *A.*

5 Co. 97.

But if *A.* had made a Leaſe for Life, the Remainder to another in Fee, the Leſſee for Life had been an Aſſignee.

5 Co. 97. a.

And it was ſaid, That if *A.* had conveyed over his whole Eſtate in Part, yet ſo long as *A.* had any Part remaining, the Tender ought to be made to him.

42E. 3. 13. b. Rol. Abr. 421.

If the Condition of an Obligation be to pay 10*l.* *&c.* it is a good Performance if he pays it to his (*a*) Deputy.

(*a*) A Bond was conditioned for the Delivery of forty Pair of Shoes at *Holbourn-Bridge*, within a Month, to *J. S.* a common Carrier, for the Uſe of the Obligee, and *J. S.* did not come to *London* within the Month, but the Obligor delivered them to his Porter; and it was adjudged a good Performance, for that the Delivery to the Man was a Delivery to the Maſter, within the Intent of the Condition. 2 Mod. 309. Eq. Caſ. Abr. 308, 309. 10 Mod. 110, 111, 423. 11 Mod. 87. pl. 7. 88, 267. 12 Mod. 488, 564. 2 Ld. Raym. 792. Stra. 480, 505, 653. Sel. Caſ. Evid. 81, 89.

Moor 68. pl. 183.

If the Condition of an Obligation is to pay 20*l.* to the Obligee, and other the Pariſhioners of *D.* it (*b*) may be paid to any two of them.

(*b*) Where the Condition is to pay Money to Baron and Feme, it may be pleaded to have been paid to the Baron only. Goulſ. 73. *& vide* 2 Sid. 41.

3. At what Time it may be performed.

If a Man makes a Feoffment in Fee, upon Condition that the Feoffor upon Payment of such a Sum of Money to the Feoffee without Limitation of Time should re-enter, the Feoffor hath Time during Life to pay the Money to the Feoffee during his Life; but if either die before that Time is elapsed, which is set by the Parties for the Performance of the Condition, the Feoffment is absolute; but if the Payment were to be made to the Feoffee, his Heirs or Executors, then the Feoffor hath Time during Life. Lit. Sect. 337. Co. Lit. 208.

But if the Condition be, That the Feoffee shall pay Money to the Feoffor, it must be paid in convenient Time, for it is not reasonable the Feoffee should have the Benefit of the Land without Payment. 2 And. 73.

If the Condition of an Obligation be to do a local Act to the Obligee, to which the Concurrence of the Obligor and Obligee is necessary, as to make a Feoffment, &c. (no Time being limited) the Obligor hath Time during his Life to perform it, if not hastened by Request. Co. Lit. 208. b. 6 Co. 30. b.

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*When by the Condition the Obligor, Feoffor, Feoffee or Stranger, are to do a sole (a) Act or Labour, as to go to *Rome*, &c. they shall have Time during Life, and cannot be hastened by Request. *Page 426 Co. Lit. 208. a. 209. b.

(a) Which in no Manner concerns the Obligee, Feoffor, &c. nor their Benefit. 6 Co. 31. a. b. Leon. 125.

The Lord *Clifford* held, &c. *in Capite*, and the King licensed him to alien to *B.* and *C.* so that they should give the same to my Lord *Clifford* and the Heirs of his Body, the Remainder over; and the Lord *Clifford*, according to the Licence, enfeoffed *B.* and *C.* and before any Reconveyance the Lord *Clifford* died; and it was adjudged his Heir might enter; for if they should make the Estate to the Issue of the Lord *Clifford*, the King might seize for want of a Licence, and that in Default of the Feoffees. Co. Lit. 222. 2 Co. 80. a. S. C. cited.

When the Act, by the Condition of an Obligation to be done to the Obligee, is of its own Nature transitory, as Payment of Money, Delivery of Charters, and the like, and no Time limited, it ought to be performed in (b) convenient Time. 6 Co. 31. Co. Lit. 208. (b) Rol. Abr. 436. S. C. and several Cases there cited to this Purpose.

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If the Condition of an Obligation be to pay a certain Sum to a Stranger, without limiting any Time, this ought to be done (c) in convenient Time. Rol. Abr. 437.

(c) So where the Condition was, in convenient Time to assure the Land for the Maintenance of a School, and the Devisee did not do it in eight Years, Co. 25. b. it was adjudged a Breach.

If the Condition of an Obligation be to pay so much to a Stranger such a Day, if he pays it before the Day, (d) this is a good Performance, (e) because Payment before contains Payment at the Day. Rol. Abr. 440. (d) Co. Lit. 212. a.

Cro. Car. 284. Cro. Jac. 435. Moor 367. pl. 502. & *vide* 2 Sid. 78. (e) And upon *solvit ad diem*, such Payment may be given in Evidence. Moor 267. Cro. Eliz. 142. And. 108. Sav. 96. Owen 45. Dyer 222. Godb. 10. Moor 47. adjudged. Doug. 49. 2 Term Rep. 383. 3 Term Rep. 374.

Rol. Abr. 437. If a Deviſe be to *A.* upon Condition that he pays the Debts of the Teſtator, he muſt pay them in a convenient Time, otherwiſe the Condition is broken; but where Lands are deviſed to be ſold for that Purpoſe, the Deviſee is not obliged to pay the Debts before he can find a Purchaſer for the Lands.

2 Co. 78. Lord Cromwell's Caſe. 2 And. 69. Moor 472. S. C. Co. Lit. 222. And. 17. Moor 105. S. P. If *A.* conveys a Manor to which an Advowſon is Appendant, to *J. S.* in Fee, upon Condition that *J. S.* ſhall re-grant the Advowſon to *A.* for his Life, and if it happens not to be void in his Life, then one Turn to his Executors; though in this Caſe *J. S.* hath all his Life to re-grant it, if he be not haſtened by Requeſt, and the Church does not become void in the mean Time, yet if the Church becomes void during his Life, before any Requeſt, the Condition is broken, becauſe the Feoffee cannot have all the Effect which was intended him by the Re-grant, which was to have all the Preſentations during his Life.

Co. Lit. 208. b. Moor 472. Goulſ. 117. 2 Co. 79. If *A.* enfeoffs *B.* the firſt of *May*, upon Condition that he ſhall grant to *A.* an Annuity or Rent during his Life, payable yearly at *Michaelmas*, and the Annunciation; in this Caſe the Feoffee hath not Time to do it during his Life, but he ought to do it *(f)* before the firſt of the ſaid Feaſts, for otherwiſe *A.* cannot have all the Advantage of the Rent intended him by the Condition.

(f) Where one is to grant a Reverſion, he may do it any Time during his Life, if it ſo long continues a Reverſion, if he be not haſtened by Requeſt. Lev. 44.

*Page427 * If an Obligor or Feoffee be, by Force of the Condition of a Bond or Feoffment, to pay Money, or make a Feoffment to a Stranger, they muſt do it preſently, and *(g)* muſt give Notice to the Stranger, and they ſhall not ſave the Condition by making a Tender thereof, if the other refuſes to accept of it; for where one undertakes to do an Act to a Stranger, he muſt at his Peril take Care of the Performance of it.

Co. Lit. 208. *(g)* But if the Condition be to be performed to the Party himſelf only, who is to take Advantage of the Breach of the Condition, the Feoffee is not bound to do it before Requeſt. Rol. Abr. 439. Moor 472.

Co. Lit. 208. b. 6 Co. 31. a. S. P. *Vide* Perk. 756. *cont.* ‖ But the Text ſeems to be law. If *A.* be bound to *B.* that *C.* ſhall infeoff *D.* *C.* has Time during his Life to do it, unleſs he be haſtened by Requeſt; and if *C.* make a Tender thereof, and *D.* refuſe, the Bond is ſaved; for the Obligor undertakes not to do any Act himſelf, but his Intent is to engage for the Readineſs of a Stranger to do an Act to another who ſhall be intended to be a Friend of the Obligee, and under his Influence; but in the ſaid Caſe if the Condition were, That *C.* ſhould enfeoff *D.* on ſuch a Day, *C.* muſt ſeek *D.* and give him Notice thereof, and requeſt him to be on the Land at the Day.

Co. Lit. 219. b. If the Condition be to make a Gift in Tail to the Feoffor, the Remainder to a Stranger in Fee, the Feoffee has Time during his Life to do it, becauſe the Feoffor, who is Party and Privy to the Condition, is to take the firſt Eſtate.

Rol. Abr. 439. 6 Co. 31. If a Feoffment be upon Condition to re-enfeoff the Feoffor and his Wife, he *(h)* ought to do it upon Requeſt.

(h) But if not haſtened by Requeſt, he hath Time during his Life, becauſe the Feoffor, who is privy to the Condition, is to take jointly with her. Co. Lit. 219. Hetl. 59. But if the Baron dies, the Feoffment muſt be made to the Wife without Requeſt. Hetl. 56.

2 Co. 3. Manſer's Caſe. Rol. Abr. 440. S. C. If the Condition of an Obligation be, That whereas *A.* the Obligor hath conveyed Lands to *B.* the Obligee, if *A.* the Obligor, and *C.* his Son, ſhall do all Acts, and deviſes for the better Aſſurance of theſe Lands to *B.* which ſhall be diviſed by *B.* or his Counſel, then the Obligation ſhall be void; and after *B.* deviſes and tenders a Releaſe to be ſealed

by *A.* and *C.* his Son, and *A.* preſently ſeals, but *C.* becauſe he was not lettered, nor could read it, prays *B.* to deliver it to him, to ſhew to ſome Man learned in the Law, who might inform him whether it was according to the Condition; and if it was according to the Condition, he would ſeal it; this was a Breach of the Condition, becauſe he did not require the Writing to be read to him, and he was bound to take Conuzance of the Law, whether it was according to the Condition, and ſhall not have reaſonable Time to ſhew the Writing to his Counſel learned in the Law, to be inſtructed by them.

If the Condition be to make ſuch Aſſurance, *&c.* to the Obligee as the Obligee ſhall deviſe, and after the Obligee deviſes an Indenture, *&c.* and tenders it to him, and he requires Time to ſhew it to his Counſel, to be adviſed thereupon, which is denied to him; yet if he does not ſeal it (*c*) preſently, the Condition is broken, becauſe the Condition is peremptory, *ſcilicet*, to be performed preſently. Rol. Abr. 424. 2 Co. 3. Leon. 62. 2 And. 53. Moor 182, S. C.

(*c*) But where a Man ſhall have Time to adviſe with his Counſel. 4 Leon. 190. Cro. Eliz. 9. Rol. Abr. 441. Moor 143.——That if the Condition be to make ſuch Aſſurance as his Counſel ſhould adviſe, his Counſel ought to draw and engroſs it, *&c.* Moor 595.*

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* Or at leaſt to approve the Draft.

If the Condition of an Obligation be, If the Obligor do at all Times hereafter within the Space of one Month, when he ſhall be required, make ſuch further Act or Acts, Aſſurance and Aſſurances, as the Obligee ſhall by his Counſel demand, for the Recovery of one Annuity of 30*l.* due from *J. S.* then the Obligation to be void; in this Caſe if the (*a*) Obligee does not demand any further Aſſurance within the Month after the making the Obligation, yet the Obligor is bound to make further Aſſurance within a Month after requeſt made after the Month paſt, after making the Obligation; becauſe the firſt Words, *ſcilicet, at all Times hereafter*, are without Limitation; and the other Words, *within one Month, when he ſhall be required*, refer to the Requeſt, *ſcilicet*, he ſhall have a Month for the making thereof after Requeſt; for the moſt benign Conſtruction ſhall be made to make this Agreement effectual; for this is not like a common Aſſurance, by which it is covenanted to make further Aſſurance within ſeven Years, becauſe the Uſe in ſuch Caſe hath interpreted it, that he ſhall not be troubled beyond ſeven Years. Rol. Abr. 441. *Wentworth* and *Wentworth*, Stile 241. S.C. adjudged. *Page 428

(*a*) If the Condition of an Obligation is to pay 50*l.* upon the tenth of *January* next, on three Months Warning, the Obligor muſt pay the Money upon the tenth of *January* next, giving the Obligee three Months Warning; for the Words ſhall be taken moſt ſtrongly againſt the Obligor. Lev. 85. Raym. 61. but ſaid by *Windham*, admitting the Obligee is to give Warning, and omits it, yet the Money is not loſt, but ſhall be paid on any Three Months Warning. Keb. 381, 415.

If the Condition be to do a Thing within a certain Time, he may perform it the laſt Day of the Time appointed. 8 H. 4. 14. But for this *vide* Cro. Eliz. 14. Moor 122. pl. 266. Rol. Abr. 442.

If upon a Mortgage a Tender be made of the Money at the Place, at any Time of the Day ſpecified in the Condition, and the Mortgagee refuſes, the Condition is ſaved for ever, and the Mortgagor need not ſtay at the Place appointed till the laſt Inſtant of the Day, becauſe by the expreſs Letter of the Condition, the Money is to be paid on the Day indefinitely; nor needs there be any new Tender afterwards within convenient Time, becauſe by the Words of the Contract both Parties ought to acquieſce. Plow. 173. 5 Co. 114. Co. Lit. 206. 7 E. 4. 3. 9 H. 6. 12. 22 H. 6. 37. 47 E. 3. 26.

If the Condition of an Obligation be, to deliver to the Obligee twenty Quarters of Corn the twenty-ninth of *February* next following the Date, Leon. 101. adjudged.

and the next *February* hath but twenty-eight Days, he is not bound to deliver it till a Leap year.

4. At what Place it may be performed.

Rol. Abr. 445, 446. If a Place be limited and agreed on by the Parties where the Condition is to be performed, the Party who is to perform it is not obliged to ſeek the Party to whom, &c. elſewhere, nor is he to whom it is to be performed, (*a*) obliged to accept of the Performance elſewhere.

(*a*) But he may accept it at another Place, and it is good. Moor 367. pl. 502.

21 E. 4. 6. 20E. 4. 18. b. Rent reſerved, payable yearly, is to be paid on the Land; ſo if a Man leaſes, rendering Rent, and the Leſſee binds himſelf in 20*l.* to perform the Covenants; this does not alter the Place of Payment of the Rent, for it may be tendered (*b*) on the Land without ſeeking the Obligee.

(*b*) But where the Condition is for Performance of Homage, or other ſpecial corporeal Service, to the Perſon of the Lord, the Tenant by the Law of Convenience ought to ſeek him in any Place in *England*. Co. Lit. 211. a.

Lit. ſ. 78. Co. Lit. 210. But if a Man makes a Feoffment, upon Condition that the Feoffor, upon Payment of 10*l.* may enter, &c. the Money being a Sum in Groſs, and collateral to the Title of the Land, the Feoffor muſt tender the Money to the Perſon of the Feoffee if in *England*.

*Page 429 Co. Lit. 210. * If the Condition of a Bond or Feoffment, is to make a (*c*) Feoffment, it is ſufficient to tender it upon the Land; becauſe the Eſtate muſt paſs by Livery.

(*c*) Otherwiſe, if to make an abſolute Eſtate of Inheritance, unleſs he firſt gives Notice that he will do it ſuch a Time by Feoffment. Allen 24. Stile 61. adjudged.

Co. Lit. 210. 3 Leon. 260. S. P. If the Condition of an Obligation or Feoffment be, to deliver twenty Quarters of Wheat, or twenty Load of Timber, &c. to the Obligee or Feoffee, the Obligor or Feoffor is not bound to carry the ſame about, and ſeek the Feoffee, but the Obligor or Feoffor, before the Day, muſt go to the Obligee or Feoffee, and know where he will appoint to receive it, and there it muſt be delivered*.

* In Caſe of ſuch an Obligation, to be entered into, it behoves the Obligor to fix a proper and convenient Place. Yet, Q. If Tender at the Habitation of the Obligee would not be good?

5. What ſhall be ſaid a ſufficient Performance.

Co. Lit. 95. b. 96. a. Cro. Eliz. 383, 384. Moor 708. Goulſ. 177. Poph. 99. Co. 209. Godb. 299. S. C. between *Goodall* and *Wiat*. If a Man makes a Feoffment in Fee, upon Condition that the Feoffor, within a Year after the Death of the Feoffee, pay to his Heirs, Executors, or Adminiſtrators, 100*l.* that then the Feoffor ſhould re-enter, the Feoffee makes a Feoffment over, and dies, the Feoffor paid the 100*l.* within the Year, and the Heir paid back 30*l.* this is a partial and fraudulent Payment; and no good Performance of the Condition, to defeat the Eſtate of the [ſecond] Feoffee; but if the whole Money had been paid, it had been good; becauſe the Payment is to be made to the Perſons mentioned in the Condition, and not to the Aſſignee of the Land, who is not named therein.

Shep. Touch. 140. 1 Wood's Conv. 273, 283, 290, 299, 362.

Cro. Eliz. 7. Moor 709. Goulſ. 177. Leon. 52. S. P. (*d*) Sid. 48. Bull. N. P. 161. If *A.* is boond to *B.* in an (*d*) Obligation, conditioned that *A.* ſhall deliver to *B.* before ſuch a Day an Obligation, in which *B.* is bound to *A.* if *A.* ſues *B.* upon the Obligation, and recovers, and after, before the Day, delivers it to *B.* this is no Performance of the Condition; for notwithſtandin

ſtanding the Delivery of the Obligation, he may take Benefit of the Judgment; and ſo the Intent of the Condition is not performed. Raym. 25. Keb. 103.

Like Point in Caſe of a Covenant.——So in Caſe of a Promiſe. Rol. Abr. 448.

If *A.* being a common Brewer, covenants that *B.* ſhall have ſeven Parts of all his Grains made in his Brew-houſe, for ſeven Years, and after *A.* puts in great Quantities of Hops into his Malt, of which the Grains were made, by Means whereof the Grains are ſpoiled, this is a Breach; becauſe in all Contracts the Intention of the Parties is to be conſidered; and here it was the Intention of the Parties, that *B.* ſhould have the Grains for the Uſe of his Cattle, and they will not eat them when Hops are put into them. Raym. 464. 2 Jones 191. S. C. between *Griffith* and *Goodland*, adjudged, though objected Caſe would lie, and no Covenant; for that was performed by the Delivery of the Grains, the Plaintiff ſhewing for a Breach, that the Defendant had *ſubdole & callide*, to deceive the Plaintiff of the Benefit of the Covenant, mixed Hops with his Malt, by which he had diſabled himſelf to perform the Intent of the Agreement.

So if I covenant to deliver ſo many Yards of Cloth, and cut it in Pieces, and deliver it, this is a Breach; for the Law regards the (*c*) real and faithful Performance of Contracts, and diſcountenances all ſuch Acts as are done *in fraudem legis*. Raym. 464. (*c*) If the Condition of a Bond be to pay 50*l.* though it is not ſaid of Money, yet it muſt be ſo intended; and the Obligee cannot tender fifty Pound Weight of Stone. Sid. 151. Said by *Twiſden*, that he remembered it to have been adjudged.—But if a Man covenants that his Son, then *infra annos nubiles*, ſhall marry the Daughter of *B.* before ſuch a Day, and he marries her accordingly, but at the Age of Conſent diſagrees to the Marriage, yet is the Covenant performed; for it was a Marriage, though ſubject to be defeated by Diſagreement, and no other could be had within the Time. Owen 25. adjudged.

*If a Man aſſumes to make a Surrender of a Copyhold, upon Requeſt, he is not bound to make it into the Hands of two Cuſtomary Tenants; for that is but a particular Way of making a Surrender, grounded upon a particular Cuſtom. *Page 430 Allen 68. Stile 107. adjudged. —So if a Man be bound to make an Aſſurance as the Obligee ſhall deviſe, he is not bound to acknowledge a Fine by *Dedimus*; for that is but a ſpecial Way of taking the Cognizance. Allen 69.—*Secus* if there is a Proviſo that he ſhall not go above five Miles from his Houſe, and his Houſe is above five Miles from *Weſtminſter*. Allen 69.——Covenant to make an Eſtate to *A.* and it is made to *B.* to the Uſe of *A.* and whether good, Godb. 95. *per Curiam dubitatur, & vide* Cro. Eliz. 825.—‖ If one Man is bound to make to another a ſure, ſufficient, and lawful Eſtate in certain Lands, by the Adviſe of *J. S.* if he makes an Eſtate to him according to the Advice of *J. S.* be it inſufficient, or not lawful, he is excuſed of the Obligation. 5 Co. 23. b.—Where the Condition is to deliver a Releaſe to the Obligee, it is not enough to ſay that it was written, and Wax affixed to it, and that he was ready to ſeal and deliver it, but that the Obligee refuſed to accept; for he ought to have done all that he could; and he might have ſealed it notwithſtanding. 2 Rol. Rep. 238.

‖ Qu. Why not ſince the Statute of Uſes; unleſs *A.* abſolutely refuſes to have the Intervention of a Truſtee.

If a Man by Indenture bargains and ſells his Lands to another in Fee, and covenants to make thereof to the Vendee a good and ſufficient Eſtate before *Chriſtmas* next, and before *Chriſtmas* the Vendor cauſes this Deed to be inrolled, yet this is not a good Performance; for by the Intention of the Covenant, ſome other Aſſurance was to be made. And. 27. Bendl. 36. 3 Leon. 1. S. C. adjudged.

If one be obliged to Aſſure twenty Acres of Land, the Acres ſhall be accounted according to the Eſtimation of the Country where the Land lies, and not according to the Meaſure limited by the Statute. Cro. Eliz. 476, 665. 6 Co. 67. Poph. 55.

Cro. El. 681. 1 Wood's Conv. 307. 441.

If *A.* covenants with *B.* to make ſuch Aſſurance of all his Lands, at the Coſts of *B.* as *B.* his Counſel ſhall (*a*) adviſe, *B.* may require one Aſſurance Moor 570. (*a*) If *A* co-

venants to make such Assurance

rance for one Parcel, and another Assurance for another Parcel; for being to be made at the Costs of *B.* it is no Prejudice to *A.*

of Lands to *B.* as the Counsel of *B.* shall devise, himself, though learned in the Law, cannot devise the Assurance, but it ought to be devised by some of his Counsel; for if the Party himself might advise it, then it would be no Plea to say *Quod concilium non dedit advisamentum.* 5 Co. 19. b. Cro. Eliz. 297. S. C. Rol. 466. S. P. *cent'.*

Moor 570. Cro. Eliz. 681.

But if the Assurance is to be made at the Costs of the *Covenantor*, if an Assurance of Part only is required, he must make it; but then he is discharged from making any Assurance of the Residue.

Yelv. 44. Moor 682. S.C. adjudged, the Condition being to do *all Acts*, &c. to be required by

If the Condition of an Obligation be, that the Obligor, before *Michaelmas*, shall make, *&c.* all and every reasonable Act and Thing for assuring the Manor of *D.* to *J. S.* and his Heirs, and the Obligee requests him generally to convey, the Obligor must make an Assurance; and if thereupon the Obligor makes a Feoffment, and the Obligee after requests a Fine, the Obligee must acknowledge it; and so upon every Request, he ought to make several Assurances.

the Obligee; but said, if it had been to be devised by the Obligee or his Counsel, he ought to have shewed he had devised, and required such a particular Feoffment or Fine.

Cro. Jac. 251. Moor 810. S. C. adjudged; because the Note is an Act preparatory for the

If a Man covenants to make further Assurance, and to do any Act or Acts, *&c.* as shall be devised, *&c.* and a Note of a Fine is tendered, and he is required to acknowledge it before a Judge of Assise, he must acknowledge it, though no Writ of Covenant is depending; for he hath covenanted to do every Act; and this Note of a Fine is an Act; and whether it be well levied, or to no Purpose, is not material.

Fine; and the Writ of Covenant may be sued out after; and so it is an Act for further Assurance, though the Writ of Covenant is not depending. Bulst. 90. S. C. & *vide* Latch 186. And. 56.

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Lit. s. 352. Co. Lit. 229. *Vide* Jones 380. Rol. Abr. 451. Eq. Abr. 19. & *post* 433.

* If *A.* (*a*) enfeoffs *B.* upon Condition that *B.* shall make a Gift in Tail to *A.* and his Wife, and the Heirs of their two Bodies, Remainder to the right Heir of the Feoffor, and *A.* dies; *B.* ought to make an Estate for Life to the Wife, (*b*) without Impeachment of Waste, Remainder to the Heirs of *A.* for the Estate shall be made as near the Intent of the Condition as it can be.

(*b*) And yet if the Wife accepts the Estate for Life, without this Clause, it is good; because the Estate for Life is the Substance of the Grant, *&c.* Co. Lit. 219. b.

Owen 52. Leon. 74. Goulf. 71. Rol. Abr. 444.

If the Condition be in the Copulative, and it is not possible to be performed, it shall be taken in the (*c*) Disjunctive.

(*c*) As if the Condition be, that he and his Executors should do such a Thing, this is in the Disjunctive, because he cannot have an Executor in his Life-time. 21 Ed. 4. 44. b. Rol. Abr. 444. S. C.——So if the Condition be, that he and his Assigns shall sell certain Goods, this is in the Disjunctive, because both cannot do it. 21 E. 4. 44. b. Rol. Abr. 444. S. C.

Co. Lit. 225. a. Moor 239. Owen 52. Goulf. 71. And. 161. Leon. 244. Cro. Eliz. 269.

If a Lease be made to Husband and Wife for twenty-one Years, if the Husband or Wife, or any Child between them, so long lives; and the Wife dies without Issue, yet the Lease shall continue during the Life of the Husband; for the Disjunctive referreth to the Whole, and disjoineth not only the latter Part, as to the Child, but also to the Baron and Feme; so that the Sense is, if the Baron, Feme, or any Child, should so long live.

Co. Lit. 225. a. Leon. 243. Cro. Eliz. 270. 3 Wilf. 262.

So if an Use be limited till *A.* shall come from beyond Sea, and attain to his full Age, or die; if he comes from beyond Sea, or attains his full Age, the Use ceases.

If a Deviſe be made upon a Disjunctive Condition, to be performed by the Deviſee, he hath his (*d*) Election. Palm. 76. (*d*) So if the Condition be to enfeoff the Obligee of *D.* or *S.* the Obligor hath his Election. 18 E. 4. 17. b. 5 Co. 22. a. But for this *vide* Title *Election*, and Rol. Abr. 446.

If an Obligation be conditioned to pay *B.* or his Heirs, annually 12*l.* at *Midſummer* and *Chriſtmas*, or to pay him or his Heirs, at any of the ſaid Feaſts, 150*l.* the Obligor hath Election to pay the 12*l.* or the 150*l.* though he may at any Time * determine the Payment of the 12*l.* by the Payment of the 150*l.* Cro. Jac. 594. adjudged. Doug. 15.

* This muſt mean, at either of the Feaſts, becauſe an annual Sum is payable, in the mean Time.

If *A.* covenants with *B.* that *A.* or his Son *C.* or either of them, ſhall work with *B.* at the Grinding and Poliſhing of Glaſs, *B.* paying to each of them ſo much, &c. and *B.* requeſts *C.* to work with him, &c. if he doth not, the Covenant is broken; for *B.* had the Election to require both, or any one of them to work with him. 2 Sid. 107. Sir *Paul Neele* and *Reeve*, adjudged.

If an Obligation be conditioned to pay Money, if a Ship puts to Sea, or the Goods, or the Obligor return ſafe, and the Obligor dies before his Return, yet the Money is payable; for all thoſe Things being contingent, and uncertain which of them will happen, the Law ſupplies the Words *which ſhall firſt happen*, and foreclоſes the Election of the Obligor; (*e*) and is not like the Caſe where a Man is bound to pay Money at *Lady-day* or *Michaelmas*, and he dies after *Lady-day*, and before *Michaelmas* †. Lev. 54. *Sayer* and *Glean*, adjudged.

(*e*) *Vide* Cro. Eliz. 380.

† This ſuppoſes the Obligor to have had an Election.

So where the Condition of a Bond was, that the Obligor ſhould bring the Son and Daughter of *J. S.* at their full Age, to give ſuch Releaſes as a third Perſon ſhould require; the Defendant pleads that the Son is alive, and under Age; and on Demurrer to this Plea, it was held, that the Force of the Bond was not ſuſpended till they are both of Age, becauſe it is to be taken not conjunctively, but reſpectively and diſtributively; for the Obligor undertakes that the Daughter ſhall releaſe at her full Age, as well as the Son; and if ſhe does not, the Condition is broken. *Reſvel* and *Coats*, adjudged.

* If the Condition of an Obligation be to pay 30*l.* or twenty Kine, within a Month after the Death of *K.* at the Election of the Obligee, he muſt, at his Peril, make his Election within the Time limited; for the Obligor is not bound to tender both; but where the Condition is to pay ſuch a Day 10*l.* in Gold or Silver, at the Election of the Obligee, if he does not make his Election before the Day, yet the Duty remains payable, being Parcel of the Penalty. *Page 432 Leon. 69. Moor 241.

If the Condition of an Obligation be, that if the Obligor, within ſix Months after the Death of *B.* ſhall aſſure a Rent of 20*l.* yearly to *C.* as the Counſel of *C.* ſhall adviſe, at the Coſts and Charges of *C.* if *C.* require the ſame; or if the Obligor ſhall not grant the Rent, if then he ſhall pay to *C.* 300*l.* the Obligation ſhall be void; and *B.* dies, and *C.* tenders no Grant of the Rent within the Time, the Obligor is not bound to pay the 300*l.* Mod. 265. adjudged by three Judges *niſi*, againſt *Windham*, who ſaid the Condition is not diſjunctive till Requeſt to ſeal a Deed of Annuity; and that therefore the Obligor ought to pay the 300l. 2 Mod. 201. S. C. adjudged *per totam Curiam.**

* In this Caſe *C.* not having tendered a Grant, had not done every Thing in his Power to intitle himſelf to his Action, as the Grant was to be at his Coſts, and he was to requeſt the Obligor to make the ſame.

If

2 Mod. 304. *Wright* and *Bull*, adjudged.

If the Condition of an Obligation be, that the Obligor ſhall work out 40*l.* at the Uſual Prices in Packing, when the Obligee ſhall have Occaſion for himſelf or Friends to employ him therein, or otherwiſe ſhall pay him 40*l.* if the Obligee hath no Occaſion to make Uſe of him in Packing, he muſt pay the 40*l.*

(Q) What ſhall excuſe the Non-performance: And herein,

1. Of the Act of God.

Rol. Abr. 449. Co. Lit. 206. a. Same Rule.

REgularly, if a Condition, which was poſſible at the making thereof, (*a*) becomes impoſſible by the Act of God, the Obligation is diſcharged.

(*a*) Where the Sickneſs of the Wife will excuſe the Huſband and Wife from levying a Fine, the Condition being to levy it upon the reaſonable Requeſt of the Obligee. Moor 124. pl. 270. *& vide* Leon. 304.

But for this *vide* Title *Bail*. And Rol. Abr. 449.

If a Man be let to Mainprize, it is a good Plea at the Day when the Manucaptors ought to have the Body, *&c.* for the Manucaptors to ſay that he who was let to Mainprize was dead before the Day, ſo that they could not have his Body at the Day.

Rol. Abr. 450.

If a Man covenants to build an Houſe before ſuch a Day, and after the Plague is there before the Day, and continues there till after the Day, this ſhall excuſe him from the Breach of the Covenant, for the not doing thereof before the Day, for the Law will not compel a Man to venture his Life for it, but he may do it after.

5 Co. 22. *Laughter's* Caſe. * Poph. 98. Moor 357. Cro. Eliz. 398. S. C.

If the Condition conſiſts of two Parts in the Disjunctive, in which the Party hath an Election which of them to perform, and both poſſible at the Time of making the Condition, and one becomes impoſſible afterwards, by the Act of God; this ſhall excuſe the Performance of that and the other alſo; for otherwiſe his Election ſhould be taken away by the Act of God.

The Condition being, that if *B.* aliened his Wife's Lands, if then he purchaſed other Lands of as much Value, to his Wife and her Heirs, or ſhould leave her the Value by his Will, then the Bond ſhould be void, and he aliened his Wife's Lands; and before any Purchaſe made the Wife died, living *B.* but *Gaudey* held, that he ought to purchaſe Lands to the Heir of the Wife. *Et vide* Cro. Eliz. 277, 864. Moor 432, 645. 2 Jones 95. 3 Keb. 738, 761, 770. Mod. 265. 2 Will. Rep. (617.) 3 Will. Rep. 189. 3 Mod. 234.

* See *poſt* 433.

*Page433 Salk. 170. pl. 2. *Per Treby* Ch. Juſt.

* But it has been held, where the Condition was to make the Obligee a Leaſe for Life, by ſuch a Day, or pay him 100*l.* that though the Obligee die before the Day, his Executor ſhall have the 100*l.* and the Ground of *Laughter's* Caſe was denied to be univerſal.

5 Co. 22. Cro. Eliz. 780. S. P.

If a Condition conſiſts of two Parts, of which one was not poſſible at the making of the Condition to be performed, he ought to perform the other.

21 E. 3. 30. Rol. Abr. 450.

As if the Condition be to infeoff *J. S.* or his Heirs, when he comes to ſuch a Place, he is bound to infeoff *J. S.* when he comes, becauſe the other

other is not poſſible; for he cannot have an Heir during his Life, and ſo he had not any Election.

If a Condition of an Obligation be to make an Aſſurance of certain Land to the Obligee and his Heirs, and after the Obligee dies, yet he ought to make the Aſſurance to his Heir; for this Copulative *and his Heirs* ſhall have the Signification of a Disjunctive. Rol. Abr. 450. Jones 180. Palm. 552. & *vide* Cro. Eliz. 399.

3 Mod. 233. Vern. 35. 8 Mod. 23. 10 Mod. 18, 334, 370, 372. 11 Mod. 45. 12 Mod. 404. Caſe *Temp. Talb.* 109, 110. 1 Wood's Conv. 312.

If the Condition of an Obligation be to infeoff two before ſuch a Day, and one dies before the Day, yet he ought to infeoff the other. Rol. Abr. 451. N. Bendl. 35. S. P. *cont. per Montague.*

If the Condition of an Obligation be, that whereas a Marriage is intended between *A.* and *B.* if the ſaid Marriage takes Effect, and if *B.* the Wife ſurvives *A.* and does not receive 300*l.* of *A.* by his Will, or by the Cuſtom of *London*, within three Months after the Death of *A.* that then if the Obligor pays to *B.* or her Executors, 500*l.* within ſix Months after, the Obligation ſhall be void; and after the Marriage takes Effect, and *B.* ſurvives *A.* and dies within three Months, without receiving any Thing of the ſaid 300*l.* by the Will of *A.* or by the Cuſtom of *London*; it ſeems the Death of *B.* within the three Months, ſhall not excuſe the Obligor to pay the 500*l.* to the Executors of *B.* becauſe it is not any diſjunctive Condition of which the Obligor hath any Election to do the one or the other; but the Condition is, that if a Stranger does not pay ſo much within a Time, that he himſelf will pay another Sum, ſo that the Death of the Party, who is to receive from the Stranger, ſhall not excuſe the Obligor.‡ Rol. Abr. 450. *Wood* and *Bates*. But *Jones* 171. S. S. adjudged, *cont. per totam Curiam.* Palm. 513. S. C. adjudged *cont.* and it was ſaid that there was no Difference when the Election is in a Stranger, or in the Obligor. ‡ The Text ſeems to be Law.

If *A.* binds himſelf Apprentice to *B.* for ſeven Years, and *B.* enters into a Bond to *A.* conditioned to pay *A.* his Executors or Aſſigns, 10*l.* at the Time of the End or Determination of his Apprenticeſhip, and *A.* ſerves ſix Years, and then dies, the Money ſhall not be paid to his Executor, though it was objected that his Apprenticeſhip ended at his Death. 2 Brownl. 97. *Cheney* and *Sell.* Godb. 153. S. C. adjudged

If *A.* enters into a Bond to *B.* conditioned that *C.* ſhould perform an Award to be made between *B.* and *C.* and it is awarded that *C.* ſhall pay to *B.* 10*l.* at *Michaelmas*, and 10*l.* at *Lady-Day*, yet becauſe the Sum awarded is a Duty, it is as if the Condition of a Bond had been for the Payment of the Money; and if not paid, the Bond is forfeited. 2 Leon. 155. *Kingwell* and *Chapman.* Cro. Eliz. 10. S. C. adjudged.

But if the Condition of an Obligation be, that the Obligor ſhall infeoff the Obligee at ſuch a Day, and before the Day the Obligor dies, and the Land deſcends to his Heir, the Condition is become impoſſible by the Act of God, and the Performance thereof excuſed. 2 Leon. 155. Co. Lit. 218. a. S. P.

But it has been held in Equity, that if the Condition of a Bond be to ſettle certain Lands in ſuch a Manor, by ſuch a Day, though the Obligor die before the Day, by which the Bond is ſaved at Law, yet an Execution ought to be decreed in Specie. Eq. Abr. 18. Decreed accordingly, and ſaid to have been often done.

One deviſed to his eldeſt Daughter upon Condition ſhe ſhould marry his Nephew, on or before ſhe attained the Age of twenty, the Nephew *died young, and the Daughter never refuſed, and indeed never was required to marry him; after the Death of the Nephew, the Daughter, being about ſeventeen, married *J. S.* and it was adjudged that the Condition was not broken, being become impoſſible by the Act of God. *Page 434 Salk. 170. pl. 1. *Thomas* and *Howel*, adjudged in *C. B.* and affirmed in *B. R.* *Skin.* 301. pl. 5. 319. pl. 1. S. C. adjudged.

2. Of

2. Of the Act of Law.

Rol. Abr. 451. If an Annuity be granted upon Condition that the Grantee ſhall be Attorney for the Grantor, in all Pleas, if he be after made Sheriff, yet this ſhall not excuſe him from the Performance of the Condition; but he ought to be his Attorney; otherwiſe the Condition is broken.

Rol. Abr. 452. *Slade* and *Thompſon*, adjudged. Cro. Jac. 374. Rol. Rep. 198. 3 Bulſt. 58. If *A.* deviſes Land to *B.* and his Heirs, upon Condition that he, his Heirs and Aſſigns, with the Iſſues and Profits of the Land, ſhall pay yearly ſo much for certain Charitable Uſes, and dies, and after the Deviſee dies, his Heir within Age, and in Ward to the King, the Payment ſhall be excuſed, during the Time the King hath him in Ward; for by the Intent of the Condition, the Payment ought to be made with the Iſſues and Profits, which are transferred, by Act in Law, to the King.

S. C. adjudged. Hard. 10, 11. S. P. appears, and long Argument, whether the King ſhould be bound by the Condition.

Yelv. 207. *Roſſe* and *Pie*, adjudged. Bulſt. 155. S. C. *per Curiam*, and ſaid that though the Hands of the Judges were ſhut, and foreclоſed by the *Certiorari*, yet they might have entered his Appearance. Cro. Jac. 281. S. C. adjudged, and that he ought to have procured his Appearance to be recorded. Gilb. Eq. Rep. 43. If a Recogniſance be conditioned for the Appearance of *B.* at the next Aſſiſes held for the County of *S.* and before the next Aſſiſes, *B.* ſues a *Certiorari* out of the *King's Bench*, to remove the Recognizance, and at the next Aſſiſes delivers the *Certiorari* to the Judge, yet this does not excuſe his Appearance; for though the *Certiorari* was the Command of the King, yet the Purchaſe thereof was the Act of *B.* and he could by no ſuch Slight ſave his Recognizance.

2 Lev. 26. Vent. 175. 2 Keb. 831. S. C. adjudged againſt the Opinion of *Twiſden*. If a Man hath good Title to Land, by Virtue of a Fine, and ſells the ſame, and covenants with the Vendee, his Heirs and Aſſigns, that he ſhall enjoy againſt him and *B.* and all claiming under him; and after by an Act of Parliament, reciting that *B.* had ſettled this Eſtate upon *C.* and that certain Perſons had unduly procured the ſaid Fine from her, it is enacted that the Fine ſhall be void, and that every Perſon may enter, as if no ſuch Fine had been; and after one enters, claiming Title under *C.* this is a Breach of the Covenant; for the Act makes no new Title, but removes the Obſtruction of the old; and it was ſaid, that doubtleſs *B.* was named in the Covenant for this Purpoſe, in Caſe this Fine unduly obtained ſhould be avoided.

3. Of the Act of the Parties.

8 Co. 92. Co. Lit. 206. S. P. Upon the Condition of a Feoffment. If the Condition of an Obligation be, that the Obligor ſhall enfeoff the Obligee of the Land, before ſuch a Day, and after, before the Day, the Obligee diſſeiſes the Obligor, and keeps it by Force till after the Day, ſo that the Obligor cannot enter, this will excuſe the Performance of the Condition.

Rol. Abr. 453. but 454. S. C. *cont.* & *vide* Cro. Eliz. 374. S. C. adjudged, it not being alledged that the Leſſor held him out, and diſturbed him in doing it. Moor 402. Owen 65. Godb. 69. If Leſſee for Years covenants to drain the Water which is upon the Land, before ſuch a Day, and after the Leſſor enters before the Day, and there continues till the Day is paſt, yet this ſhall not excuſe the Performance of the Covenant, (*a*) becauſe this is collateral to the Land.

(*a*) But if it had been a Covenant adhering to the Land, and in reſpect of the Enjoyment thereof, it would have been otherwiſe; but then it muſt have been ſhewn that he held him out of Poſſeſſion. Moor 402. pl. 534. Owen 65.

* If a Man be bound to build an Houſe, &c. he is excuſed if the Obligee will not ſuffer him to build it; for he cannot come upon the Land againſt his Will. *Page 435 Bro. Covenant 31. Rol. Abr. 453.

So if a Condition be to repair a Houſe, he is excuſed thereof, if a Stranger, by the Command of the Obligee himſelf, diſturbs him, and will not ſuffer him to do it. 9 H. 6. 44. b. Rol. Abr. 453.

If the Condition be to erect a Mill, and after he comes to the Obligee, and ſays all is ready for the Erecting thereof, and demands of him when he ſhall come with the Mill to erect it; if the Obligee ſays, he will not have the Mill, and intirely diſcharges him of the Mill, this ſhall excuſe him of the Performance. 3 H. 6. 37. Rol. Abr. 453, 454.

If Leſſee for Years of an Houſe covenants to repair it, and to leave it in as good Plight as he found it, and after certain Sparks of Fire come out of the Chimney of the Leſſor, into an Houſe not much remote, by which the Houſe of the Leſſee is burnt, this will excuſe the Performance of the Covenant to the Leſſee; ſo that he is not bound to rebuild, becauſe this comes by the Act of the Leſſor himſelf. Rol. Abr. 454.

If a Leaſe be made upon Condition that the Leſſee ſhall not permit or harbour any Whore within the Houſe to him let, and that if he ſuffers ſuch Woman to ſtay there ſix Weeks after Warning, &c. it ſhall be lawful for the Leſſor to enter; and after the Leſſee ſuffers ſuch Woman to be there, and Warning is given him by the Leſſor, although after the Leſſor commands the Woman to ſtay there for ſix Weeks, yet this ſhall not excuſe the Performance of the Condition, becauſe the Leſſor did not do any Act; and notwithſtanding the Command, the Leſſee (*a*) might have removed her*. 35 H. 6. 162. 8 Co. 91. b. Godb. 70. S. C. cited.

(*a*) If a Bond be conditioned to procure a Marriage between the Obligee and *B.* before a certain Day, and before the Day the Obligee calls *B.* Whore, and tells her if he marries her, he will tie her to a Poſt; by Reaſon whereof the Obligor could not procure *B.* to marry him, this will excuſe the Non-performance. Cro. Eliz. 694. Admit *per Cur'*, but then it muſt be ſhewn in pleading, that the Obligor did what he could to procure her to marry, &c.

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* *Sed qu.* If a Jury would now find in an Ejectment for the Leſſor, under ſuch Circumſtances, as it might be a Colluſion between the Landlord and the Woman, and it might be ſuppoſed the Landlord, by his Command to the Woman to ſtay, had given Licenſe and diſpenſed with the Condition?

But if the Leſſor ouſts the Leſſee, and by Force, and againſt the Will of the Leſſee, puts in the Woman, and violently makes her ſtay there by Force, againſt the Will of the Leſſee, for ſix Weeks, this ſhall excuſe the Performance of the Condition. 35 H. 6. 162. 8 Co. 92.

If *A.* is bound to *B.* that *J. S.* ſhall marry *Jane G.* before ſuch a Day, and before the Day *B.* marries her, he ſhall take no Advantage of the Condition, becauſe by his Means it could not be performed. Co. Lit. 206. b.

If a Man makes a Feoffment in Mortgage, upon Condition to be void upon Payment of Money by the Feoffor, &c. to the Feoffee, at a Day, if at the Day the Feoffee is out of the Realm, the Feoffor is not bound to ſeek him, or to go out of the Realm to him; and therefore, becauſe the Feoffee is the Cauſe that the Feoffor cannot tender the Money, the Feoffor may enter into the Land, as if duly tendered †. Co. Lit. 210. b.

† But he will remain liable to the Payment of the Money.

If *A.* leaſes to *B.* for Years, upon Condition that if *B.* pays Money to *A.* or his Heirs, at a Day, that *B.* ſhall have the Fee; and before the Day, *A.* is attainted of Treaſon, and executed; now though the Condition became impoſſible by the Act and Offence of *A.* yet *B.* ſhall not have a Fee; becauſe Co. Lit. 218. a.

because a precedent Condition to increase an Estate must be performed; and if it becomes impossible no Estate shall rise.

3 Leon. 159. adjudged, *Bedel's* Case. If *A.* leases to *B.* certain Lands for Years, rendering 40*l.* *per Ann.* and a Stranger covenants with *A.* that *B.* shall pay unto him the 40*l.* for the Farm and Occupation of the Lands; and before any Day of Payment, *A.* ousts *B.* of his Farm, *B.* is excused of the Payment of the Rent; for the Covenant was, that *B.* should pay 40*l.* for the Farm and Occupation; so that it is a conditional Covenant; and there ought to be *quid pro quo*; and here the Consideration upon which the Covenant is conceived, *viz.* *Page 436 * the Farm, and the Occupation of it, is taken away by the Act of *A.* himself.

Cro. Eliz. 672. *A.* entered into a Bond to *B.* conditioned to save *B.* harmless from a Bond made to *C.* for Payment of 100*l.* at a Day and Place, and at the Day of Payment *A.* was going to the Place to pay it, and *B.* by Covin caused *A.* to be imprisoned till after Sun set, to the Intent the 100*l.* should not be paid; and this being pleaded to an Action of Debt upon the Bond, it was adjudged upon Demurrer, that such a bare Surmise was no Bar.

8 Co. 76. b. *Strafford's* Case adjudged. 2 Brownl. 252. S. C. adjudged. If the King grants a Reversion in Tail, upon Condition that if the Grantee pays 20*s.* at the Receipt of the *Exchequer*, &c. the Grantee shall have a Fee, if afterwards the King, under his Great Seal, refuses to receive the Money, yet if the Grantee tenders it at the Receipt of the Exchequer, he shall gain a Fee; for the King by no Means can countermand or hinder the Increase of the Estate in such Case.

Hob. 103. adjudged. So if by pleading it had been applied to the Lease, &c. Rent as Rent. If the Condition of an Obligation be, that the Obligor shall pay 10*l.* to the Obligee, which is for the Rent of certain Lands, and the Obligee enters upon the Land, and so suspends the Rent, yet this shall not excuse * the Payment; for it is but a Recital that it was for Rent, and not material.

* But Entry and Eviction before Rent due, avoids Payment in Covenant, &c. for the

Hetley 54. *Jeakil* and *Linn*, adjudged. So in Case an Obligation for Payment of the Rent. If a Parson by Indenture leases his Parsonage for Years, rendering Rent, and the Lessee covenants to pay his Rent, and before any Day of Payment, the Parsonage (*a*) is sequestered, for the Non-payment of the first Fruits, yet the Lessee shall not be excused of the Payment of his Rent †.

(*a*) Otherwise, if Lessee for Years is evicted by a prior Title. Hetley 54. Rol. Rep. 398. Yelv. 23. Cro. Car. 415.

† *Qu.* If this is Law, the Fault being in the Lessor, and Tentamount to his Eviction?

Poph. 39. Cro. Eliz. 313. Owen 104. Moor 597. S. C. adjudged. If *A.* leases Lands to *B.* for seventeen Years, and after *B.* enters into an Obligation to *A.* conditioned to pay an annual Rent to *C.* for the Term of seventeen Years, if *C.* lives so long; and the said *B.* or his Assigns, or any claiming under him, shall or may so long enjoy the said Land, and *B.* after surrenders to *A.* yet he must continue the Payment of the Rent, because merely collateral, and to be made to a Stranger.

Poph. 40. Owen 104. Cro. Eliz. 313. Like Point by *Popham*; But if the Condition had been that *C.* during the Term should hold Part, without the Interruption of *B.* or his Assigns, if after the Surrender, *A.* had interrupted him, *B.* should not have forfeited his Bond ‡.

for that the Obligee should not take Advantage of his own Act. ‡ In this Case *A.* was the *Assignee* of *B.* 1 Wood's Conv. 315. Doug. 384. 2 Term Rep. 366.

22 E. 4. 26. Rol. Abr. 455. If the Condition of an Obligation be, that the Son of the Obligor shall serve the Obligee for seven Years, if he tenders his Son, and the Obligee (*b*) refuses, it is no Forfeiture.

(*b*) So if he takes him, and after within the Term commands him to be gone. Rol. Abr. 455.

If

If the Condition of an Obligation be to pay a ſmall Sum, and the Obligee refuſes it at the Day, though this ſaves the Penalty, yet the Principal Money (*a*) muſt be paid; for it ſtill remains a Debt. 20 E. 4. 1. b. 22 E. 4. 26. Ro. Abr. 448. Co. Lit. 207.

S. P. becauſe the Sum mentioned in the Condition is Parcel of the Obligation; and the Obligee hath Remedy for it by Law. Cro. Eliz. 755. S. P. (*a*) And therefore if an Action be brought againſt him upon the Obligation, and he pleads the Tender and Refuſal, he muſt alſo plead, that he is yet ready to pay the Money, and tender it in Court. Co. Lit. 207. a —But if the Plaintiff will not then receive it, but takes Iſſue upon the Tender, and it be found againſt him, he hath loſt the Money for ever. Co. Lit. 207. a. Hob. 198, 199. Noy 110.

* But if the Condition of an Obligation of 100*l.* be for the Delivery of Corn, Timber, *&c.* Performance of an Arbitrament, or other Act, *&c.* this is collateral to the Obligation, and no Parcel of it; and therefore a Tender and Refuſal is a perpetual Bar. *Page 437 Co. Lit. 207. a.

4. Of the Act of a Stranger.

Regularly, if the Condition be, to be performed by a Stranger, and he refuſes, the Obligation is forfeited; for the Obligor hath taken upon him that the Stranger ſhall do it. Rol. Abr. 452.

As if the Condition be, that my Son ſhall ſerve *J. S.* if he will not, my Obligation is forfeited. 22 E. 4. 26. b.

A. and *B.* ſubmit themſelves to the Award of *C.* and *A.* enters into an Obligation to *C.* to ſtand to the Award, and *B.* alſo, and *C.* awards *A.* to pay 10*s.* to *B.* who tenders it, and *B.* refuſes; the Obligor is excuſed (*b*) becauſe *B.* is not a mere Stranger, but privy, and ſo is the Obligee. 22 E. 4. 25. b. Rol. Abr. 452.

(*b*) So if a Recognizance, Bond, *&c.* is made to *A.* to the Uſe of *B.* conditioned to pay Money, *&c.* to *B.* and *B.* refuſes, *&c.* Cro. Eliz. 755. Cro. Jac. 14.

But if the Condition be, that the Son of the Obligor ſhall marry the Daughter of the Obligee, if the Daughter of the Obligee refuſes the Son, yet the Condition is forfeited; for the Daughter is a mere Stranger, and the Obligor hath taken upon him that his Son ſhall marry her. Hutt. 48. Winch 30. 3 Bulſt. 30.

So if the Condition (*c*) be to enfeoff a Stranger, who refuſes, yet the Obligation is forfeited*. (*c*) 2 E. 4. 2. 39 H. 6. 10. b. Co. Lit. 209.

S. P.—But otherwiſe if to be made to the Obligee, or to any other for his Benefit. Co. Lit. 209. a. *Secus*, where the Condition is that a Stranger ſhall enfeoff a Stranger. Co. Lit. 209. a.

* To be ſure Lord *Coke* lays down this Doctrine poſitively, yet ſuppoſing that it is ſo at Common Law, Equity would certainly give Relief.

If there be a Feoffment upon Condition to enfeoff a Stranger, if the Stranger refuſes, yet the Condition is broken, becauſe the Intent was not that the Feoffee ſhould retain it. 19 H. 6. 34. b. Co. Lit. 209. 1 Leon. 266. 2 Leon. 222.

But otherwiſe it had been if the Condition was to make (*d*) a Gift in Tail to a Stranger, and he refuſes; for there the Intent was that he ſhould have the Reverſion. S. P. 2 E. 4. 2. Co. Lit. 209. Leon. 266. 2 Leon. 222.

S. P. (*d*) So if the Condition be, that he ſhall grant a Rent-charge to a Stranger, and he refuſes, becauſe intended the Feoffee ſhould retain the Land. Co. Lit. 209.

If the Condition of an Obligation be, that whereas the Obligor and Obligee are jointly ſeiſed of the Office of the Court of Admiralty, if the Obligor ſhall permit the Obligee to uſe the ſaid Office, and to take the Profits thereof only to his own Uſe during his Life without Interruption made by the Obligor, then, *&c.* although after the Admiral dies, and the new Rol. Abr. 453. 2 Leon. 114. 3 Leon. 142. S. C. Godb. 47. S. C. and

new Admiral grants the ſaid Office to a Stranger, (as he may by Law) and he interrupts and ouſts the Obligee, yet if the Obligor after this interrupts the Obligee alſo, the Condition is broken.

S. P. *per Curiam*, and ſaid whether the Obligee occupy by Right or Wrong, the Obligor is not to interrupt him againſt his own Bond.

Co. Lit. 208. b. If *A.* is bound to (*d*) *B.* to pay 10*l.* to *C.* if *A.* tenders it to *C.* and he refuſes, the Bond is forfeited†.

(*d*) Otherwiſe if bound to pay it to the Obligee, or his Aſſigns, and the Obligee appoints *C.* to receive it as his Aſſignee, and it is tendered to *C.* and refuſed by him. Dalſ. 38.

† See Note, on Caſe of Condition to infeoff a Stranger, *ante*.

Cro. Eliz. 656. adjudged. If *A.* diſſeiſes *B.* and after leaſes to *C.* for Years, and *C.* covenants at the End of the Term to leave and yield up the Tenements well repaired to *A.* and after *B.* enters, &c. *C.* is excuſed.

*Page 438 * If the Condition of an Obligation be, that the Obligee ſhall in *Michael. mas* Term next give unto the Obligor, &c. ſuch Releaſe as by the Judge of the Prerogative Court ſhall be thought meet, the Obligor ought to procure the Judge to deviſe and direct ſuch Releaſe; for the Judge is a Stranger to the Condition, and the Condition is for the Benefit of the Obligor, and he hath (*e*) taken upon him to perform it at his Peril.

5 Co. 23. b. adjudged. Cro. Eliz. 716. S. C. Moor 645.

Doug. 684. And Cro. Eliz. 864. S. C. cited, & *vide* like Point, Lit. Rep. 13. Lev. 101. Sid. 313. (*e*) So if the Condition of an Obligation be, that a Stranger ſhall releaſe all the Right which he hath, or pretends to have in a certain Manor, the Obligor muſt procure him to make a Releaſe *de facto*, though he hath no Right. Sand. 215.

Winch 26, 69. If *A.* leaſes his Land for forty Years, rendering Rent, and deviſes the Reverſion to *J. S.* in Tail, &c. provided that *B.* and his Wife ſhall have the Rent to their own Uſe till *J. S.* comes of Age, upon Condition that *B.* and his Wife, within three Months after his Death, enter into a Bond to his Overſeers for the Payment of 34*l.* *per Ann.* in ſuch Penalty as his Overſeers ſhall adviſe, and *A.* dies, *B.* and his Wife muſt give Notice of this to the Overſeers, and at their Peril procure them to adviſe.

CONSTABLE.

(A) How choſen and appointed. 438.
(B) Who are obliged to ſerve. 440.
(C) Of their Power and Duty in acting without any Warrant from a Juſtice of the Peace. 441.
(D) Of their Power and Duty in executing ſuch Warrants. 442.

(A) How

(A) Now choſen and appointed.

CONſtables appear to have been Officers of great (*a*) Antiquity; for by the Laws of King *Alfred*, the Freemen were to digeſt themſelves into Decennaries and Hundreds, and every ten Freeholders choſe an annual Officer, whom they called Conſtable, Borſholder, Tithingman or Headborough, as Head of the Decennary; theſe, * in every Hundred where there was a Feudal Lord, were ſworn in, and admitted by the Lord or his Steward in his Leet; but where there was no ſuch Feudal Lord, the Sheriff in his Torn had the ſwearing and placing of them in; alſo if there was no Feudal Lord of the Hundred, an annual Officer was choſen, who was to preſide over the whole Hundred, who was called the High Conſtable; but if the Hundred was Feudal, as it often antiently was, then ſuch Lord of the Hundred adminiſtered the Office himſelf. * Page 439

Of the High Conſtable of *England*, *vide* Title *Courts, and their Juriſdiction in general.*

(*a*) Were before the Statute of *Wincheſter*. 2 Hawk. P. C. 61. 4 Inſt. 267. *Vide* Somner's *Antiquities Canterbury*. Lamb. Conſtable 8. *Vide* ſtat. 13 & 14 Car. 2. c. 12.——By Common Law, they are to be choſen by the Leet or Torn. 4 Inſt. 265.——And by 2 Hawk. P. C. 62. it is difficult to determine to whom the Power of chuſing them doth of common Right belong; for by Dalt. Sheriff 400. Rol. Rep. 34. both High and Petty Conſtables are to be choſen and appointed by the Sheriff in his Torn; and by 2 Jones 212. Lamb. Conſtable 8. Salk. 175. pl. 1. 2 Salk. 502. pl. 2. 5 Mod. 124. 11 Mod. 215. 12 Mod. 88, 115, 180. Comb. 351. Skin. 635. pl. 4. 669. pl. 6. Ld. Raym. 69. They are to be choſen by the Decennary; but it ſeems clear, that whether a Conſtable is to be choſen by the Sheriff or Decennary, yet he is to be ſworn and placed in his Office by the Sheriff, * as being Judge of the Court. Alſo it ſeems certain, that a Cuſtom either Way is good. 2 Hawk. P. C. 62. And that a Sheriff or Steward, having Power to place a Conſtable in his Office, have by Conſequence a Power of removing him. Bulſt. 174. 2 Hawk. P. C. 63.

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* See *poſt*. 439.

It ſeems by the better Opinion, that a Cuſtom in a Town, that the Inhabitants thereof ſhall ſerve the Office of Conſtable by Turns, is good, and that the Objection, that by ſuch Means it may come to a Woman's Turn to ſerve, is of no Force, ſince ſhe is allowed to make a Deputy, or procure one to ſerve for her, who ſhall be conſidered as the proper Officer. Sid. 355. 2 Hawk. P. C. 63. 2 Stra. 943. Cro. Car. 389. *cont'*.

Alſo the Office of Conſtable being neceſſary for the Preſervation of the Peace, Juſtices of the Peace have by an uninterrupted Uſage, not now to be diſputed, taken upon them not only to ſwear Conſtables who have been choſen at a Torn or Leet, but alſo to nominate and ſwear Conſtables, where none have been ſworn at ſuch Courts, through the Neglect of the Sheriff or Lord, and alſo to (*b*) diſplace thoſe who have been ſo choſen; and this Point has been carried ſo far as to allow the Seſſions of the Peace to ſwear one Conſtable who had been elected at the Leet, and unduly rejected by the Steward, who had ſworn another in his Place. Salk. 175. pl. 2. 176. Mod. 13. 12 Mod. 180, 181. 2 Stra. 1050. 2 Jones 212. Allen 78. Dalt. ch. 121. (*b*) Salk. 176. pl. 2. 2 Stra. 798, *cont'*. Bulſt. 174

And by the 13 & 14 *Car.* 2. *cap.* 12. *par.* 15. reciting, "That the "Laws and Statutes for apprehending Rogues and Vagabonds had not "been duly executed, ſometimes for want of Officers, by reaſon Lords of "Manors do not keep Court-Leets every Year for making of them;" it is enacted, "That in caſe any Conſtable, Headborough or Tithingman, ſhall "die, or go out of the Pariſh; any two Juſtices of the Peace may make "and ſwear a new Conſtable, Headborough or Tithingman, until the ſaid "Lord ſhall hold a Court, or until next Quarter-Seſſions, who ſhall ap-

"prove

" prove of the ſaid Officers ſo made and ſworn as aforeſaid, or appoint " others, as they ſhall think fit; and if any Officer ſhall continue above a " Year in his or their Office, that then in ſuch Caſe the Juſtices of the " Peace in their Quarter-Seſſions may diſcharge ſuch Officer, and may put " another fit Perſon in his or their Place, until the Lord of the Manor ſhall " hold a Court as aforeſaid."

The Caſe of the Conſtable of *Holmby*. Mod. 13. S. C. 2 Keb. 557. S. C.

The Juſtices of the Peace of the County of *Northampton*, at their General Seſſions choſe a Conſtable for *Holmby*, and for not coming in to take the Oath, proceeded againſt him; which proceedings being removed by *Certiorari* into *B. R.* it was moved on Affidavits, that there had not been a Conſtable there for fifty Years before, that he might be diſcharged, alledging likewiſe, that *Holmby* was a privileged Place, and that all the Inhabitants were the Duke of *York*'s Tenants: But the Court held, that they (*x*) could not Diſcharge him on Motion, and ſaid, That they muſt determine the Matter by Action of falſe Impriſonment, or ſome other Way, and inclined ſtrongly, that he could not any Way be diſcharged; for *per Cur'*, Though originally Conſtables were choſen in Leets, yet the Conſtable being an Officer, whoſe Duty is to keep the Peace, the Juſtices may chuſe him in Caſes of Neceſſity; as in the Hamlets about the *Tower*, the Juſtices, by reaſon of the Increaſe of Buildings, where there was formerly but one Conſtable, did chuſe five; and it was ruled they might do ſo; and they ſeemed to incline, that though formerly there had been none, yet they might chuſe one if they ſhould think it convenient.

(*x*) That the Court of King's Bench has the ſupreme Power of ordering an inferior Juriſdiction to ſwear, reſtore or diſcharge a Perſon choſen Conſtable, and of awarding a *Mandamus* where it ſhall be neceſſary. *Vide* Rol. Abr. 535. 2 Rol. Rep. 82. 2 Hawk. P. C. 65.

*Page 440

Cro. Car. 567. Co. Ent. 572.

* A Perſon duly elected Conſtable refuſing to take upon him the Office, may, if preſent, be (*a*) fined by the Court; and if abſent, on having a certain Time and Place appointed him for the taking of the Oath before a Juſtice of Peace, may, after Notice of ſuch Appointment and Preſentment at the next Court, be amerced.

5 Mod. 130. Salk. 175. pl. 1. Ld. Raym. 69. 8 Co. 38. (*a*) But cannot be lawfully committed without more. 2 Hawk. P. C. 64. 1 Eſpinaſe Dig. 414.

2 Hawk. P. C. 64. 2 Stra. 920. Fitzgib. 192. Barnard. K. B. 413.

Alſo in either Caſe he may be indicted, either before Juſtices of *Oyer* and *Terminer*, or at the Seſſions of the Peace; but ſuch Indictment ought ſpecially to ſet forth the Manner of every ſuch (*b*) Election, Appointment, (*c*) Notice and Refuſal, and before (*d*) whom the Court was holden.

11 Mod. 215. 12 Mod. 180. See Caſ. 480. (*b*) That it is inſufficient to ſay in general, that the Party was *debito modo electus*, or *Legitime electus*. 5 Mod. Rep. 96, 129. adjudged. (*c*) That the ſpecial Circumſtances of ſuch Notice muſt be ſet forth. Allen 78. 5 Mod. 96, 130. Keb. 418. adjudged *. (*d*) Mod. 24. *vide* 2 Sand. 290.

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* *Sed qu.* if alledging that he had *due Notice* is not ſufficient.

Keb. 416. 2 Hawk. P. C. 64.

Neither is an Indictment for not finding a ſufficient Perſon to ſerve the Office of Conſtable good, unleſs ſuch Indictment ſhew that the Party refuſed to ſerve it himſelf.

Penalty on Conſtable neglecting to provide Waggons, &c. for the Army, 30 *Geo.* 2. *cap.* 6. *ſect.* 41. Or for the Mariners, *cap.* 11. *ſect.* 25. Or for the Militia, *cap.* 25. *ſect.* 50. For taking Money to excuſe from quartering Soldiers, *cap.* 6. *ſect.* 66. Or Mariners, *cap.* 11. *ſect.* 9. ‖

‖ See further the Table to the Statutes, Tit. *Conſtable.*

(B) Who are obliged to ſerve.

IT ſeems agreed, that all (*e*) ſworn Attornies, and all (*f*) other Officers whoſe Attendance is required in the Courts in *Weſtminſter-Hall*, are not obliged to ſerve or execute any inferior Pariſh Office, and that where they are choſen, though by a (*g*) particular Cuſtom, with reſpect to their Eſtates or otherwiſe, they may have a Writ of Privilege; for no Cuſtom ſhall be intended to be more antient than the Uſages of thoſe Courts, and therefore ſhall give Way to them.

Vide Title *Privilege*. (*e*) Noy 112. March 30. Cro. Car. 389. 2 Keb. 477. (*f*) That Practiſing Barriſters at Law, and the Servants of Members of Parliament, have the ſame Privilege. Mod. 22. 2 Keb. 578. Mod. 13. (*g*) 2 Keb. 508. Cro. Car. 389. Lev. 265, 266. 2 Hawk. P. C. 63.

So if an Alderman of *London* has an Houſe at *D.* in the County of *Eſſex*, and he as an Inhabitant there is choſen Conſtable, yet he is not compellable to ſerve, for that as an Alderman he is bound to be preſent in the City, for the good Government thereof.

Alderman *Abdy*'s Caſe. Cro. Car. 585. Jones 462. S. C.

But a Captain of the King's Guards being preſented to ſerve as Conſtable, in Purſuance of a Cuſtom in reſpect of his Lands in a Town, cannot claim this Privilege; for though by his Office he is bound to a Perſonal Attendance on the King, yet ſuch Office being of late Inſtitution, ſhall not prevail againſt an antient Cuſtom.

Vide Keb. 309. Sid. 272, 355. Lev. 233. Keb. 933.

Yet if ſuch an Officer, or a (*b*) Gentleman of Quality, who hath no ſuch Office, or a practiſing Phyſician, be choſen Conſtable of a Town, which has (*i*) ſufficient Perſons beſides to execute this Office, and no ſpecial Cuſtom concerning it, perhaps he may be relieved by the *King's Bench*.

2 Hawk. P. C. 63. (*b*) Keb. 439. *cont'*. 2 Keb. 578.

(*i*) But no Privilege can exempt fitting Perſons from ſerving the Office of Conſtable, where there are not ſufficient beſides them to execute it. 2 Hawk. P. C. 63. Sid. 272. Keb. 933. *Vide* Title *Privilege*. 2 Bl. Rep. 1126. 1 Com. Dig. 450. Doug. 538. 2 Hawk. P. C. 100. 1 Term Rep. 686. 2 Term Rep. B. R. 404.

By the 5 *H.* 8. *cap.* 6. "The Wardens and Fellowſhip of Surgeons in- "franchiſed in *London*, and all Barber Surgeons admitted and approved "according to the Statute made in that Behalf, not exceeding the Number "of Twelve, ſhall be diſcharged of Conſtableſhip and Watch, *&c.*

Vide 2 Keb. 578.

* By the 32 *H.* 8. *cap.* 40. "The Preſident of the Commonalty and "Fellowſhip of Phyſic in *London*, and the Commons and Fellows of the "ſame, ſhall not be choſen Conſtables in the City of *London*, or Suburbs "of the ſame, *&c.*"

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By the 6 & 7 *W.* 3. *cap.* 4. "All Perſons uſing the Art of an Apothe- "cary, who have been brought up and ſerved as Apprentices in the ſaid "Art for ſeven Years, according to the Statute of 5 *Eliz. cap.* 4. ſhall "be freed and exempted from the Office of Conſtable."

By 10 & 11 W. 3. c. 23. ſ. 2, 3, the Proſecutor of a Felon to Conviction, or the Perſon to whom he ſhall aſſign the Certificate thereof, ſhall be diſcharged from the Office of Conſtable. By 30 Geo. 2. c. 25. ſ. 23. a Perſon ſerving for himſelf as a private Man in the Militia, ſhall during ſuch Service be exempted from the Office of Conſtable.

A. was indicted for not taking on him the Office of High Conſtable; and the Queſtion on a ſpecial Verdict was, Whether a Tenant in Antient Demeſne may be made Conſtable of an Hundred, which reaches farther than the Demeſnes; and it was adjudged that he might.

2 Show. 75. *The King* and *Betteſworth*. Vent. 344. S. C. adjudged.

[By 31 *Geo.* 2. *c.* 17. *ſ.* 13. None are to be Conſtables who are ſixty-three or upwards.]

(C) Of their Power and Duty in acting without any Warrant from a Juſtice of the Peace.

2 Hawk. P. C. 61, 62.

AS Conſtables were originally inſtituted for the better Preſervation of the Peace, they may by the Common Law arreſt Felons, and all ſuſpicious Perſons that go abroad in the Night and ſleep by Day, or reſort to Bawdy-houſes, or keep ſuſpicious Company.

(a) Lamb. Conſtable 5, 6. 45 E. 3. (b) Crompt. 212. Dalt. Sheriff 388. See Raſt. Ent. 151.

Alſo by the (a) antient Common Law, the Conſtable was to preſent at the Torn or Leet all thoſe within his Precinct who were not admitted into ſome Tithing, and who had not ſworn to the King's Allegiance; and it ſeems, that by (b) the Law in Uſe at this Day, he ought to preſent (c) all Offences inquirable in the Torn or Leet.

(c) Yet in the Oath ſet down by *Kitchen* 47. he only ſwears to preſent all Bloodſhed, Outcries, Affrays and Reſcouſes done within his Office.

3 Inſt. 158. H.P.C.135. Lamb. 132. Dalt. c. 8.

A Conſtable is not only impowered, as all private Perſons are, to part an Affray in his Preſence, but is bound at his Peril to endeavour it, not only by doing his utmoſt himſelf, but alſo by demanding the Aſſiſtance of others, which they are bound to give him under Pain of Fine and Impriſonment.

Lamb. 132. Dalt. c. 1, 8. Bro. Surety 23, 36. Cro. Eliz. 375. 9 E. 4. 26 a. Moor. 284. 22 E. 4. 35. b. 10 E. 4. 18. 5 H. 7. 6. a. Savil 97. Rol. Rep. 238. 2 Bulſt. 329.

And it is ſaid, That if he ſees Perſons actually engaged in an Affray, whether the Violence were done or offered to another, or even to himſelf, or ſee them upon the very Point of entering upon an Affray; as where one threatens to beat another, &c. he may either carry the Offender before a Juſtice of Peace, in order to his finding Sureties for the Peace, &c. or may impriſon * him himſelf a reaſonable Time till the Heat be over, and afterwards detain him till he give ſuch Surety by Bond; but he ſeems to have no Power to commit the Offender in any other Manner, or for any other Purpoſe, for he cannot commit him to Gaol till he ſhall be puniſhed; neither ought he to lay Hands on thoſe who barely contend with Words, without any Threats or Perſonal Hurt; but all he can do in ſuch Caſe is to command them, under Pain of Impriſonment, not to fight.

* 'Tis more adviſable for the Conſtable to carry the Offender immediately before a Juſtice of the Peace.

Dalt. c. 8, 67. 13 E. 4. 9. a. 7 E. 3. 12. b. H. P. C. 92, 135.

If an Affray be in a Houſe, the Conſtable may break open the Doors to preſerve the Peace, and if Affrayers fly to a Houſe, and he freſhly follow, he may break open the Doors to take them.

But he cannot of his own Authority compel a Man to find Sureties, who is delivered into his Hands, as having broken the Peace in his Abſence, but ought to carry him before a Juſtice of the Peace; neither can * he arreſt a Man for an Affray out of his View, without a Warrant from a Juſtice of the Peace, unleſs a Felony were done, or likely to be done.

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Lamb. 133. Cro. Eliz. 375. Owen 105. 1 Hawk. P. C. 269. 2 Hawk. P. C. 97. Doug. 359.

Moor 284. 2 Hawk. P. C. 77. And ſo may a private Perſon.

If a Conſtable ſee a Perſon expoſe an Infant in the Street, who refuſes to take it away, he may lawfully apprehend and detain ſuch Perſon till he or ſhe ſhall conſent to take Care of it.

(D) Of

(D) Of their Power and Duty in executing the Warrants of Juſtices of the Peace.

AS the Conſtable is the proper Officer to a Juſtice of Peace, he is bound to execute his Warrants. Hence it hath been (*a*) reſolved, that where a Statute authorizes a Juſtice of the Peace to convict a Man of a Crime, and to levy the Penalty by Warrant of Diſtreſs, without ſaying to whom ſuch Warrant ſhall be directed, or by whom it ſhall be executed, the Conſtable is the (*b*) proper Officer to ſerve ſuch Warrant, and indictable for diſobeying it.

(*a*) 5 Mod. 130. Salk. 175. pl. 2.

(*b*) Salk. 381. 2 Rol. Rep. 78.

Yet in as much as the Office of Conſtable is wholly Miniſterial, and no way Judicial, it ſeems that he may appoint a Deputy to execute a Warrant directed to him, when by Reaſon of Sickneſs, Abſence or otherwiſe, he cannot do it himſelf, but without ſome ſuch ſpecial Cauſe a Conſtable cannot make a Deputy.

Rol. Abr. 591. Moor 845. Crompt. 222. 3 Bulſt. 77. Dalt. c. 1.

S. C. Rol. Rep. 274. Sid. 355. Lev. 233. March 30. 2 Keb. 309, 321.

If a Warrant be directed generally to all Conſtables, no one can execute it out of his own Precinct; but if it be directed to a particular Conſtable by Name, he may execute it any where within the Juriſdiction of the Juſtice.

Salk. 176. Carth. 508. Ld. Raym. 545.

Salk. 378. pl. 23. 5 Mod. 446.

A ſworn Conſtable in executing a Warrant need not ſhew it to the Party, although he demand a Sight of it; but in making an Arreſt he ought to acquaint him with the Subſtance of it.

6 Co. 54. 9 Co. 69.

An unlawful Arreſt without a Juſtice's Warrant, cannot be made good by a Warrant taken out afterwards.

Dyer 244. Fitz. Bar. 248. Crompt. 149.

If the Conſtable, after he hath arreſted the Party by Force of a Warrant, ſuffer him to go at large on his Promiſe to return again, he (*c*) cannot, by Force of the ſame Warrant, arreſt him again.

2 Keb. 705. Crompt. 148. 2 Keb. 206.

Dalt. c. 117. 13 E. 4. 9. a. (*c*) But by the better Opinion, if the Party voluntarily returns into Cuſtody, the Conſtable may lawfully detain him, and bring him before the Juſtice, in Purſuance of the Warrant. 2 Hawk. P. C. 81.

A Conſtable cannot juſtify an Arreſt by Force of a Warrant from a Juſtice of the Peace, which expreſsly appears in the Face of it to be for an Offence whereof a Juſtice of Peace hath no Juriſdiction, or to bring the Party before him at a Place out of the County for which he is a Juſtice.

14 H. 8. 16. Crompt. 147, 148, 149.

But it ſeems that he ought to execute a general Warrant to bring a Perſon before a Juſtice, to anſwer ſuch Matters as ſhall be objected againſt him on the Part of the King.

Dalt. c. 117. 2 Hawk. P. C. 81.

Alſo by the better Authorities it ſeems holden, that it is not material whether the Party arreſted by Virtue of a Warrant from a Juſtice of Peace, were guilty or innocent, or whether the Felony, &c. were actually committed or not; for it would be a great Diſcouragement to Officers, to ſubject them to Actions in ſuch Caſes, for doing what they apprehend to be their Duty; and the Liberty of the Subject ſeems ſufficiently ſecured by ſubjecting the Juſtice to an Action.

But for this *vide* 2 Hawk. P. C. 81, 82. Skin. 568. 24 Geo. 2. c. 44. ſ. 6. And how far a Conſtable may execute a general Warrant to a general Seach for Felons or ſtolen Goods. 2 Hawk. P. C. 82.

[Conſtables to plead the general Iſſue, and as to their Coſts, *vide* 7 *Jac.* 1. *c.* 5. and 21 *Jac.* 1. *c.* 12.

No Action is to be brought againſt a Conſtable, till Demand of Copy of the Warrant, and the ſame hath been refuſed or neglected for the Space of *ſix* Days after ſuch Demand, 24 *Geo.* 2. *c.* 44. *ſ.* 6.]

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*Page 443 * # COPARCENERS.

In *Coparcenary* theſe Things to be conſidered.

(A) The Nature and Reaſon of ſuch Inheritance. 443.
(B) The Nature of ſuch Eſtate, both in reſpect of their own Actions, and Actions brought by Strangers. 444.
(C) Of a Partition, when the Things are dividable or intire, and the Manner thereof. 445.
(D) Of Partition by the Writ de Partitione facienda. 450.
(E) Of Hotchpot, and the Nature and Incidents of this Kind of Partition. 452.
(F) Of the Nature and Incidents of their Eſtate after Partition made. 453.

(A) Of the Nature and Reaſon of ſuch Inheritance.

Bracton, *lib.* 2. c. 30. Co. Lit. 241. IF one ſeiſed of an Eſtate of Inheritance die, leaving only Daughters, Siſters, Aunts, or other Females of Kin in equal Degree, and the Eſtate deſcends to any of theſe, they are ſaid to hold in *Coparcenary*, and to make but one Heir to their Anceſtor.

Co. Lit. 164. b. This came over to us from the Civil Law, and they took the Deſcent *in Stirpes* for this Reaſon, that the Child was intitled to his Portion by the Law of Nature during the Father's Life, though he was not to poſſeſs it, or be a compleat Heir according to the Civil Law of the Country, till after his Death; and that founded the Fiction, that the Children ſhould ſtand in the Place that he poſſeſſed.

In this Inheritance ſometimes the Deſcent is *in Capita*; as where a Man hath Iſſue, two Daughters, and dies, the Deſcent is *in Capita*; therefore each ſhall inherit alike; and ſometimes the Deſcent is *in Stirpes*; as if a Man hath Iſſue two Daughters, and dies, and the eldeſt daughter hath Iſſue three Daughters, and the youngeſt one Daughter; all theſe four ſhall inherit, but the Daughter of the Youngeſt ſhall have as much as the three Daughters of the Eldeſt.

If

If a Man hath Iſſue two Daughters, and the eldeſt hath Iſſue ſeveral Sons and Daughters, and the youngeſt hath Iſſue ſeveral Daughters; the eldeſt Son of the eldeſt Daughter ſhall only inherit *his* Anceſtor; but all the Daughters of the Youngeſt ſhall hold their Mother's Moiety in Coparcenary with him. Co. Lit. 164. b.

If a Man ſeiſed of Lands in Fee hath Iſſue two Daughters, and one of them is attainted of Felony, and the Father dies, both Daughters being alive, one Moiety ſhall deſcend to the innocent Daughter, and the * other Moiety ſhall Eſcheat; but if a Man make a Leaſe for Life, Remainder to the *right Heirs* of *A.* being dead, who hath Iſſue two Daughters, whereof one is attainted of Felony, it ſeems the Remainder is not good for a Moiety, but void for the Whole. *Page 444

Co. Lit. 163. For in the firſt Caſe the Lord by Eſcheat muſt make a Title to deveſt the Eſtate, which was once lawfully veſted in the Anceſtor, which he cannot do, becauſe there is no Defect in this Caſe, ſince the Anceſtor may be legally repreſented, and the innocent Daughter may legally repreſent; and therefore there can be no Title in the Lord to evict that Moiety, though he has Title to the Moiety of the offending Daughter, who after her Crime can repreſent no Man; but in the ſecond Caſe the Siſters are to make Title to the Remainder, which they cannot do, becauſe, to make Title to the Remainder, they muſt bring themſelves within the Words of the Donation, and the innocent Daughter cannot take upon her the Character of an Heir alone, ſince they both make but one Heir to the Anceſtor, and both cannot join, becauſe one is attainted and incapable of that Character.

(B) The Nature of ſuch Eſtate, both in reſpect of their own Actions, and Actions brought by Strangers.

PArceners, in reſpect of their Anceſtor, make but one Heir; and therefore, to recover the Poſſeſſion of their common Anceſtor, they muſt join in the *Præcipe*; ſo when they come into Poſſeſſion before Partition, they are ſeiſed of an undivided Poſſeſſion though having a Right to a Writ *de Partitione facienda*, they have a Right to ſever and divide the Poſſeſſion that before was joint in them. Co. Lit. 164.

In Replevin, the plaintiff declared for taking of Bricks, *&c.* and the Defendant made Conuzance as Bailiff to one *John Bennet* and *Grace* his Wife, ſetting forth, That one *Simon Bennet* was ſeiſed in Fee of the Lands, *&c.* and made a Leaſe thereof for forty Years, rendering Rent, and died, and the Lands deſcended to his Daughters and Co-heireſſes, one whereof married the ſaid *John Bennet*, and the other was the Counteſs of *Saliſbury*, and ſo made Conuzance for a Moiety of the Rent; and upon Demurrer Judgment was given for the Plaintiff, becauſe one Coparcener cannot make Avowry for a Moiety of the Rent before Partition, though they have ſeveral Inheritances. 5 Mod. 141. Ld. Raym. 64. pl. 1. Skin. 596. Mich. 7 W. 3. between *Stedman* and *Page*. Carth. 364. S.C. adjudged; where it is ſaid *per Cur'*, That when one Siſter diſtrains, ſhe ought to avow in her own Right, and alſo as Bailiff to her other Siſter, for the intire Rent. Salk. 390. S. P. adjudged between *Stedman* and *Bates*, where it is ſtated, That the Defendant made Conuzance as Bailiff to the Counteſs of *Saliſbury*.

If Co-heirs are diſſeiſed before Partition, their poſſeſſory Action muſt be joint, for their Remedy muſt follow the Nature of their Poſſeſſion, and that being joint, it muſt be joint too; but if they had made Partition before the Diſſeiſin, then their Poſſeſſions would have been ſeveral, and then they (1) Co. Lit. 164. a. 2 Keb. 700; Bro. Tit. *Several Prac.*

* Yet, after Partition one alone they could not have recovered by a joint *Præcipe*, or on a joint Demiſe in an Ejectment*.

may bring her Ejectment, declare for the Whole, and recover what ſhe is intitled unto, or declare for her own Part, and recover accordingly.

Co.Lit. 164. a. Bro.Tit. *Several Prec.* (1) *Joinder in Action* 43. But where a joint Right deſcends from one common

But there is a Difference between an Action Poſſeſſory and an Action Droiturel; for though the Poſſeſſory Action be joint, becauſe it follows the Nature of the Poſſeſſion, which was joint, yet the Droiturel Action muſt be ſeveral, where the Right deſcending was ſeveral; as if two Coparceners be diſſeiſed, and each dies, having Iſſue, each of their Iſſue muſt have ſeveral *Præcipes*, becauſe in their Droitural Action each of them counts on the ſeveral Right deſcending from their ſeveral Anceſtor, and not from the joint Poſſeſſion their Anceſtor enjoyed.

Anceſtor; as where a Man is diſſeiſed and leaves two Daughters, there they muſt both join in an Action, and ſo muſt their Iſſue, if they die before Recovery of their Right, becauſe their Remedy muſt follow their Right. Co. Lit. 164. a.

*Page445 Bro.Tit.Copar. (2).

* Two Parceners in Tail alien and die, leaving Iſſue, the Iſſue of each ſhall have a ſeveral Remedy, and when one of them recovers, the other cannot enter with him, becauſe the Alienation of their ſeveral Anceſtors amounted to a Partition; for by ſuch Alienation each conveyed diſtinctly and ſeparately that Moiety which belonged to her, and ſo broke and divided the Eſtate.

Co.Lit. 164.

Though Parceners, before Partition have one intire Freehold in reſpect of any Stranger's *Præcipe*, yet to many Purpoſes among themſelves they have in Judgment of Law ſeveral Freeholds; for each Parcener, where there are two of them, has really but a Title to a Moiety of the Land, and is not, as in Caſe of Jointenancy, ſeiſed *per my & per tout*; the ſame Law holds where there are more Parceners, for in ſuch Caſe each has but a Title, in Judgment of Law, to her Proportion; therefore Parceners may enfeoff each other of their Share, as well as convey it to Strangers.

Co.Lit. 164.

The Parol ſhall demur during the Minority of one of the Daughters, becauſe both of them muſt be in Court, to demand, as one Heir to their Anceſtor, and the Infant cannot appoint an Attorney to continue the Suit in Court for her.

2 Rol. Abr. 254. And. 243.

If one Coparcener enter upon the Diſcontinuance of their Anceſtor, and is afterwards diſſeiſed by him, and thereupon brings an Aſſiſe, and recovers by falſe Verdict, the other Coparcener may enter and hold in Coparcenary with her; for though the Action was not well laid, yet ſhe recovered as Heir to the common Anceſtor, and conſequently under that Title, which is common to both the Parceners, ſince they both make but one Heir to the common Anceſtor.

And. 242, 243. Bro.Tit.Copar. (2).

So if two Parceners bring a *Formedon*, and one of them is ſummoned and ſevered, and the other recovers a Moiety, and enters by Execution, the ſevered Parcener ſhall enter with the other, and enjoy the Land in Parcenary, for the Severance is only an Order of the Court for diſuniting joint Intereſts, when one of the Parties is negligent in proſecuting or defending, and not a Diſheriſon; therefore the ſeveral Parcener may well enter into the Land which the other recovers as Heir to the common Anceſtor, ſince both make but one Heir to him; otherwiſe if the Perſon ſummoned and ſevered releaſes or aliens her Part, for then ſhe has departed with all her Title to the Inheritance, and conſequently can never pretend to any Share in an Intereſt which ſhe has thus conveyed away to another.

[Parceners ſhall join in *Aſſiſe of Mortdanceſter*, though in different Degrees. *St. Gloc.* 6 *Ed.* 1. *c.* 6.]

(C) Of

(C) Of Partition, when the Things are dividable or intire, and the Manner thereof.

A Villein is an Inheritance individable in its own Nature; yet if he descend to Coparceners, the Profit of him may be divided; as one of them may have the Service of him one Day, one Week, or the like, and the other another Day, Week, &c. Co.Lit. 164. b.

So an Advowson is in itself intire; yet in Effect the same may be divided between Parceners, for they may agree to present by Turns; however, this was held only a Partition of the Presentation, for the Advowson continued in the Right of Coparcenary, and they must all have joined after such Partition in a Writ of Right of Advowson; but since the Statute 7 *Ann. c.* 18. † their joining does not seem necessary. *Vide Com. Incom.* 72. Co.Lit. 164. b. 2 Rol. Abr. 255. If a Partition be made of a Manor to which an Advowson belongs, without Mention made of the Advowson, it shall remain in common among them. F. N. B. 62.

† By this Statute where Partition is made to present by Turns, each shall be seised of a separate Estate.

* A Rent-charge is partible among Co-heirs, and by the Act of Law the Tenant is subject to their several Distresses, which is no Injury to him if he punctually discharge his Duty, since he is not thereby burthened with an Increase of Rent. *Page 446 Co.Lit. 164.

Reasonable Estovers, as House-bote, Hay-bote, &c. appendant to a Freehold, Corody in certain, granted to a Man and his Heirs, a Piscary in certain, or Common *sans* Number, cannot be divided between Co-heirs, because a Partition of them would inlarge the original Grant beyond the Intention of the Grantor, and likewise prove a greater Charge than was originally intended to the Tenant of the Soil; but the Manner of enjoying them among Co-heirs, is commonly settled in the following Method. If any other Inheritance descends to them besides, then the Eldest only shall take them, and the Rest shall have a Contribution or Allowance in Value out of the other Inheritance which descended to them; but if no other Inheritance descended to them, then one shall take the Estovers, Piscary, &c. for a fixt Time, as a Month, a Year, &c. and the other for the like Time after, which will effectually secure the Owner of the Soil from any Prejudice; or in Case of the Piscary one may have the first Fish, the other the second, &c. or one of them may have the first Draught, and the other the second, &c. Co.Lit. 165. a.

So in Case of a Park or Mill which cannot be divided, the one to have the first Beast, the other the second, &c. and in Case of the Mill, the one to have it for a Time certain, and then the other for the like Time; or the one to have the first Toll fish, and the other the second. &c. 2 Rol. Abr. 255. Co.Lit. 165. a.

If there are three Coparceners of a Manor who make Partition, each shall have a Manor and Court-Baron within her Purparty. But this must be understood of a Partition before the Statute of *Quia Emptores*; for though that Statute allows of the Creation of a Rent to make Partitions equal, yet it will never allow the Erection of new Manors by Partition made of an old Manor, since such Partitions, as appears, may be equal without such new Creations. Dav. 61. 2 Rol. Abr. 257. 6 Co. 69.

If an Earl hath his Dignity to him and his Heirs, and dies, leaving only a Daughter, the Dignity shall descend to the Daughter; for it is agreeable to the original Intention of the Grant, to devolve it on such single Person; but Co.Lit. 165. a. 2 Rol. Abr. 254. *cont.*

but if there had been ſeveral Daughters, though the Poſſeſſion of the Earldom, like other Lands, ſhould be divided among them, yet the Dignity itſelf ſhall return to the Crown, who may confer it on which Daughter it pleaſes; but no Partition can be made of it between the Daughters, becauſe it is not partable in its own Nature; for that would be to make ſeveral Honours out of one, contrary to the Grant; and the eldeſt alone cannot have it, becauſe all make but one Heir; therefore, to prevent Diſputes, it returns to the Crown from whence it proceeded.

Co.Lit. 165. But there is a Difference between a Dignity or Name of Nobility, and an Office of Honour; for if a Man holds a Manor of the King to be High Conſtable of *England*, and dies, having Iſſue two Daughters, this Office ſhall not return to the Crown; for if it ſhould return to the Crown the Manor muſt go with it, which would deſtroy the Grant itſelf; therefore if the eldeſt Daughter marries, her Huſband ſhall exerciſe the Office alone, and before her Marriage it ſhall be exerciſed by ſome ſufficient Deputy.

Co.Lit. 165. a. 2 Rol. Abr. 254. A Corody certain may be divided. Co. Lit. 164. b. If a Caſtle, uſed for Defence of the Realm, deſcend to two or more Co-heirs, this ſhall not be divided, becauſe that would expoſe it to the Circumvention of Enemies, when the Garriſon was under diſtinct Intereſts and Powers; but a Caſtle deſigned only for private Uſe may be divided, becauſe none of theſe Inconveniencies will follow.

A Reverſion may be divided, *viz.* That one ſhall have the Reverſion of ſo many Acres, and the other the Reverſion of other Acres. F. N. B. 62.

*Page 447 Co.Lit. 164. b. 165. a. Lord *Montjoy*'s Caſe. * *A.* ſeiſed of the Manor of *D.* in Fee, by Indenture inrolled bargains, *&c.* the ſame to *B.* in Fee, provided always, and the ſaid *B.* does covenant, *&c.* to and with the ſaid *A.* his Heirs and Aſſigns, that he the ſaid *A.* his Heirs and Aſſigns, may dig for Ore in the Lands, (which were great Waſtes) Parcel of the ſaid Manor, and dig Turf alſo for the making of Allom; and three Points were reſolved. 1ſt, That this did amount to a Grant of an Intereſt and Inheritance to *A.* to dig, *&c.* 2dly, That notwithſtanding this Grant, which is like Common *ſans* Number, *B.* and his Heirs may dig alſo, for the Grant is not framed ſo as to exclude him. 3dly, That *A.* may aſſign his whole Intereſt to one, two or more; but then they can make no Diviſion of the Intereſt ſo aſſigned, for that would be a Surcharge to the Tertenant, but they muſt work together with one Stock; and for this Reaſon *A.* cannot aſſign Part of his Intereſt in the Waſte and retain another Part to himſelf; the plain Conſequence of thoſe Reſolutions is, That if this Inheritance deſcend to Coparceners, it is not partible among them.

Lit. ſ. 243, 244, 245. Coparceners may voluntarily agree according to their Numbers to make Partition; as if there be two of them, to divide the Tenements between them in two Parts, in Severalty and of equal Value, and they may chuſe certain Friends to make Partition in the Form aforeſaid; in which Caſe the Eldeſt ſhall chuſe firſt, and ſo on according to the Priority of Age, unleſs it be otherwiſe agreed among them; for they may agree that one ſhall have ſuch Tenements, and another ſuch, *&c.* without any *primier* Election; ſo if by common Agreement the eldeſt Siſter makes Partition in the Form mentioned, to prevent Partiality, ſhe ſhall chuſe laſt.

Lit. ſ. 245. Co.Lit. 166. Kelw. 1. a, 49. a. 2 And. 21. This Part, which the eldeſt takes by virtue of her Priority of Age, is called the *Enitia pars*, and is purely perſonal, ſo that it differs from any Privilege which the Law gives the Eldeſt without her Act, for ſuch a Privilege ſhall deſcend; as if there be two Parceners of an Advowſon, and they cannot agree to preſent, the Law gives the firſt Preſentment to the Eldeſt, and the Privilege ſhall deſcend to her Iſſue; nay, her Aſſignee ſhall have it, and ſo ſhall her Huſband, who is Tenant by the Courteſy; and the Reaſon of this Difference is, becauſe the *Enitia* is only the honorary Reſpect paid to Age among Equals; but where it is not a Reſpect merely

merely to Age, nor purely honorary, but a real Benefit, there it ſhall deſcend not only to the Iſſue, but ſhall go to the Aſſignee and Tenant by the Courteſy; for ſince they come in the Place of the Perſon in whom it firſt veſted, they are entitled to all the Benefits the Law gave him, but the mere reſpect to Age was only perſonal.

There is another Manner of voluntary Partition or Allotment, and that is, when after Partition each Diviſion is written in a Little Scroll, and that is covered all over with Wax, like a little Ball, ſo as the Scroll cannot be ſeen, and then all the Balls are put into a Hat, to be kept in the Hands of an indifferent Perſon, after which the eldeſt Daughter draws firſt, and then the Reſt according to their Seniority. Lit. ſ. 246.

Coparceners may agree to make Partition for Life, or for a fixt Term of Years; for private Perſons, for their own Convenience, may make Contracts to bind themſelves, as long as thoſe Contracts are conſiſtent with Law. F. N. B. 62.

If two Houſes deſcend to two Parceners, one worth 20*s.* *per Annum*, and the other but 10*s.* each Parcener ſhall have a Houſe, but ſhe that has the Houſe worth 20*s.* *per Annum* ſhall pay to the other and her Heirs 5*s.* *per Annum* thereout, that the Partition may be equal, and Diſtreſs may be of common Right, for this 5*s.* *per Annum*, into whoſe Hands ſoever the Houſe comes. Lit. ſ. 251, 252. *Note*; To theſe Grants no Deed is neceſſary, tho' a Rent be granted by Jointenants

Equality of Partition. Co. Lit. 169. a. But in Exchange a Deed is neceſſary; ſo when make Partition. Co. Lit. 169. 2 Rol. Abr. 255.

* If one upon Partition grants a Rent to another generally, for Equality of Partition, without taking Notice out of what Land it is to ariſe, yet it ſhall ariſe out of the Part of the Grantor, for being granted for Equality, &c. ſufficiently explains that. *Page 448 2 Rol. Abr. 257. Rent granted for Equality of

Partition ſhall go in Coparcenary; and if ſuch Rent be granted to two Siſters, it ſhall not ſurvive. Bro. Tit. Copar. (6). Co. Lit. 169. b. If two Coparceners, ſays my Lord *Coke*, alien by Deed indented both their Parts to another in Fee, rendering a Rent to them two and their Heirs, they are not Jointenants of this Rent, but ſhall have it in the Courſe of Coparcenary. Co. Lit. 169. b. But Q. for the 38 E. 3. 26. b. which he cites to Warrant this Opinion, ſeems to maintain the contrary; for this Rent being newly created by the Deed, and a new Purchaſe, muſt be governed by the Words thereof; and of this Opinion he himſelf ſeems to be. Co. Lit. 12. b.

If two Parceners of Land in Fee, at full Age, make an unequal Partition, yet it ſhall bind them; for as the Lands being in Fee may be alienated, ſo they may be diſpoſed of by Partition; beſides, the Parties being of full Age are preſumed to know what they do, and therefore their Acts are binding upon them. Lit. ſ. 255.

But if one of them had been within Age, it would not have bound; for though Partition, if equal, will bind an Infant, becauſe compellable to make Partition, and whatever one is compellable to, may be done by the ſame Perſon voluntarily, yet when the Partition is unequal, and the leſſer Part allotted to the Minor, this ſhall not bind her; for then the Security which the Law has provided for Infants, to prevent their being overreached, would be uſeleſs. Lit. ſ. 258. Co. Lit. 171.

But yet ſuch unequal Partition is not abſolutely void, but the Infant has Election either to affirm it at full Age, by taking the Profits of the unequal Part allotted to her, or to avoid it, either during her Minority, or at full Age, by entering into the other Part with her Siſter. Co. Lit. 171. But Q. if ſhe takes the Profits after full Age, of an exact Moiety of the whole, what effect this will be of.*

* It ſhould ſeem to amount to an Entry into the other Part with her Siſter.

A *pro-*

2 Rol. Abr. 256. A *prochein Amy* may make Partition on Behalf of an Infant, and it will bind the Infant if equal; for the *prochein Amy* is appointed by the Law to take Care of the Inheritance of the Infant, and this Separation and Diviſion of his Part from what belongs to another, is ſo far from being a Prejudice to the Infant, that it is really for his Benefit and Advantage.

Co. Lit. 173. b. But if ſuch Partition be unequal, tho' they are bound by it during their own Lives, yet the Iſſue of the Coparcener, who had the leſſer Part allotted to her, is not bound, but may enter and occupy in common with her Aunt. If a Partition between Parceners of tailed Lands be equal when it is made, no Alienation by one of them after ſhall avoid it, or let in her Iſſue upon the other, becauſe they were at firſt compellable to make Partition, and the Partition they did make was binding, becauſe it was juſt and equal.

If Lands in Fee and in Tail, of equal Value, deſcend to *A.* and *B.* as Coparceners, who make Partition, and *A.* has all the Fee-ſimple Lands, and *B.* the Tail, the Iſſue of *B.* cannot avoid the Partition as to the Fee-ſimple Lands; but the Iſſue of *A.* may avoid the Partition as to the Lands in Tail, if *A.* aliens any Part of the Fee-ſimple Lands; for the Iſſue of both having *per formam Doni* an equal Right to the tailed Lands, the Act of their Anceſtor, unleſs an Equivalent be left to deſcend, ſhall not bar them of ſuch Right; but as to the Fee-ſimple Lands, the Allotment thereof by *B.* to *A.* was equivalent to an Alienation of *B.*'s Part therein, which would have bound her Iſſue; but if *A.* had left the

*Page 449 * whole Fee-ſimple Lands to deſcend to her Iſſue, then ſuch Iſſue could not avoid the Partition, becauſe a full Recompence deſcended to him, and alſo, becauſe it would be unjuſt that he ſhould defeat the Partition for the tailed Lands, when the Iſſue of *B.* is bound, and cannot avoid the Partition for the Fee-ſimple Lands.

Lit. ſ. 260. Co. Lit. 172. b. 173. a. In this Caſe if *A.* ſhould make a Gift in Tail of her Part, the Reverſion is no Recompence to her Iſſue, becauſe that may be docked by a Common Recovery; but if *A.* had made only a Leaſe for Life it would be otherwiſe, becauſe the Tenant for Life could not hurt the Reverſion. Co. Lit. 173. a. And in this Caſe, if a Writ of Partition had been brought, neither of the Coparceners would have been obliged to take all the tailed Lands, but they and the Fee ſimple Lands would have been divided in Moieties equally between them, to avoid the Inconveniencies that might happen upon allotting the whole tailed Lands to one. Co. Lit. 173. b.

2 Rol. Abr. 256. And the Reaſon that it binds the Parties themſelves, is the ſame that all other Contracts bind them. ‡ If Parceners of *non ſane* Memory make Partition, unleſs it be equal, it ſhall only bind the Parties themſelves, but not their Iſſue.

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‡ The Law does not permit a Party to ſtultify himſelf.

Lit. ſ. 257. Co. Lit. 171. a. 11 Aſſ. p. 23. 8 Co. 101. b. If two Parceners ſeiſed in Fee take Huſbands, and the Huſbands make Partition equal in Value, this ſhall bind the Wives and their Heirs, becauſe being compellable by Law to make Partition, they may by Agreement make it without Proceſs of Law; but if the Partition had been unequal, the Wife who ſuffered by the Inequality might have avoided it after his Death, and ſo might her Heirs.

Co. Lit. 46. a. Dyer 52. a. If two Coparceners, and one of them lets her Part to another for Years and after, on a Writ of Partition brought againſt the Leſſor, too little is allotted to the Leſſor; ſome hold, that the Leſſee cannot avoid it, becauſe he will not be allowed to object Partiality to Men on their Oaths, and to the Proceedings of a Court of Juſtice thereon; but if two Parceners are of three Acres of Land, each of equal Value, and one Coparcener lets her Part, and after they agree to make Partition, and one Acre is only allotted to the Leſſor, the Leſſee is not bound by it, but may enter and take the Profit

Profits of another half Acre, which juſtly belongs to him, for the groſs and apparent partiality of the Partition.

A Partition that ſhall bind on Account of its Equality, muſt not only be founded on an Equality in the Value of the Land, but likewiſe on an Equality of Advantage and Profit redounding from each Share to the ſeveral Owners; as if one ſhare be incumbered with an Aſſiſe, from which the other is free, though each Share be equal in its intrinſick Value, yet the Partition is not equal, for the Expence of managing the Aſſiſe, from which the other is free, which is a real Action, and therefore dilatory and expenſive, may eat up the whole Profits of that Part which it incumbers, and ſo make the Partition unequal. 2 Rol. Abr. 256.

When a Partition is unequal, the Whole muſt be avoided, becauſe what is the Surpluſage of the unequal Part, cannot be diſtinguiſhed but by a new Diviſion; alſo the Inequality makes the Partition, which conſiſted in the Equality of it, voidable in the Whole. Co.Lit. 170. b.

Beſides the ſeveral Sorts of Partition already mentioned, there are likewiſe theſe following: 1ſt, Where Lands deſcend in Coparcenary, and they agree that one of them ſhall have and occupy the Land from *Eaſter* till the firſt of *Auguſt* in Severalty, and that the other ſhall have and occupy the Land from the firſt of *Auguſt* till *Eaſter* yearly, to them and their Heirs. Co.Lit. 167.

Alſo if two Coparceners have two Manors by Deſcent, and they make Partition, that one ſhall have the one Manor for one Year, and the other the other Manor for the ſame Year, and ſo *alternis vicibus* to them and their Heirs; this is a good Partition, and each of them has an Inheritance, though they have the Occupation but for a fixt Term. Co.Lit. 167. b. F. N. B. 26. b.

(D) Of Partition by the Writ de Partitione facienda.

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THE Writ *de Partione facienda* lies for one Coparcener againſt another, when ſhe will not agree to make Partition voluntarily, or by one Parcener againſt three or four, or generally againſt all thoſe that will not conſent to make Partition, by them that do conſent. Lit. ſ. 247. Co.Lit. 167. a. Booth 244. F. N. B. 62.

The Manner of making Partition by this Writ is thus: 1ſt, The Writ of Partition is directed to the Sheriff, to ſummon the refractory Coparcener, to ſhew Cauſe why ſhe will not make Partition, according to the Laws and Cuſtom of the Kingdom, of thoſe Lands which ſhe and the other Coparcener or Coparceners hold *ſimul & pro indiviſo* of the Inheritance of their (*a*) common Anceſtor. F. N. B. 62. Booth 244.

(*a*) But it ſeems not to be abſolutely neceſſary to mention in the Writ, that the Inheritance is of the common Anceſtor. 3 Leon. 231. F. N. B. 62.

In this Action there are two Judgments; the firſt is *quod Partitio fiat inter partes prædict' de Tenement' prædict' cum pertinentiis*, and upon this there goes out a judicial Writ to the Sheriff, to make Partition, which recites firſt the Writ of Partition and Judgment, and then commands the Sheriff, together with twelve Men of the Vicinage, *&c.* to go in Perſon to the Tenements to be divided, and there, in the Preſence of the Parties (if they appear on Summons to be made) by the Oath of theſe twelve Men, to make an equal and fair Partition, and allot to each Party their full and juſt Share, and then return the Inquiſition of the Partition annexed to the Writ, Booth 245. Lit. ſ. 248. Co.Lit. 167. b. 168. a.

Writ, under the Seals of the Sheriff, and the Jurors, whoſe Names are likewiſe to be returned.

Co.Lit. 169. a. When the Inquiſition is thus returned, upon Motion made to the Court the ſecond Judgment is given in this Manner, *Ideo conſiderat' eſt per Cur,' quod Partilio firma & ſtabilis in perpetuum teneatur.**

This Partition by Judgment binds Infants and Feme Coverts. Co. Lit. 171. b. In this Manner of Partition there is no Preference of one Siſter to another; ſo that it is left to the Diſcretion of the Sheriff who ſhall have firſt. Co. Lit. ſ. 249.

* By 8 and 9 W. 3. c. 31. made perpetual by 3 and 4 Ann. c. 18. Proceedings on the Writ of Partition are regulated.

Cro. Eliz. 65. If Errors happen in the executing a Writ of Partition and one of the Defendants releaſes all Errors to the Plaintiff, this ſhall not bar the other.

Cro. Eliz. 9, 10. *Clay's* Caſe. According to the Direction in the judicial Writ, the Sheriff muſt be upon the Lands in Perſon, and if he were not, the Court upon Information thereof, before filing the Return, will order the Filing to ſtay; and if upon Examination it be ſo found, will award a new Writ; for in all Caſes where the Writ commands the Sheriff to go in Perſon, as in Waſte, *&c.* there the Writ is his Commiſſion, from which he cannot deviate; but if the Sheriff returns, that he was there in Perſon, and this Return be received and filed, then any Information to the contrary comes too late, becauſe by the Filing it is become Matter of Record, againſt which no Averment *in Pais* lies; neither can the Party have Error upon the Return.

Fitz. B. 62. Booth 245. There are ſome Alterations made in this Writ by the 32 *H.* 8. *cap.* 32. which gives it to more Perſons than could bring it at Common Law.†

† See the Note on the 3d Clauſe, *ante.*

Co.Lit.175. a. 167. Dyer 98. At Common Law this Writ lay for one Coparcener, Tenant of the Freehold, againſt the other, and againſt the Alienee of ſuch Coparcener.

Lit. ſ. 264. But it lay not for the Alienee, nor for the Tenant by the Courteſy; nor if one Coparcener had made a Leaſe for Life, could ſhe after bring ſuch Writ during the Continuance of ſuch Eſtate. Co. Lit. 167. a.

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Co.Lit. 175. a. Dyer 243. pl. 55. * If three Coparceners, and the Eldeſt purchaſes the Part of the Youngeſt, yet ſhe ſhall have a Writ of Partition at Common Law againſt the middle Siſter; for though ſhe has one Part by Purchaſe, yet this does not ſtrip her of the Character of a Coparcener.

Co.Lit. 175. Dyer 243. So in a ſtronger Caſe, if three Coparceners are, and the Eldeſt marries and her Huſband purchaſes the Part of the Youngeſt, though he is a Stranger and no Parcener, yet he and his Wife ſhall have at the Common Law a Writ of Partition againſt the middle Siſter.

Co.Lit. 175. Tenant by the Courteſy ſhall have a Writ of Partition upon the Statute 32 *H.* 8. *cap.* 32.

Co.Lit.175. a. And as by the Statute one Jointenant, or Tenant in Common, may have a Writ of Partition againſt another, ſo at this Day the Alienee of one Parcener may have a Writ of Partition againſt the other Parcener, becauſe they are Tenants in Common.

And. 30. pl. 72. Co.Lit. 175. b. Kelw. 208. Dyer 128. *Ballard* v. *Ballard.* Bend. 42. pl. 76. But if three Coparceners are, and a Stranger purchaſe the Part of one of them, he cannot join with either of the two Coparceners in a Writ of Partition, either at Common Law, or by Force of the Statute; for the Words of the Preamble of the Statute are, *And none of them by Law doth or may know their ſeveral Parts,* &c. *and cannot by the Laws of this Realm make Partition without their mutual Conſents*; now in this Caſe one of them, with the Parcener, may have a Writ of Partition at Common Law, and there-

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fore cannot come within the Preamble, and Intent of the Act, and ſo cannot join with the Purchaſer in a Writ of Partition brought upon it.

It ſeems, if after the Awarding of the judicial Writ, and before the Return of it, the Defendant dies, yet the Partition is good, and the Writ ſhall not abate, becauſe before the Death of the Defendant Judgment was given, that Partition ſhould be made; and though upon the Return of the judicial Writ there is another Judgment given, yet that is given in Confirmation of the firſt Judgment: It ſeems like a Caſe upon the Return of the judicial Writ, no Exception can be taken to it; therefore it is not material whether the Defendant be dead or alive, ſince he can have no Advantage by any Plea on the Return of the Writ. Daliſon 59.

A Writ of Partition is brought againſt two, and one of them appears and grants the Partition, and the other makes Default; *Dyer* is of Opinion, that the judicial Writ ſhall be awarded to the Sheriff, with a *Ceſſavit Executio*, till the Parcener who made Default comes in, for all muſt be included in a Partition by Writ, becauſe it is final; otherwiſe in a Partition by Agreement. Daliſon 28.

Three Coparceners, and one of them aliens in Fee her Part, and then one of the other two brings a Writ of Partition againſt the Alienee and the other Parcener *upon the Statute*; and becauſe this Writ lay at Common Law, in this Caſe, and the Statute does not give it, but where the Common Law would not allow it, it was reſolved that the Writ ſhould abate. Dyer 243. pl. 55.

A Writ of Partition brought by a Coparcener and her Huſband, in which the Coparcener, who was formerly married to a Peer, of the Name of *Powis*, is ſtyled *D'na Anna Powis Uxor* of her preſent Huſband; this was reckoned a *Miſnomer*, though ſhe was a Woman of Quality by Birth; upon which a new Writ was brought *ad reſpondend' H. & Annæ Uxori ſuæ nuper Uxori Domini Powis Defunct'*; and in the Count it was ſet forth, That the Plaintiff Coparcener was Co-heir in Tail with the Defendants of the Inheritance of their common Anceſtor, without ſhewing the Commencement of the Tail, and allowed to be well enough in this Action, in which the Poſſeſſion of the Defendants is affirmed, and no Land demanded from them, but only a fair and equal Diviſion, that each may know their ſeveral Shares. Dyer 79. pl. 51. *Howard* and *Duke of Suffolk*. Mo. 21.

(E) Of Hotchpot, and the Nature and Incidents of this Kind of Partition.

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A Man ſeiſed of Lands in Fee-ſimple, as for Inſtance, of thirty Acres of Land, each of the annual Value of 12*s.* and hath Iſſue two Daughters, one of whom being married, the Father gives ten Acres of the thirty to the Huſband, with his Wife in Frankmarriage, and then dies, having the Reſidue; in this Caſe the unmarried Siſter ſhall enter into and enjoy the Reſidue, unleſs the Huſband and Wife will put the ten Acres given in Frankmarriage, with the twenty Acres into *Hotchpot*, that is to ſay, *together*; and then, finding each Acre to be of the ſame yearly Value, mix fifteen Acres to the unmarried Siſter, and take five Acres to the ten which they have already in Frankmarriage, which puts them on an exact Level with the Siſter that is unmarried; for upon the Death of the Anceſtor the Remnant ſhall deſcend to the other Coparcener, becauſe the Gift in Frankmarriage ſhall *prima facie* be intended a ſufficient Advancement of the other Siſter, and as full a Share of the Inheritance as ſhe could have pretended Lit. Sect. 266, 268, 269. Co. Lit. 165. a.

pretended to in caſe it had intirely deſcended in Coparcenary; but if theſe Lands given in Frankmarriage are of leſs Value than thoſe that deſcend to the unmarried Siſter, then, as hath been ſaid, ſhe ſhall have the Benefit of a Partition in the Manner before expreſſed; for it would be an unreaſonable Conſtruction, to make what was deſigned for her Advancement, turn to her Prejudice, eſpecially when we conſider, that this Gift in Frankmarriage was made by a Tenant in Fee, who might have diſpoſed of it as he pleaſed.

Lit. Sect. 269. In this Manner of Partition the Lands given in Frankmarriage cannot be allotted to the other Coparcener, for they muſt deſcend according to the Form of the Gift; and if they ſhould be transferred to another, contrary to the original Intention of the Donor, the Iſſue of ſuch Marriage would avoid the Alienation.

Lit. Sect. 273. Co.Lit. 179. a. If the Lands given in Frankmarriage be of equal Value at the Time of the Gift with the Reſidue that continues in the Hands of the Anceſtor, and remain ſo upon the Death of the Anceſtor, they ſhall never be put into *Hotchpot*; but if in this Caſe the Lands given in Frankmarriage, without Default of the Donees, decline in Value by the Act of God, or if the Donor purchaſe more Land after the Gift, or if the Remnant be improved in his Hands, ſo that the Lands, which deſcend to the other Siſter, are of greater Value than thoſe given in Frankmarriage, then the Partition in *Hotchpot* ſhall be made, that each Siſter may have her juſt and equal Proportion.

Lit. Sect. 272. Co.Lit. 178. b. The Lands given in Frankmarriage, and the Lands in Fee-ſimple, which deſcend to the other Siſter, muſt move from the ſame Anceſtor, otherwiſe there ſhall be no *Hotchpot*.

Lit. Sect. 275. Co.Lit. 179. b. This way of Partition by *Hotchpot* is appropriated to Lands in Frankmarriage; for if an Anceſtor enfeoff one of his Daughters of Part of his Lands, or purchaſe Lands to him and her and their Heirs, or make her a Gift in Tail, ſhe ſhall have her full Share of the Remnant without putting her Share into *Hotchpot*.

The Reaſon ſeems to be this, That when ſhe is enfeoffed, *&c.* ſhe is conſidered as a Purchaſer, and what ſhe acquires by Purchaſe, can never be made a Pretence to exclude her from what comes to her in a Courſe of Deſcent.

Lit. Sect. 274. Co.Lit. 179. *Page 453 If Lands in Fee-tail deſcend from the Donor in Frankmarriage, the Donee ſhall have an equal Share of them without putting the Lands given in Frankmarriage into *Hotchpot*; for ſhe claims the Lands in Tail *per formam doni*, by Force of which Gift both Parceners muſt equally * inherit, becauſe both make up but one Heir to the Anceſtor, and conſequently one without the other cannot claim under the Words of the Donation.

Co.Lit. 165. a. If Lands given in Frankmarriage are of greater Value than the Lands deſcended in Fee-ſimple, the other Siſter has no Remedy againſt the Donees, for it was lawful for the Donor, being Tenant in Fee-ſimple, to diſpoſe of his own Lands at his Will and Pleaſure.

Lit. Sect. 270. Co.Lit. 178. a. Co.Lit. 177. b. If the Donees in Frankmarriage, and all the other Parceners die before Partition made in *Hotchpot*, yet the Benefit of this kind of Partition ſhall deſcend to their Iſſues.

This Kind of Partition hath the ſame Incidents with the common Partition; ſo that the Donee, if impleaded of the Lands in Frankmarriage, ſhall have Aid of the other Parcener; for it is unreaſonable, that what was deſigned for the Donee's Advancement, ſhould put her in a worſe Condition than ſhe would have been if the Gift had not been made.

(F) Of the Nature and Incidents of their Estate after Partition made.

THough the Law gives every Parcener a Power to sever her own Moiety and to carry it over into the Family into which she marries; yet since the Partition is compulsory, the Law will not put Parceners in a worse Condition after Partition than if they had enjoyed their Moieties without Division; and therefore on a Suit commenced for any Part, or an Eviction of any Part after Partition, they shall have like Remedy as if they had enjoyed in common; in which Case, if a Suit had been commenced, both Parties must have been impleaded, and on the Recovery there had been an equal Loss to both; therefore after Partition there is a Warranty annexed to each Part, so that if either be impleaded she may vouch her Sister, and thereby deraign the Warranty paramount annexed to the Purchase of the Ancestor; and if she loses, she may recover one Moiety of her Loss in Value against the other Sister. Co. Lit. 173. b. 4 Co. 121. Bustard's Case.

So if Parceners enjoy in common, and any Part is evicted by Entry without Action, they shall enjoy what is left in common; therefore, that Parceners may not be in a worse Condition by the Partition which the Law compels them to, there is a Condition annexed to the Partition, that if either the whole of any one Share, or an Estate for Life, or in Tail, be thereout evicted by Entry without Action, that the Party so evicted may enter on her Sister's Moiety, and avoid the Partition by Enjoyment of an undivided Moiety of what is left.

But if after Partition either Sister aliens with Warranty, and the Alienee is impleaded, he shall only vouch the Alienor to recover in Value, who may with the other Sister deraign the Warranty paramount; for as the Parceners shall not be in a worse Condition by the Partition than if none had been made; so they shall not be in a better by the Warranty or Condition which the Law annexes upon the Partition; now if a Parcener before Partition aliens her Part with Warranty, and the Alienee is impleaded, he can only vouch his Warrantor, who may vouch the other Sister to deraign the Warranty paramount, but not to recover in Value; for there is no Reason that the Sister, who did not enter into the Contract of Warranty, should be subject to it, since it is fit that she, whose Folly it was to insure the Title, should answer for the Consequences of it. Hob. 21, 26. 2 Rol. Rep. 418. Co. Lit. 174. a.

* If one Sister after Partition aliens to her Heir apparent and dies, and the Son is impleaded, though he be in by the Feoffment of his Mother as a Purchaser, yet he shall pray in Aid of the surviving Parcener to deraign the Warranty paramount; for though he claims the Land by Purchase from his Mother, and so never having it in Parcenary cannot recover *pro rata*; yet upon the Contract of Warranty, whereby the Vendor did warrant to the Ancestor and his Heirs, he, together with his Aunt, make up one Heir to such Ancestor; and therefore they must join to deraign the Warranty; otherwise there is not that Heir before the Court, that by Virtue of such Contract is to take the Benefit of the Warranty. *Page 454 Co. Lit. 174. a. 2 Rol. Abr. 418.

If a Man seised of Lands in Fee have Issue two Daughters, and make a Gift in Tail to one of them, and dies seised of the Reversion in Fee, which descends to both the Sisters, and the Donee or her Issue is impleaded, she shall not pray in Aid of the other Sister to deraign the Warranty paramount, because this Estate was never in Coparcenary, and by Consequence they never possessed as Heir to the common Ancestor, whereby they may pray in Aid of each other, and there being no Warranty in Deed annexed to the Tail granted, she has no means to bring in her Sister, without whom Co. Lit. 174. b.

whom ſhe cannot take Benefit of the original Contract of the Warrantor, ſince ſuch Warranty ran to the Heirs of the Anceſtor, and the Tenant in Tail and the other Siſter make but one Heir to the Anceſtor.

Mo. 95. If two acres deſcend to two Parceners, and one of them before Partition grants a Rent-charge out of one of the Acres, and afterwards upon Partition the Acre charged is allotted to the other Siſter, ſhe ſhall hold it diſcharged; for a Parcener before Partition, having no ſeparate Title to a diſtinct Moiety, cannot pretend to charge any particular Part of the Lands, ſo as to make it ſubject to that Charge in the Hands of another who does not hold under her; therefore this Grant by the Siſter, who at the Time of the Grant had only a Title to an indiſtinct and undivided Moiety, ſhall never affect the other Parcener who does not claim under her, and who at the Time of the Grant had as good a Title to that Acre out of which the Rent was to ariſe, as the Grantor had.

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•Page457 * (A) Of the Nature of the Tenure, and what ſhall be deemed Copyhold.

(a) As to the Name and Origin of Copyhold, *vide* Co. 76. Co. Lit. 76. Rol. Rep. 236.
(b) Lit. ſ. 172. 4 Co. 21. a.

THE (a) Original of this Tenure aroſe from Grants of Lands made by Lords to their Villeins, to hold of them by baſe Tenures; thoſe Villeins or Tenants were inrolled on the Lord's Roll, and ſaid to hold by Copy thereof; and were capable of taking no greater Eſtate than at the (b) Will of the Lord; for otherwiſe, they had been infranchiſed; yet to prevent the frequent ending of theſe Eſtates, they granted them in Fee, but ſtill at the Will of the Lord; who, notwith-

notwithſtanding ſuch Grant, (*c*) might have ouſted them when he pleaſed; which being a very great Inconvenience (*d*) was, it ſeems, altered by ſome poſitive Law, (though ſuch Law does not now appear) which (*e*) preſerved their Eſtates to them and their Heirs, doing their Services, but yet in other Reſpects left them only Eſtates at Will.

(*c*) Co. Copyholder 6, 7.
(*d*) Preced. Chan. 574.
(*e*) They are now eſtabliſhed by Cuſtom, and ſuch Tenant, ſo long as he doth his Services, and does not break the Cuſtom of the Manor, is not to be ejected by his Lord. 4 Co. 21. b. 22. a.

Lands, Parcel of the Manor of *C.* in *Wilts*, and Parcel of the Dutchy of *Cornwal*, although they paſs by Surrender and Copy of Court-Roll, yet if by the Rolls or Copies they appear only to have been granted *tenendum* (*f*) *ſecundum conſuetudinem Manerii*, and not (*g*) *ad voluntatem Domini Manerii*, they are not Copyhold, but a Cuſtomary Freehold.

Carth. 432. *Gale* and *Noble*, reſolved on a Trial at Bar, and a Verdict for the Plaintiff accordingly, againſt whom there was a Verdict at *Niſi prius*, for a Forfeiture by committing Waſte, he and all the other Tenants taking them to be Copyhold. Comb. 387. S. C. reſolved accordingly.
(*f*) That he was ſeiſed *ſecundum conſuetudinem Manerii*, does not neceſſarily import a Copyhold. 3 Bulſt. 230. Rol. Rep. 211. 5 Co. 84. 2 Vent. 144.——The Copyholds are Parcel of the Manor, and not held *ut de Manerio*, *vide* Salk. 185. pl. 4. 186. 3 Lev. 405. (*g*) The Omiſſion of theſe Words aided after Verdict. Salk. 364. pl. 5. 365. Ld. Raym. 43. 2 Ld. Raym. 1225.

The Biſhop of *N.* 10 *H.* 8. was ſeiſed of the Manor of *N.* in Right of his Biſhoprick, and, at a Court holden within the ſame Manor, granted Parcel of the Demeſnes of the ſaid Manor to one *T.* and his Heirs, by Copy; whereas, in Truth, the Land was never demiſed by Copy before; and ſo the Land continued in Copy till 23 *H.* 8. when *T.* committed a Forfeiture, and the Biſhop ſeiſed the Land, and granted the ſame again by Copy to *T.* in Fee, from which Time it continued in Copy till the 8th of *Eliz.* which was forty-ſeven Years; and it was held by the whole Court, That fifty Years Continuance is requiſite to faſten a Cuſtomary Condition upon the Land againſt the Lord; and that though the original Commencement of granting thoſe Lands by Copy, was 10 *H.* 8. from which Time to 8 *Eliz.* was above ſixty Years; yet that the Seiſure for a Forfeiture which happened 23 *H.* 8. interrupted utterly the Continuance from the Time, which might by the Law have perfected the Cuſtomary Intereſt; ſo that the Commencement of the Copyhold was to be reckoned from 23 *H.* 8. which not being ſufficient Time to make good a Cuſtom, the Lord might enter upon the Copyholder as upon his Tenant at Will.

3 Leon. 107. Style 141. *Taverner* and *Cromwell*. *Vide* 4 Co. 24.

(B) In what reſpect Copyholds partake of the Nature of Freehold Lands.

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MY Lord *Coke* ſays, that Copyholders have only a Fee-ſimple *ſecundum quid*; that though they are Tenants at Will, yet their Eſtates ſhall deſcend to their Heirs, and ſuch Deſcent ſhall be governed by the Rules of the Common Law; but not *ſimpliciter* to have all the collateral Qualities of Eſtates in Fee-ſimple.

4 Co. 22. a. Co. Copyh. 114.

Therefore where a Copyholder by Licence made a Leaſe for Years, and the Leſſee entered, and the Leſſor died, leaving Iſſue a Son and a Daughter by one Venter, and a Son by another; the eldeſt Son dies; it was adjudged

4 Co. 21. a. Moor 125. pl. 272. adjudged.

judged the Daughter of the whole Blood ſhould inherit; (*a*) for the Poſſeſſion of the Leſſee for Years was the Poſſeſſion of the elder Brother, who may have Poſſeſſion before Admittance.

Vide 4 *Leon.* 38.

(*a*) The ſame Law of a Guardian. Co. Copyh. 113. Dyer 292. Cro. Car. 411. Rol. Abr. 502. That there ſhall be a *Poſſeſſio fratris* before Admittance. Rol. Abr. 502. 3 Leon. 70. Mod. 102, 120. 11 Mod. 73. pl. 4. 107. pl. 5. Fitzgib. 287. Will. Rep. 63. pl. 13, 66. Salk. 243. pl. 4. 6 Mod. 120. 2 Ld. Raym. 1024, 1224, 1226, 1228. 3 Will. Rep. 63. 2 Vern. 226. Stra. 445. Vent. 261. Daſſ. 110. S. P. but ſaid, that if the Lord, by Cuſtom, during the Nonage of the Heir demiſes it to a Stranger, for Years, this will not make a *Poſſeſſio fratris*; and *vide* Co. Copyh. 114. where my Lord *Coke* ſaith, that if the Leaſe for Years determine, and the elder Brother die before Entry, the youngeſt Brother ſhall inherit; but *Quære?*

4 Co. 23. a. 30. b. 6 Mod. 64.

But though it be governed by the Rules of Common Law concerning Deſcents, yet it partakes not of the Nature of Freehold Lands in other Reſpects; for it is not Aſſets in the Heir's Hands; neither ſhall a Woman be endowed of it, nor a Man be Tenant by the Courteſy, unleſs by Special Cuſtom; nor ſhall a Deſcent take away an Entry.

4 Co. 23. a. Co. Copyh. 141. Supplement 59. Cro. Eliz. 717. *cont.*

A Man ſeiſed of Copyhold Lands in Right of his Wife, ſurrenders to the Uſe of another in Fee, this is no Diſcontinuance, but the Wife may enter after the Death of her Huſband; for this is not like a Feoffment at Common Law*, which by the Notoriety of it took away the Entry of the Wife, for the Benefit of Strangers, that they might not be at a Loſs againſt whom to bring their *Præcipes*; but in Caſe of Copyhold Lands, as there is no ſuch Inconvenience, ſo the Nature of the Conveyance will not admit of ſuch Expoſition.

* By 32 H. 8. c. 28. ſ. 6. the Huſband is diſabled from diſcontinuing his Wife's Eſtate. See *poſt* 460.

Moor 753. 4 Co. 23..

So if a Tenant for Life ſurrender to the Uſe of another in Fee, it is no Forfeiture; for it may be ſeen by the Court-Rolls who is Tenant, and ſo the Stranger is at no Loſs to ſue.

Co. Copyh. 97. Cro. Car. 366. Brownl. 127. Noy 152. adjudged.

If a Copyholder in Fee ſurrenders to the Uſe of *A.* and *B.* and the longer Liver of them, and that for Want of Iſſue of *A.* the Lands ſhould remain to the youngeſt Son of *J. S.* in this Caſe *A.* has but an Eſtate for Life for an Eſtate Tail in Copyhold Lands ſhall not paſs by Implication.

Style 145. 4 Co. 29. b.

A Man may ſurrender a Copyhold Eſtate to the Uſe of his Wife; for ſhe takes the Eſtate from the Lord, as an Inſtrument to convey the Eſtate to her; and ſo it comes not within the Reaſon of other Caſes, that the being but one Perſon cannot contract; for he gives the Eſtate, to the Lord, and he admits the Feme to it.

Salk. 188. pl. 7. 2 Ld. Raym. 994. 6 Mod. 63.

There can be no Occupant of a Copyhold Eſtate, becauſe of the Prejudice it would do the Lord; and therefore if a Copyholder being Tenant *pur auter vie* die, the Lord ſhall enter.

per Holt, Ch. Juſt.

(C) Wh

* (C) What Acts of Parliament shall be said to extend to Copyhold Estates: And herein,

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1. Of the Statute *De Donis*, the Intailing Copyhold Estates by Custom, and the Manner of Docking such Intails.

THE Intailing of Copyholds, and whether they are within the Statute *De Donis*, appears to have been Matter of great Controversy; and it seems now agreed, that the Statute *De Donis* creates no Intail of Copyhold Lands, becaufe they are intirely fubject to the Cuftom of the Manor, and governable by it; and becaufe they are not within the Word *Tenementa*, which comprehends only an Eftate of Freehold.

Co. Lit. 60. 3 Co. 8. *Heydon's* Cafe. Sid. 314. Rol. Abr. 506, 838. 2 Vern. 585. 705.

Alfo it feems now agreed, that if the Cuftom of the Manor has admitted of Limitations of Remainders upon fuch Gifts, that then the Cuftom of the Manor, (*a*) purfuing the Model of the Statute, creates a good Intail; but fuch Intail doth not arife by Virtue of the Statute; but it fhall be prefumed there was the fame Law of that Manor by Cuftom, Time immemorial, as began in the Kingdom by the Statute.

(*a*) My Lord *Coke* fays, Co. Lit. 60. that by the Cuftom of the Manors, the Statute co-operating with it, Copyholds may be intailed; but there cannot be an Eftate Tail in Copyholds by Cuftom only, nor any Eftate Tail by the Statute only; the Meaning of which feems to be, that Eftates Tail were before the Statute, as to the Manner of the Limitation, by the Cuftom of fome Manors; as that an Eftate was granted to a Man and the Heirs of his Body begotten, the Remainder over to another; but that in other Refpects, thofe Eftates were not Eftates Tail before the Statute; as that the Tenant fhould no ways alien to debar his Iffue, or them in Remainder; and that if he difcontinued, they fhould have a *Formedon* in Defcender or Remainder; but thefe Things were introduced by the Statute upon the Eftate, which was the fame in Limitation by the Common Law. And this feems fupported by the following Authorities. Carter 22. Cro. Eliz. 307, 717, 907. Moor 173, 188. Leon. 175. Poph. 128. Sid. 268. Cro. Car. 45. Moor 850. 3 Co. 8. 9 Co. 105. a. 3 Lev. 327. 4 Mod. 86. *

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* See 1 Com. Dig. 377. c. 8. By a modern Refolution, a Copyhold to Husband for Life, Wife for Life, then to the Heirs of the Bodies of Husband and Wife, Remainder in Fee to the Survivor, is an *Eftate-tail* after Poffibility of Iffue extinct in the Wife who furvives, and the Eftate vefts in the Perfon who is Heir of the Body of both Husband and Wife. *Sutton* v. *Stone*, *M.* 1740. 2 Atkyns 101. See farther the Notes at the end of this Divifion.

A Copyhold was furrendered to the Ufe of the Copyholder's laft Will, who devifed it to *J. S.* in Tail, &c. *J. S.* hath Iffue, and furrenders to the Ufe of his Wife for Life; and it was adjudged, that fince the Jury found it was not the Cuftom of the Manor to have an Eftate Tail in the Copyhold, that *J. S.* had a Fee-Conditional; and that by his having of Iffue, he had performed the Condition; and the Surrender to the Ufe of his Wife was good.

Cro. Car. 44, 45. *Rowden* and *Malt-fter*. See Co. Copyholder prefixed to Co. Lit. fo. 59. f. 49. Bull. N. P. 161. 3 Term Rep. 398.

But though, by Cuftom Time out of Mind, Copyholds may be intailed, yet it is no Proof of fuch Cuftom, that an Eftate hath been granted to a Man and the Heirs of his Body; for that may be a Fee Conditional; but it muft be fhewn that a Remainder hath been limited over, and enjoyed, or that the Iffue hath recovered after the Alienation of his Anceftor, or the like.

3 Co. 8. b. Co. Lit. 60. b. Rol. Abr 838.

Thefe Intails, like all others, may be dock'd; but the Manner of doing differs according to the Cuftom of the Manor; the more common Way of barring fuch Intails is by Recovery in the Lord's Courts, which is (*b*) always

Co. Lit. 60 Sid. 314. Moor 358. (*b*) But a

always allowed where the Cuſtom of Intailing prevails, to avoid the Danger of Perpetuity in ſuch Copyholds.

Recovery with Voucher doth not bar the Intail of a Copyhold Eſtate, but that as to the intailing of them, Cuſtom of common is requiſite; ſo without Cuſtom the Intail cannot be cut off: The Reaſons are, that becauſe that, without an intended Recompence in Value, no Recovery ſhall bind, and the Surrenderee comes in the *Poſt* by the Lord, and is not in the *Per* by the Party, and ſo no Warranty can be annexed of common Right; for no Eſtate leſs than a Freehold is capable, of common Right, of having a Warranty annexed to it. Moor 358, 753. Cro. Eliz. 380, 907. 4 Co. 23. Cro. Eliz. 391. Raym. 164. Lev. 136.

*Page460 * Alſo, according to the Cuſtom of ſome Manors, a Surrender to the Lord is equivalent to a Recovery at Common Law, and ſhall bar ſuch Intails.

Co. Lit. 60. b. Moor 188. 2 Vern. 705. Co. Copyh. 135. Style 450. Sid. 314. 2 Sand. 422.

And in ſome Manors, a Forfeiture committed by Tenant in Tail, of the Copyhold, and the Lord's making three Proclamations, and ſeiſing the Copyhold, and regranting it to the Copyholder, has been allowed a good Cuſtom to bar the Intail. So it is if Tenant in Tail ſurrenders to the Purchaſer and his Heirs, who commits a Forfeiture, and the Lord as before, ſeiſes it, and makes Proclamations; this is a Bar of the Intail, and the Cuſtom allowed good ‡.

‡ There may be a good Cuſtom in a Manor, that Tenant in Tail may ſurrender, and bar his Iſſue, without ſuffering a Recovery; or that he may ſuffer a Recovery in the Manor-court, and have the ſame Effect. *Everall* v. *Smalley*, *M.* 17 *Geo.* 2. Str. 1197. Wilſ. 26.——In a Manor where Copyhold may be intailed, either by ſpecial Cuſtom, or by the general Doctrine of Surrender in Fee, *vel aliter*, *&c.* if a Cuſtom does not appear to bar by Recovery in that Manor, it may be barred by Surrender; for otherwiſe it would create a Perpetuity. *Moore* v. *Moore*, *T.* 1755. 2 *Vezey* 596.——And this by Surrender to the Uſe of the Will only. *Ibid.* *Car.* v. *Singer*, *p.* 1750. in *C. B.* 2 *Vezey* 603.——By Cuſtom it may be barred by Surrender, and wherever Tenant in Tail of a Freehold can bar the Eſtate by any Means, there Tenant in Tail of *ſuch* Copyhold may bar by Surrender. *Martin* v. *Mowlin*, *p.* 33 *Geo.* 2. 2 Bur. 969.—In ſuch Manor, if *A.* deviſes to his Son *B.* and *C.* his Wife, and the Heirs of the Body of *B.* of *C.* begotten; this Eſtate may be barred by Surrender of *B.* alone. *Ibid.*

2. Of ſuch Statutes which may be ſaid to relate to them.

The general Rule laid down for the Expoſition of Statutes, as to their extending or not extending to Copyhold Eſtates, is this, that where an Act of Parliament alters any Eſtate, Intereſt, Tenure or Cuſtom, or Service of the Manor, or doth any Thing in Prejudice either to the Lord or Tenant, there the general Words of an Act of Parliament will not extend to Copyhold Eſtates; but when an Act is generally made for the publick Good, and no Prejudice accrues to the Lord, *&c.* there Copyholders are bound by them.

3 Co. 7. Leon. 4. Moor 128. Cro. Car. 42, 43. Skin. 297. Salk. 185. pl. 2. 4 Mod. 83. 1 Atk. 385 to 390. 2 1 Wilſ. 26.

Atk. 37, 45, 85, 101, 189. 2 Vez. 603. 2 Bl. Rep. 946. Burr. 206, 97

Moor 410. (*a*) Copyholders are within the Statute of Limitation; for that is an Act made for the Preſervation of the Publick Quiet, and no Ways tending to the Prejudice of the Lord or Tenant.

(*a*) But Debt for a Fine is not within the Statute of Limitations. 2 Keb. 536.

(*b*) Co. Copyh. 151, 156. Suppl. 106. Cro. Car. 24. Lex Cuſtom. 253. Yelv. 135, 222. Cro. Jac. 305. Hob. 177. Cro. Eliz. 17. Keb. 356.

It ſeems (*b*) formerly to have been the better Opinion, that Grantees or Surrenderees of Reverſions of Copyholds could not take Advantage of Covenant broken, by 32 *H.* 8. *c.* 3. becauſe he comes in in the *Poſt*, and not in the *Per*; and the Lord would have a Tenant put upon him without his Admittance; but it (*c*) has been ſolemnly adjuded, that this being a beneficial Law, it ſhall extend to Copyholds.

(*c*) 4 Mod. 82 to 86. adjudged between *Cope* and *Glover*. 3 Lev. 326. S. C. adjudged. Skin. 297, 305. pl. 1. S. C. adjudged. Salk. 185. pl. 2. S. C. adjudged.

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The 32 *H.* 8. *cap.* 28. of the Huſband's diſcontinuing of the Wife's Lands, extends to Copyhold Eſtates. Co. Copyh. 152. Supp. 68.

4 Co. 23. But whether the other Branch of it, or the 13 Eliz. c. 10. concerning Leaſes made by Huſband and Wife, Tenants in Tail, or Eccleſiaſtical Perſons, extend to Copyhold, *vide* Cro. Car. 44. Co. Copyh. 151. Co. Lit. 44. a. 6 Co. 37. 3 Lev. 327. And *vide* Tit. *Leaſes*.

Copyholds are not within the 11 *H.* 7. *cap.* 20. which makes the Alienation of the Wife void of any Eſtate which ſhe hath in Dower, for Life, or in Tail, jointly with her Huſband, *&c.* for thereby an Entry being given to the next Heir, he would come in to be Tenant, without the Admittance of the Lord. 2 Sid. 41, 73. 3 Lev. 327. 4 Mod. 85.

The 27 *H.* 8. *cap* 10. for executing Uſes to the Poſſeſſion, extends not to Copyholds, neither doth that Branch of the Act concerning Jointures extend to them; ſo that if a Jointure be made to a Woman of Copyhold Lands, that will be no Bar to her Dower. Co. Copyh. Cro. Car. 44. 4 Mod. 85.

But yet the Statute of *Merton*, that gives Damages in a Writ of Dower, where the Huſband died ſeiſed, extends to Copyholds, though the Word *ſeiſed* is properly applicable to Freeholds; but this is by Force of the Equity of the Statute. 2 Inſt. 325. Cro. Car. 43. 4 Co. 30. b. Co. Copyh. 152.

* The Statute of *Weſtm.* 2. *cap.* 3. in all its Branches extends to Copyhold Lands; for it is an Act made to redreſs Wrong, and no way prejudicial to the Intereſt either of the Lord or Tenant, either in the *Cui in vita* given to the Wife upon the Huſband's Diſcontinuance, the Receipt of the Wife, *&c.* or *quod ei deforciat* to particular Tenants. *Page 461 Co. Lit. 369. b. Co. Copyh. 152. 4 Mod. 84. 3 Lev. 327.

It is enacted by 31 *H.* 8. *cap.* 13. that if any Abbot, *&c.* ſhall make any Leaſe of Lands, *&c.* in the which any Eſtate for Life, *&c.* then had its Being and Continuance, then every ſuch Leaſe to be void. A Copyhold was let by Copy for Life, and then the Religious Houſe granted a Leaſe of it to another for eighty Years; and the Queſtion was, whether a Copyhold Eſtate for Life was within the Words of the Act, *in the which any Eſtate or Intereſt, &c.* and it was reſolved that the Leaſe was void, and that the Copyholder had an Eſtate or Intereſt for Life. 3 Co. 7. *Heydon's* Caſe. Leon. 4. Moor 128. Cro. Car. 42, 43.

The 32 *H.* 8. *cap.* 9. againſt *Champerty*, extends to Copyholds, for the Words, *if any bargain, buy or ſell any Right or Title*; ſo that they are within the Words of the Act, being made to ſuppreſs Wrong, and within the Equity of it, neither Lord nor Tenant being prejudiced by it. Co. Lit. 369. Co. Copyh. 152 4 Mod. 84. 3 Lev. 327.

The 31 *H.* 8. *cap.* 1. and 32 *H.* 8. *cap.* 32. concerning Partitions, extend not to Copyholds, becauſe the Act provides it ſhall be done by Writ of *Partition*; and Copyhold Lands are not impleadable at Common Law. Cro. Car. 44. Co. Copyh. 151.

The Statute of *Weſtm.* 2. *cap.* 20. which gives the *Elegit*, extends not to Copyhold Lands, for then the Lord would have a Tenant brought in upon him without his Admittance or Conſent. 4 Mod. 85. 3 Co. 9. Co. Copyh. 149. Gilb. Ten. 185. Sav. 67. Rol. Abr. 888. Cro. Car. 44. Hardr. 433. O. Benl. 163. 3 Read. Stat. Law. 123. 2 Inſt. 396.

By 2 *E.* 6. *cap.* 8. it is expreſsly provided, that Copyholders ſhall have the like Traverſe and Remedy where their Intereſt is not found by the Office, as Freeholders and others have; and ſo alſo upon 12 *Eliz. cap.* 8. Co. Copyh. 145.

By 1 *E.* 6. *cap.* 14. it is expreſsly provided, that no Copyhold ſhould come into the King's Hands by Diſſolution of Monaſteries; which Clauſe was put in for the Benefit of Lords of Manors. Co. Copyh. 146.

The Forging of Court-Rolls is expreſsly within 5 *Eliz. cap.* 14. as well as Forging any other Charter, Deed or Writing ſealed, whereby to defeat a Copyholder or Freeholder. Co. Copyh. 146.

Copyholds are within the Statutes of Bankrupts, for the Statute of 13 *Eliz. cap.* 7. expreſsly mentions them; and though other Statutes do not,

Cro. Car. 550, 568. Co. Copyh. 146. But the Statute of 34 and 35 H. 8. c. 4. did not extend to them; therefore it was neceſſary to make a ſubſequent Law to include them. 4 Mod. 84, 85.

not, yet they being made for further Remedy, are to be expounded by the former, eſpecially ſince that hath taken Care that no Prejudice ſhould happen to the Lord.

Co. Copyh. 147. Leon. 97, 98. Owen 37. 2 Inſt. 737. Cawley 107. 2 Hawk. P. C. 14.

Copyholds are within the 35 *Eliz. cap.* 2. againſt Recuſancy, and forfeitable for the Recuſant's Life, but the Forfeiture goes to the Lord, not to the King, by the expreſs Words of the Statute; but it ſeems that Copyholds are not within the 29 *Eliz. cap.* 6. or 3 *Jac.* 1. *cap.* 4. in Reſpect of the Prejudice that would accrue to the Lord by the Loſs of his Services.

Co. Copyh. 149.

The 16 *R.* 2. *cap.* 5. which makes it a Forfeiture of Lands, *&c.* to purchaſe Bulls of the Pope, extends not to Copyhold Lands for the Prejudice the Lord would ſuſtain if the King ſhould have the Lands.

9 Co. 105. a. Co. Copyh. 153. but ſee 5 Co. 125. Bulſt. 50.

The Statute of Fines extends to Copyhold Lands, becauſe it was made to avoid Controverſies, and is no ways prejudicial to the Lord.

Copyholds are not within the 31 *Eliz. cap.* 7. of Cottages.

Co. Copyh. 152. 4 Co. 126. b.

The 17 *E.* 2. *cap.* 10. which giveth the Wardſhip of Idiots Lands to the King, he finding them convenient Maintenance out of the Profits thereof, extends not to Copyhold Lands, for the Prejudice that would thereby enſue to the Lord; but yet all Alienations made by an Idiot, of his Copyhold Lands, after Office found, ſhall be avoided by the King.

*Page 462

3 Lev. 395. *Clench* and *Cudmore.*

* A Copyholder is not within the Statute 12 *Car.* 2. *cap.* 24. to diſpoſe of the Cuſtody of his Infant Heir, becauſe of the Meanneſs of his Eſtate, and the Prejudice that would accrue to the Lord of the Manor; and therefore the Lord, or thoſe intitled by the Cuſtom, ſhall have the Cuſtody of him.

2 Lutw. 1181. S. C. Comb. 243. S. C.

By 28 *Geo.* 2. *cap.* 13. *ſect.* 4. Aſſignees of Copyhold Eſtates of poor Priſoners, may compound with the Lord of the Manor for the uſual Fine on Surrender, and be admitted Tenants, *&c.* †

† See farther as to this Diviſion, Com. Dig. 1 V. 416. n.

(D) Of ſuch general Cuſtoms as may be ſaid to relate to all Copyhold Eſtates.

Salk. 184. pl. 1.

THERE are two Sorts of Cuſtoms; firſt, General, which extend to all Kinds of Manors, which is warranted by the Common Law, and of which the Courts take Notice; ſecondly, particular Cuſtoms, which muſt be pleaded.

13 Co. 68. Godb. 172. 2 Brownl. 329.

By the general Cuſtom, and of common Right, every Copyholder may take Hedge-bote, Houſe-bote and Plough-bote, upon his Copyhold; but yet this Power may be reſtrained by Cuſtom; as that the Copyholders ſhall not take it, unleſs by the Aſſignment of the Lord, or his Bailiff.

4 Co. 26. a. Cro. Eliz. 461.

Every Copyholder may make a Leaſe for a Year, and ſuch Leſſee may maintain an Ejectment; for as the Common Law warrants ſuch Leaſe, ſo it gives him a Remedy for the Recovery of it.

Cro. Jac. 526. Cro. Eliz. 443. *cont'.*

A Copyholder may (*a*) ſurrender to the Lord by Attorney in Court, becauſe he may do that *communi Jure*; and ſo the Common Law gives him

Cro. Car. 273. Leon. 36. Co. Copyh. 92. 1 Term Rep. 600. 2 Term Rep. 48

(*a*) Admittance by the Lord in Court, or out of Court, ſeems to be *de communi Jure*; but Quæ whether *de communi Jure* he is to admit by Attorney; and *vide* 9 Co. 75. Leon. 36. *cont'.* Co. Li 59. 3 Bulſt. 80. and 2 Sid. 37, 61. That the Lord is not compellable to admit by another, becau the corporal Service of Fealty is due from every Copyholder.

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Power to do it by Attorney, as an Incident to his Eſtate. So a Surrender to the Lord out of Court is *de communi Jure*, and therefore the Copyholder may, as it ſeems, do it by Attorney, and ſo it ſeems to the (*b*) Steward; but if the Surrender be to two cuſtomary Tenants, there it cannot be done by Attorney without a ſpecial Cuſtom ||.

(*b*) That there is the ſame Reaſon that the Steward ſhould take Surrenders out of Court, and alſo out of the Manor, as that the Lord ſhould. Salk. 184. pl. 1.*

|| So R. 9 Co. 76. a. b. 1 Rol. Abr. 501. l. 5.

* See farther Com. Dig. 1 V. 382. A Cuſtom that a Surrender muſt be made in Perſon, unleſs in Caſe of ſpecial Diſability, is not contrary to Law. *Mitchel* v. *Neale*, *M.* 1755. 2 Vezey 679.—A Purchaſer of a Copyhold is not obliged to accept of a Surrender by Attorney, but may inſiſt on the Venders ſurrendering in Court. *Ibid.*

(E) Of particular Cuſtoms that are good and peculiar only to ſome Copyholds.

PArticular Cuſtoms are to be conſtrued ſtrictly, but the Reaſonableneſs of them is not altogether to be conſidered from the Rules and Maxims of the Common Law; for there is no Cuſtom but what in ſome Point or other overthrows the Common Law, but from the Conveniency of the Thing itſelf.

A Cuſtom that if a Copyholder do not repair, it ſhall be preſented by the Homage, the Tenant amerced, and that the Lord ſhall diſtrain upon the Copyholder or Under-Tenant; this is a good Cuſtom, for the Under-Tenant is not a mere Stranger. March 161. Moor 788.

But a Cuſtom that after the Death of Tenant for Life the Lord is compellable to make a Grant for Life to his Son, and if no Son, to the Daughter, is a void Cuſtom, becauſe it obliges the Lord, who hath the Intereſt to grant it to this or that particular Perſon, whether he will or no; (*c*) but a Cuſtom for a Copyholder for Life to nominate his Succeſſor, is good. 2 Brownl. 85. Noy 2. Cro. Jac. 368. Moor 842.

(*c*) And a Cuſtom that ſuch a Copyholder may cut down Trees, is good. Noy 2. Cowp. 377. 1 Term Rep. 396.

* Cuſtom for the Steward to make By-Laws for the Ordering the Common, is good; but an Order that the Tenant ſhould not put in this or that Beaſt, is void; becauſe it takes away his Inheritance; but a By-Law that he ſhould not do it before ſuch a Day, is good, being not reſtrictive of his Inheritance, but only directive of it. *Page 463 Leon. 190. March 28.

Cuſtom that he who lives above ten Miles from the Manor, upon paying 8*d.* and 1*d.* to the Steward, ſhall be excuſed from Attendance upon the Court, is a good Cuſtom, if it be averred that there are ſufficient Tenants who live near the Manor. Sid. 361. Mod. 77. 2 Keb. 344, 380, 851.

A Cuſtom to deviſe Land, the Leſſee paying the treble Value of the Rent, and if he died within the Term, that his Heir ſhould have it, paying one Year's Rent; and that if he aſſigned, the Aſſignee ſhould have it, paying a Year's Rent; this was held to be a good Cuſtom. Hut. 101, 126, 127.

That a Copyholder ſhall not alien without a Licenſe, is a good Cuſtom; ſo is a Cuſtom that if a Copyholder make a Leaſe for one Year, and die, that it ſhall be void againſt his Heir; (*d*) but a Cuſtom that the Copyholder ſhall hold the Land half a Year after the Term, is void. Moor 8. pl. 27. Lit. Rep. 233.

(*d*) A Cuſtom that the Executors ſhall hold a Year after the Copyholder's Death, is a good Cuſtom. Cro. Jac. 36. 1 Term Rep. 474, 600. 2 Term Rep. 198, 484.——That a Copyholder may give a Warrant of Attorney to ſurrender after his Death, is a void Cuſtom. 2 Rol. Abr. 157.

That

Lex Cuſtom. 34. That if a Copyholder will ſell his Land, the next of Blood ſhall have the Refuſal, or the next Neighbour to the *Eaſt*, is a good Cuſtom.

Cro. Jac. 671. 2 Brownl. 277. Co. Copyh. 70, 71. If there be a Cuſtom that a Copyholder ſhall not put in his Beaſts to take the Common before the Lord hath put in his, this is a void and unreaſonable Cuſtom, becauſe it is in the Power of the Lord to take away the Intereſt of his Commoners. (*b*) So a Cuſtom that the Tenant ſhall pay a Fine upon the Marriage of his Daughter, is void, becauſe againſt the Freedom of the Subject; but if a Man obliges himſelf to ſuch a Thing by Tenure, it is good, being his own Contract.

(*b*) If the Huſband ſhall be Tenant by the Courteſy, or the Woman in Dower, then to pay a Fine upon Marriage, is reaſonable. Co. Copyh. 73. 2 Rol. Abr. 264, 265.

Co. Copyh. 71. 2 Rol. Abr. 264. A Cuſtom may be void for the Uncertainty of it; as, if a Feoffment be made by an Infant, it ſhall be good, if he can tell 12*d.* or that Tenants ought not to pay above two Years Rent for a Fine, but that they may pay ſo much or leſs.

Co. Copyh. 94. *Vide* Moor 123. where My Lord *Coke* ſeems to be of Opinion, that, by ſpecial Cuſtom, a Wife may deviſe Copyhold Land to her Huſband; but he ſays that this Cuſtom hath been ſo much impugned, that he cannot juſtify the Validity of it.

it was debated, whether a Cuſtom that Feme Covert might deviſe Copyhold to her Huſband, or any other, was good; and it ſeemed to be the Opinion of the Court that it was; but the Judgment went on a Fault in pleading; but *vide* Winch 27. March 8. 4 Co. 61. *b.* where it is held no good Cuſtom.

2 Saund. 326. Sid. 152. Rol. Abr. 888. Winch 8. Lit. Rep. 234. Copyholders by Cuſtom may have *ſolam* and *ſeparalem paſturam* in the Soil of the Lord, and exclude the Owner *; but a Copyholder of Inheritance cannot, without ſpecial Cuſtom, dig for Mines, neither can the Lord dig in the Copyholders Lands, for the great Prejudice he would do to the Copyholder's Eſtate; but the Copyholders may dig Marl to lay on the Copyhold Land, but cannot incloſe where it never was incloſed before.

* A Copyholder in fenny Lands may be intitled to dig the Lord's Soil for Turf. *Dean of Ely* v. *Warren*, T. 1741. 2 Atkyns 189.——Common of Turbary cannot belong to an Occupant. *Ibid.*

Hob. 215. Noy 27. (*c*) But *vide* Cro. Jac. (*c*) The Lord ſhall not have the Cuſtody of Lunatics Lands, unleſs there be a Cuſtom for it; neither ſhall the King have it, for the Prejudice that might enſue to the Lord.

105. where it was reſolved, that the Lord may have the Cuſtody of one that was *mutus & ſurdus*, and no Cuſtom is laid; and the Reaſon given is, that otherwiſe the Lord would be prejudiced in his Rents; *ideo Quære.*

*Page 464 4 Co. 31. a. b. * A Cuſtom that one Copyholder may have Common, *&c.* in his Lord's Soil, is good; for all the other Copyholders might have forfeited their Eſtates.

2 Keb. 344. 2 Rol. Abr. 450. and yet the Licence Cuſtom, that, upon Payment of ten Years Rent, the Lord ſhould licenſe to let for ninety-nine Years; and if he would not licenſe, the Tenant ſhould leaſe without Licenſe; adjudged a good Cuſtom.

ſeems unneceſſary here, ſince it may be done without it.

Rol. Abr. 511. But if it had been ſhewn in pleading, that he could not grant otherwiſe; *Quære.* Cuſtom was that the Lord might *ſolummodo* grant Eſtates in Fee; this Word *ſolummodo* was expounded to mean that he had only granted Eſtates in Fee; and ſo it was held that he may grant for a leſs Time.

Co. Lit. 59. b. 3 Bulſt. 219. *Lex Cuſtomar.* 156. Co. Copyh. 154, 155. That the Widows of Copyholders ſhall have Dower, or their (*c*) Free Bench, or a Moiety of the Lands, is a good Cuſtom; and alſo that Huſbands of Feme Copyholders ſhall be Tenants by the Courteſy; that if a Copyholder holds Lands in Fee, that his Wife ſurviving him ſhould have it

(*c*) The Wi-

it in Fee, is a good Cuſtom; (*b*) alſo a Cuſtom that ſhe ſhould have it *durante viduitate*, is good.

dow of *Ceſtuy que Truſt* of a Copyhold Eſtate, ought to have her Free Bench as much as if the Huſband had the legal Eſtate in him. 2 Vern. 585.*—Tenants in Dower, and by Courteſy, ſhall pay a Fine upon Admittance, eſpecially if there be a Cuſtom for it. Co. Copyh. 154. but *vide* Lex Cuſtom. 156. where it is ſaid, that in Caſe of a Widow's Eſtate no Fine is due; and *vide poſt* of Fine, Letter (I. 479, &c.) and Hut. 18. Rol. Abr. 592. Noy 29. That the Widow is in before Admittance, in the ſame Manner as the Heir at Law is. (*b*) A Copyholder *durante viduitate* ſows the Ground, and takes Huſband, ſhe loſeth the Corn: but if ſhe had let the Lands, her Leſſee ſhould have the Corn; ſo if ſhe die, her Executors or Adminiſtrators ſhall have it. 5 Co. 115.

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* Free-Bench is a Widow's Eſtate in ſuch Lands as the Huſband *dies ſeiſed of*; not that he was ſeiſed of during the Coverture, as Dower is. *Godwin* v. *Winſmore*, H. 1742, 2 Atkyns 525.——If a Man before Marriage ſettles on his Wife Part of his real Eſtate for her Jointure, in bar of all Dower which ſhe may claim out of any Lands, Tenements, Meſſuages and Hereditaments, of which he is or ſhall be ſeiſed, of Freehold or Inheritance; ſhe cannot claim her *Free-Bench*, in Copyholds purchaſed afterwards. *Walker* v. *Walker*, M. 1747. 1 Vezey 54.

The Cuſtom of a Manor was, that if a Man took a Cuſtomary Tenant to Wife, and out-lived her, he ſhould be Tenant by the Courteſy. A Man took a Woman to Wife who had no Copyhold Land then, but ſome deſcended to her during the Coverture; and it was adjudged that he ſhould not be Tenant by the Courteſy, becauſe he is out of the Cuſtom. 2 Leon. 208, 209.

A Copyholder may diſpoſe of his Lands, and bar his Wife of her *Free-Bench*, unleſs there be a particular Cuſtom that ſhe ſhall avoid any Alienation, &c. and therefore where a Copyholder made a Leaſe of Lands which was warranted by Cuſtom, it was held, that though by the Cuſtom the Wife was alſo intitled to her Free Bench, yet that the Leſſee's Title being purſuant to the Cuſtom, was as good as hers, and being prior could not be (*c*) avoided by her. Cro. Jac. 36. 3 Leon. 81. Co. Copyh. 129.

(*c*) But it ſeems after the Leaſe ended ſhe ſhould be endowed; but *Quære* whether ſhe ought to be endowed of the third Part of the Rent during the Continuance of the Leaſe, becauſe Cuſtoms are to be taken ſtrictly. *Vide* Head of *Dower*, and that her Title doth not commence by the Marriage, as it doth in Dower at Common Law. Carth. 276.

If a Copyholder in Fee, where by the Cuſtom the Widow is intitled to her *Free Bench*, ſurrenders his Copyhold into the Hands of two Tenants, according to the Cuſtom, to *J. S.* in Fee, and this Surrender is preſented at the next Court; but after, and before the ſecond Court, the Surrenderor dies, and on the next Court after his Death *J. S.* and the Widow are admitted, the Title of the Surrenderee ſhall prevail; for though the Huſband died ſeiſed, yet it was of a defeaſible Eſtate, of which Quality the Wife's Eſtate muſt partake, being thereout derived, and by the Admittance, which had relation to the Surrender, was actually defeated. Salk. 185. pl. 3. *Benſon* and *Scott*. 3 Lev. 385. S. C. adjudged. Skin. 406. pl. 1. S. C. adjudged. Carth. 275, 276. adjudged without Difficulty.

* If the Lord of a Copyhold Manor, in which are ſeveral Copyholders for Life, (*d*) takes a Wife, and a Copyholder dies, and the Lord after Coverture grants the Land again, according to the Cuſtom of the Manor, for Life, and dies, his Wife in a Writ of Dower ſhall not avoid this Grant; for though the Grant was after her Title of Dower, yet the Cuſtom, which is the Life and Force of the Grant, was long before. * Page 465 4 Co. 24. adjudged. 8 Co. 63. cited. 2 Brownl. 208. S. C. cited.

(*d*) So if he grant a Rent-charge. 2 Leon. 109. 8 Co. 63. but for this *vide* Leon. 4. 16. 2 Leon. 152. 3 Leon. 59. Godb. 130. Moor 94. Rol. Abr. 684. But the Heir's Grant the Wife ſhall avoid. Moor 234.

If there be a Cuſtom in a Manor, that the Lord ſhall enter and enjoy the Lands, during the Nonage of the Infant, it is a good Cuſtom; for the Freehold Leon. 266. pl. 357. Co. 87.

Freehold of the Land is in the Lord, and he is Tenant to the *Præcipe*; and an Eſtate at Will may ceaſe for a Time, and revive again, as well as it may deſcend by Cuſtom. †

† See *ante* 460. n.

(F) Of granting Copyhold Lands: And herein,

1. What Perſons may make good Grants.

(*b*) EVERY Lord of a Manor that hath a lawful Eſtate in the Manor, whatſoever that Eſtate be, whether in Fee, in Tail, for Life, Years, or at Will, *&c.* may make voluntary Grants of Copyhold Lands that come into their Hands; which Grants ſhall bind thoſe that have the Inheritance of the Manor, whatſoever defects the Lord of the Manor may be under, that made the Grant; (*c*) provided the ancient Rent, Cuſtom and Services be reſerved; for theſe Eſtates and Grants derive not their Force and Effect from the Lord's Intereſt, but from the Cuſtom of the Manor by which they have been (*d*) demiſed, and are demiſable, Time out of Mind; ſo that to ſupport ſuch Grant, it is ſufficient if it be done *per dominum manerii pro tempore exiſtente.*

(*b*) Co. Lit. 58. b. 4 Co. 23. b. Co. Copyh. 79, 107. Moor 147. Rol. Abr. 499. S. P. 8 Co. 63. b. Noy 41.

(*c*) The antient Services muſt be reſerved, the Reaſon whereof is, that, there being nothing but Cuſtom to warrant the Grant by Copy, the Cuſtom ought to be ſtrictly purſued, as to the Eſtate, Cuſtom, Services and Tenure, or elſe it is not the Eſtate that was demiſed before, Co. Copyh. 107, 108. *Bro. Tenant by Copy* 27.——Therefore he that hath but a particular Eſtate in the Manor, cannot grant a Copyhold by Parcels or demiſe Part, and retain the Reſidue himſelf. Cro. Eliz. 662. (*d*) It is one of the Pillars of a Copyhold Eſtate, that it hath been demiſed, or demiſable Time out of Mind. 4 Co. 24. b. Co. Lit. 58. b. Leon. 56. 3 Leon. 107, 108.

4 Co. 23. b. 8 Co. 63. S. P.

If Baron and Feme, being ſeiſed of a Copyhold Manor, in the Right of the Feme, (*e*) grant a Copyhold, this ſhall bind the Feme notwithſtanding her Coverture; for the Copyholder is in by Cuſtom, without Regard to the Eſtate or Perſon of the Grantor.

(*e*) But the Grant muſt be made in the Name of both. Cro. Jac. 99.

4 Co. 23. 8 Co. 63. (*f*) Noy 41. S. P. adjudged.

So a Grant made by an (*f*) Infant, *Non compos mentis*, Biſhop, Prebend, (*g*) Parſon, *&c.* ſhall bind for ever.

(*g*) Grants by a Parſon before Induction, are not good; ſo if after Inſtitution and Induction he reads not the Articles. Co. Copyh. 48. ſ. 34. ‡

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‡ *Quære*, and ſee the firſt Clauſe under this Head, and *poſt.* 467.

4 Co. 23.

So if the Queen be Tenant for Life of a Manor, and a Copyhold of Inheritance eſcheat, ſhe may grant it by Copy, and ſuch Grant by the Cuſtom of the Manor ſhall bind the King; for ſhe was *Domina pro tempore.*

*Page 466 Co. Copyh. 97.

* If there are two Jointenants of a Manor, and a Copyhold eſcheats, one may grant the Whole; for he is *Dominus pro tempore*, being ſeiſed *per my & per tout.*

(*b*) Owen 115. Co. Copyh. 87.

Leſſee for Years of a Manor grants Lands by Copy; this by (*b*) ſome Opinions has been held void, unleſs the Reverſion happens before his

his Eſtate for Years ended; for by this Means he binds the (*b*) future Lord's Intereſt, and lets his own go at large; but (*c*) now by the better Opinion, this Grant is good; for the firſt Grounds of this Law, that the Lords, for the Time being may grant Copyhold Eſtates, was, becauſe Copyholders were only Tenants at Will; and ſo though the Lord, for the Time being, had but a particular Eſtate, and granted the Lands in Fee, yet that was no Prejudice, but rather an Advantage to the Lord that was to have the Manor afterwards; for if he had a Mind, he might put out the Tenant at his own Pleaſure; but this Uncertainty of the Copyholder's Eſtate being found inconvenient, it was afterwards adjudged that he ſhould retain his Lands, and not be ſubject to the Pleaſure of the Lord; but the other Part of the Law was left as before, *viz.* that Lords for the Time being might grant Lands in Fee, though they themſelves had but a particular Eſtate; and this Cuſtom being continued to this Day, it is that which warrants the Grants by Copy; for it is moſt certain theſe Eſtates, granted by Lords who have a particular Intereſt, cannot be derived from the Intereſt of the Lord; for if they were, they muſt determine when the Lord's Eſtate determines; for *nemo poteſt plus Juris*, &c.

That there ought to be a Cuſtom to enable a Lord of a Manor to grant Copyholds in Reverſion. March 6. *Vide* Goulſ. 102, 103. 3 Leon. 226. Godb. 140.

(*b*) Tenant in Dower of a Copyhold may grant in Reverſion, it ſhall bind the Heir after her Death. Rol. Abr. 499.

Cro. Eliz. 661. S. C. *Vide* Godb. 135. Owen 4. ‡——Guardian in Socage may grant Copyhold in Reverſion, and it ſhall bind the Ward, though it comes not in Poſſeſſion during his Infancy. Godb. 143. Cro. Jac. 55, 98. Owen 115. Rol. Abr. 499. 2 Rol. Abr. 41. S. C. Hetley 54. Moor 95, 147. Cro. Eliz. 661. (*c*) 8 Co. 63.

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‡ But ſee the ſtat. 11 H. 7. c. 20. as to Alienations by her of the Land of her Huſband, being void.

If a Lord of a Manor deviſes by his Will in Writing, that his Executors ſhall grant Copies according to the Cuſtom, for Payment of Debts, and dies, the Executor, though he hath no Eſtate in the Manor, may make Grants according to the Cuſtom of the Manor. Co. Lit. 58. b. *Vide* Dyer 251. a. Co. Copyh. 85. 4 Co. 24. a.

If the King, by Letters Patent, grants the Stewardſhip of a Copyhold Manor, and after a Copyhold eſcheats, the Steward (*d*) *ex officio*, without any ſpecial Warrant, may grant it again, and the King ſhall be bound by the Cuſtom of the Manor. 4 Co. 30. adjudged. But it was ſaid, though by Law he might do it, yet it was his Duty, before he made any Grant, to inform the Treaſurer, Chancellor, and Barons of the Exchequer, or ſome of them, for their Direction.

(*d*) Much more may the Steward of a common Perſon, *ex officio*, make ſuch Grants. Co. Copyh. 124. for the Steward is in the Place of the Lord, and, without a Command to the contrary, may, &c. Cro. Eliz. 699.

But a Steward retained only by the King's Auditor or Receiver, cannot make ſuch a voluntary Grant of a Copyhold; for they have not any Authority to appoint Stewards, the Buſineſs of the one being to take Accounts, and of the other to ſurvey the Land. 4 Co. 30. adjudged. Cro. Eliz. 699. S. C. adjudged, but may take Preſentments, or make Admittances, being Things of Neceſſity. Cro. Eliz. 699.

If *A.* and *B.* under the Seal of the Exchequer are appointed joint Stewards of all the Lands of a Fugitive, and the Lord Treaſurer makes a Court, and grants Copies, though in Strickneſs he had no Power without *B.* yet theſe Grants are good, being made by one that had a Colour to keep Courts. Moor 109. Leon. 288.

If *A.* being Tenant for Life of a Manor, within which are ſeveral Copyhold Tenements grantable for one Life in Poſſeſſion, and another in Reverſion, grants the Stewardſhip thereof, by Deed, under his Hand and Seal to *B.* for Life, with the Fee of 10*s. per Ann.* for the executing thereof,

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Ley 47, 48. Resolved by *Hobart* and *Fanfield*; thereof, and after *A.* becomes a Lunatick, and being found so by Inquisition, is committed to, &c. yet *A.* by his Steward, may grant Copies.

but it was ordered the Steward should grant none, but with the Privity of the Committees, and Warrant from the Court; but there is a Note that this was in Discretion, and the Grant of the Steward good.

Ley 48. resolved by *Hob.* and *Fanfield.* But the Committees cannot grant Copies; for they themselves have no Estate in the Manor, nor are Lords thereof.

Dyer 344. a. 4 Co. 24. a. Co. Copyh. 82, 88. If a Man makes a Feoffment in Fee of a Manor, upon Condition, and the Feoffee grants Estates by Copy, and then the Condition is broken, yet the Grant by Copy shall stand good, though it be a Rule that he, who enters for a Condition broken, shall be in of the same Estate he was before, and shall avoid all mean Incumbrances; and it is the same, though the Grant were made (*a*) after Breach of the Condition; for the Feoffor may wave the Advantage of it, if he pleases; also a Grant by the Feoffee of an Infant, which by Law he may avoid, is good.

(*a*) But a Grant made by Lessee for Years, after Breach of a Condition is void; for his Interest is *ipso facto* determined. Co. Copyh. 88.—A Grant made by a Feoffee on Condition to enfeoff the next Day, is good; for he is *Dominus pro tempore.* Co. Copyh. 88.

Co. Copyh. 88, 89. A Man seised of a Manor in Fee hath issue a Daughter, and dies, his Wife *privement enseint* with a Son, the Daughter may grant by Copy; so Grants made after Alienation in Mortmain, and before Entry of the Lord, are good.

Co. Copyh. 47. f. 34. If a Lord of a Manor commits Felony, and is attainted or convicted by Verdict or Confession, yet after such Attainder, &c. he may make voluntary Grants of Copyholds.

Co. Lit. 58. b. 4 Co. 24. a. Co. 140. Poph. 71. Moor 112, 236. pl. 369. 2 Leon. 45. Owen 27, 28. Cro. Eliz. 699. But if any Person that hath a tortious or defeasible Estate of Inheritance, as a Disseisor, or the Feoffee of a Disseisor, or Tenant at Sufferance, make voluntary Grants upon Escheats or Forfeitures, they shall not bind him that hath the Right; for they are not *Domini* within the Meaning of the Custom; but Admittances upon Surrenders or Descents, made by such as have defeasible Titles, are good, and shall bind him that hath Right; for that they were compellable to do, and it was no more than the rightful Lord must have done.

2. What Acts shall destroy the Power they had of making such Grants.

(*b*) Rol. Abr. 498. Co. Lit. 58. Cro. Eliz. 699. 4 Co. 31. a. (*c*) 4 Co. 31. a. (*d*) Rol. Abr. 498. 4 Co. 31. Although Lords of Manors, who have Copyholds come to them by Escheat or Forfeiture, (*b*) may re-grant them again according to the Custom of the Manor; (*c*) yet by their Acts, such Power may be destroyed; therefore (*d*) if Copyholds come into the Lord's Hands in (*e*) Fee, and he make a Lease of them for Life, Years or Half a Year, or for any (*f*) certain Time, by Deed or without Deed, the Copyhold is destroyed; because during those Estates, it was not demised, nor demisable by Copy.

(*e*) But if Tenant in Tail, for Life, &c. makes such Lease, &c. this shall not destroy the Power of him in Reversion. 2 Rol. Abr. 271. 2 Sid. 35, 37. *Vide* Cro. Car. 521. *cont. per Cur' arguendo* (*f*) *Secus* if he leases it at Will. 4 Co. 31. 3 Leon. 108.

4 Co. 31. a. So if the Lord makes a Feoffment thereof in Fee, upon Condition, and after enters for the Condition broken, yet it cannot be regranted again by Copy.

So

So if the Land ſo eſcheated, &c. is extended upon a Statute or Recogniſance made by the Lord, or the Wife of the Lord, in a Writ of Dower, hath it aſſigned to her, though theſe Interruptions are by Act of Law, yet it cannot again be granted by Copy. 4 Co. 31. In *French*'s Caſe.

But if the Lord keeps them in his Hands, though never ſo long, yet may they be granted again by Copy. 4 Co. 31. a. Co. Lit. 58. b. Cro. Eliz. 699.

* So if the Lord be diſſeiſed thereof, and the Diſſeiſor dies ſeiſed, or if the Land be recovered againſt the Lord by a falſe Verdict, or erroneous Judgment, though it is not demiſed or demiſable by Copy, till it is recovered by the Lord, or the Judgment reverſed; yet after it is re-continued, it is grantable again by Copy, becauſe the Interruption was tortious. *Page 468 4 Co. 31.

If a Copyholder takes a Leaſe for Years of the Manor, by which his Copyhold is extinct, yet he may re-grant it again, if he will; for it was always demiſed or demiſable. 4 Co. 31. b.

So if a Copyhold eſcheats, &c. and the Lord aliens the (*a*) Manor, his Alienee may re-grant the Land by Copy. 4 Co. 31. b.

(*a*) So if he leaſes the Manor, and the ſaid Copyhold Land, by the Name of his Tenement, called *H.* for the Manor being demiſed, the Copyhold is incloſed as Parcel thereof; and the naming the Copyhold is but Surpluſage. Cro. Car. 521.

3. What Things may be granted to be holden in Copyhold.

Things that lie not in Tenure are not grantable by Copy, unleſs (*b*) appendant to ſome Thing that doth lie in Tenure; and therefore Things Incorporeal, for which there can be no Diſtreſs, and which are not Parcel of the Manor, which conſiſt only in Demeſnes and Services, cannot be demiſable by Copy; for of ſuch incorporeal Things no Service is due; and therefore no Court neceſſary to be kept for Surrenders, Admittances, &c.

(*b*) A Rent-Service, Rent-charge or Common in Groſs, cannot be granted otherwiſe than as they are appendant to Things which lie in Tenure, Co. Copyh. 116. and therefore where my Lord *Coke* ſays that any Thing concerning Lands or Tenements may be granted, it muſt be underſtood of Things appendant to the Demeſnes, or thoſe Parcels which make up the Manor. *Vide* Co. Lit. 58. Tithes may be demiſed by Copy, becauſe they are Parcel of the Manor, as a Rent-charge may. *Per* Rol. Abr. 498. Cro. Eliz. 413. cited to have been adjudged; but Cro. Eliz. 814. S. C. and S. P. *dubitatur*; becauſe not Parcel of the Manor; and therefore not grantable *ſecundum conſuetudinem manerii*. 4 Co. 24. b.—A Mill may be granted by Copy. 4 Leon. 241. cited to have been adjudged.——So a Fair appendant to a Manor may be granted by Copy. 4 Co. 31. a. Co. Lit. 58.

(*c*) *Tenſura prati*, the (*d*) Herbage or Veſture of Land may be demiſable by Copy. (*c*) Rol. Abr. 498. (*d*) Co. Lit. 58. 4 Co. Lit. 31. *a.* ſo reſolved.

Things grantable by Copy muſt be Things of Perpetuity; otherwiſe it can never be ſhewn that there hath been a Cuſtom to demiſe them by Copy; yet Underwood, without the Soil, may be demiſed by Copy. 4 Co. 30, 31. Becauſe it is a Thing of Perpetuity, to which the Cuſtom may extend. Co. Lit. 58. *b.* S. P. Cro. Eliz. 413. and Moor 315. adjudged and affirmed upon a Writ of *Error*.—That a Man may grant, by Copy, twenty Loads of Wood to be taken by the Grantee, is good; for it is not neceſſary that the Thing granted have Continuance, but only that it be a Thing of Perpetuity. Co. Copyh. 118. but *Quære*.

A Cuſtomary Manor may be held by Copy of Court-Roll, *ad voluntat'*, &c. and ſuch a Lord may grant Copies, but it muſt be of ſuch Things as have been uſually demiſed by him; for he cannot grant all his Demeſnes by Copy, without they have been uſually demiſed; for tho' they have been demiſed Time out of Mind, by the ſuperior Lord by Copy, that will not warrant Co. Lit. 58. b. 2 Brownl. 40. 11 Co. 17. Stra. 621. 1 Bl. Rep. 580.

3TermRep. 396. adjudged; and that such warrant his Demiſe by Copy; becauſe the Cuſtom of the Manor muſt be, that Time out of Mind they have been granted *per Dominum manerii.*

Cuſtomary Lord may keep Courts, and grant Copies. Cro. Jac. 327. adjudged. Bulſt. 57. cited; but Cro. Jac. 260. *dubitatur.*——But he cannot hold a Court-Baron, for he can have no Freeholders; for a Copyhold Manor is not capable of an Eſcheat of a Freehold; for if it were, the Freehold, after the Eſcheat, muſt become Copyhold, which is repugnant and impoſſible. Yelv. 190. Cro. Jac. 259. Bulſt. 54, 55. Theſe Caſes which ſeem to contradict each other, and which *vide*, may perhaps be thus reconciled, that a Cuſtomary Court may be held by one that hath ſuch a Manor, but not a Court Baron; and my Lord *Coke*'s Caſe ſeems to go no farther; and *Quære* whether ſuch a Lord may not have Freehold Services.

*Page469 * 4. Of the Operation of the Grant, and the Eſtate and Intereſt that paſſes thereby.

Co. Copyh. 123, 126, 139. Grants of Copyholds regularly receive the ſame Expoſition that Grants of Freehold Lands do at Common Law, therefore a Grant to one and his Heirs Male is a Fee-ſimple; ſo is a grant to one *& ſanguini ſuo hæreditabili*, but a Grant to one *& ſanguini ſuo in perpetuum* is but an Eſtate for Life.

(*a*) Co. Lit. 52. Godb. 20. S. P. By two (*a*) If Copyhold Lands have been uſually granted in Fee, a Grant to one and the Heirs of his Body, or to one for (*b*) Life or (*c*) Years, is within the Cuſtom.

Juſtices. Leon. 56. S. P. *per Curiam.* Cro. Eliz. 373. S.P. adjudged. Salk. 188. pl. 7. and 6 Mod. 63. S. P. agreed. (*b*) And after the Death of the Tenant for Life the Lord may grant the ſame again in Fee, for the Grant for Life was not any Interruption of the Cuſtom. Leon. 56. *per Cur'*. (*c*) Copyholds are very ſeldom granted for Years; but if they be ſo granted, the Executor of the Termor is obliged to be admitted, and the Lord is entitled to a Fine on ſuch Admittance. See Bur. Rep. 206. &c.

4 Co. 29. b. 30. a. Cro. Eliz. 323. 1Term Rep. 466. So where Grants have been made by Copy for Life, a Grant *durante viduitate* is good, for that is a leſs Eſtate than during her Life, but not *vice verſa*.

Co. Copyh. 142, 143. If a Copyhold be granted to three, *habend' ſucceſſive*, they are Jointenants, unleſs by (*d*) ſpecial Cuſtom the Word *ſucceſſive* makes the Eſtate ſeveral.

(*d*) It has been ruled in Chancery, That if a Copyhold is granted to three *ſucceſſive*, and there is no Cuſtom proved, the firſt Taker had Power of diſpoſing of the Whole, nor that the firſt Taker paid the Purchaſe Money, it ſhall not go to the Executor of the firſt Taker, but ſhall go in Succeſſion. 2 Vern. 264.

Rol. Abr. 511. If there be a Cuſtom that Copyholds may be granted for three Lives, a Copy may be granted to three for the Lives of two, within the Cuſtom; for there is not any Inconvenience to the Lord, though it be for the Life of another; for there ſhall not be any Occupancy thereof, but the Lord ſhall have it, if the Tenant *per auter vie* die, living *Ceſtui que vies*, and this is not a greater Eſtate than for three Lives, which is leſs than the Cuſtom warrants.

Salk. 188. pl. 7. *Smartle* and *Penhallow* adjudged. 6 Mod. 63. Ld. Raym. 434. S. C. So if the Cuſtom of a Manor be, That the Lands are demiſable by Copy to two or three Perſons for their Lives, and the Life of the Survivor, *Habendum ſucceſſive ſicut nominantur in Charta, & non aliter*, paying a Heriot on the Death of every Tenant dying ſeiſed, a Grant to *A.* and his Aſſigns for the Lives of *B.* and *C.* and of the ſaid *A.* is good within the Cuſtom; for there can be no Occupant againſt the Lord, neither will he be prejudiced by the Tenant's becoming a Bankrupt, for the Aſſignees have no other Right or Intereſt than the Bankrupt, and the Lord is intitled to his Heriot on the Death of the Tenant, notwithſtanding the Aſſignment.

Moor 677. pl. 922. (*e*) If by the If by the Cuſtom a Copyhold may be granted for three Lives, and it is granted to one (*e*) for his Life, Remainder to ſuch Woman as he ſhall marry

marry, and to the first Son of his Body; both these Remainders are void, but the Estate for his own Life is good.

Custom it is demisable in Fee, or for one for Life,

Life, *solummodo ea Capienti extra manus Domini*, yet a Surrender may be to the Use of Remainder in Tail, Remainder in Fee. Cro. Eliz. 373. adjudged; though it was objected, the Taking ought to be *immediate*, but the particular Estate and Remainders make but one Estate.

(G) Of Surrenders, Presentments, and Admittances: And herein,

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1. Of the Necessity of a Surrender, and where the Copyholder shall be said to be in before Admittance.

COpyholders cannot regularly (*a*) transfer their Estates otherwise than by Surrender, the Reason whereof is, because they have only an Estate at Will, which is determined when they take upon them to grant it over, for that is a plain Declaration of their Intention to hold the Lands no longer; therefore a Surrender to the Lord is necessary, who is to grant another Estate at Will, and which now he is compellable to do to him, to whose Use the Surrender is made, seeing the Tenant hath a settled Estate and Interest in the Land, which his Heir shall inherit whether the Lord will or not.

Co. Lit. 57. a. 60. b. 4 Co. 21. a.

(*a*) Though a Copyholder cannot alien by Deed, yet he that hath a Right only to a Copyhold, may

by Deed or Copy release it to one that is admitted Tenant *de Facto*. Co. Lit. 59. 4 Co. 25. S. P. adjudged. Hut. 65. S. P. said. Cro. Jac. 101. S. P. *dubitatur*.——But he cannot release to one that ousts him by Wrong, for he gains no Customary Estate, upon which the Release of the Customary Right may enure. 4 Co. 25. b. Leon. 102. But Q. Whether such Release will not enure by way of Estoppel against the Copyholder himself. Release in Fee to one who was admitted for Years, will not inlarge his Estate; for no Man can come to the Fee of a Copyhold without Surrender and Admittance by the Lord. Co. Copyh. 97, 28.——But if a Copyholder surrenders upon Condition, he may after release the Condition by Deed. Cro. Jac. 36.

Copyhold Lands cannot be (*b*) exchanged by Deed, but there must be a Surrender and Admittance thereupon; but (*c*) if there be two joint Copyholders, and one of them releases to the other, this is good without (*d*) any Surrender or Admittance, for the first Admittance was of them, or either of them, and their Ability to release was from the first Conveyance and Admittance.

(*b*) Co. Copyh. 97, 98.

(*c*) Winch 3. adjudged.

(*d*) That any Conveyance to the

Lord will pass the Copyholder's Interest, for the Custom of passing by Surrender, is for his Benefit, which he may wave. Hut. 65. Winch. 67. Jones 41. S. C.

Though regularly Copyhold Estates can only be transferred by Surrender and Admittance, yet if the Copyholder dies, his (*e*) Heir may enter before Admittance, and take the Profits; for perhaps there may not be a Court held in a great while afterwards; also such Heir may (*f*) surrender to the Use of another before Admittance, but not to prejudice the Lord of his Fine.

4 Co. 22. b. 23. b. Leon. 174.

(*e*) And if he dies, his Heir may enter.

4 Co. 23. b.

—Though the Lord had admitted another. Noy. 172. adjudged. (*f*) May take the Profits, bring Trespass, have an Assise of *Mortdancestor* before Admittance. 4 Co. 23. Lane 20. 1 And. 192. Cro. Eliz. 148. Moor 597. Leon 100.——But is not compleat Heir, for he cannot maintain a Plaint in Nature of an Assise. Co. Copyh. 112. Moor 272. *cont'*.

Lev. 63. *per Cur'.* upon a Trial at Bar.

But if upon Proclamation the Heir does not come in to be admitted, the Lord without any particular Cuſtom, may ſeiſe (*g*) *quouſque* the Heir come in to be admitted.

(*g*) But without Cuſtom he cannot ſeiſe the Copyhold as forfeited. Lev. 63. *per Cur'.*

Hob. 181. Cro. Jac. 573. 2 Rol. Rep. 178. Noy 29. Rol. Abr. 502. S. C.

If the Cuſtom of a Manor be, that the Wife of every Copyholder for Life ſhall have her Free Bench *dum caſta & ſola vixerit*, after the Death of the Huſband, the Law caſts the Eſtate upon the Wife ſo that ſhe ſhall have the Eſtate before any Admittance, and may make a Leaſe for a Year, as another Copyholder may.

*Page 471 Moor 271. And. 192. By the better Opinion of the Books.

* So if the Cuſtom of a Manor be *quod ſi aliquis vir habet uxorem* ſeiſed in Fee *ſecundum conſuetudinem Manerii* of Cuſtomary Lands, that he ſhall hold *ad terminum vitæ ſuæ poſt mortem uxoris per Legem Angliæ*, and a Copyhold Tenement deſcends to a Feme Covert, and the Huſband enters, but before Admittance his Wife dies, yet he ſhall be Tenant by the Courteſy; for tho' the Lord before Admittance ſhall claim no Duty as Fealty, Homage, Relief, Rent, *&c.* yet his Delay ſhall not prejudice a third Perſon.

Godb. 46. Cro. Jac. 199.

If a Man ſurrenders a Copyhold to the Uſe of his Will by which he deviſes it to his Wife for Life, and that after his Death, his Wife or her Executors ſhall ſell the Land; or if the Deviſe be, That ſhe ſhall chuſe two Attornies, and make Sale of the Land according to the beſt Advantage, by theſe Deviſes the Wife hath but a bare Authority, and there needs no Surrender to make the Sale; for upon the Nomination of the Vendee he ſhall be in by the Will of the Deviſor.

2. Where the Want of a Surrender will be ſupplied in Equity.

Although Copyholds, by the ſtrict Rule of the Common Law, can only be conveyed by Surrender, yet in Equity this Rule receives a Relaxation, and the Want of a Surrender will be ſupplied in the following Inſtances.

2 Chan. Rep. 218. Abr. Eq. 122.

1. In Favour of Purchaſers; as if *A.* contracts with *B.* for the Purchaſe of a Copyhold Eſtate, and pays the Purchaſe-Money, and *B.* agrees to ſurrender the Premiſſes at the next Court, but (*a*) dies before the next Court, or any Surrender made, Equity will ſupply the Want of a Surrender.

(*a*) So if he had refuſed; for if a Man covenants to ſurrender, Equity will compel him to a ſpecific Performance, and by Decree, not only bind the Perſon, but likewiſe the Lands. Abr. Eq. 122.——But if there are two Purchaſers who have equal Equity, he who has the legal Eſtate or Intereſt ſhall prevail. *Vide* 2 Vern. 565, 609. 2 Salk. 449. pl. 2. Will. Rep 280. 10 Mod. 492. S. C. cited.

Abr. Eq. 124. admitted in ſeveral Caſes.

2. In Favour of Creditors; as where a Man deviſes Copyhold Lands for the Payment of his Debts, this ſhall be good without any Surrender.

Abr. Eq. 123. 124. *Raſtor* and *Stock* decreed.

But if a Man ſeiſed of Freehold and Copyhold Land, deviſes (*b*) both for the Payment of Debts and Legacies, without ſurrendering the Copyhold to the Uſe of his Will, and the Freehold is ſufficient for Payment of the Debts; Equity will not ſupply the Want of a Surrender, and lay the Legacies on the Freehold, and the Debts on the Copyhold, as is done when there are Simple Contract Creditors, and Bond or Judgment Creditors, and Perſonal Aſſets not ſufficient to pay both; nor will Equity ſupply the Want of a Surrender for the Sake of Legatees, eſpecially if they be Strangers as they were in this Caſe.

(*b*) Where a Man deviſed all his Real and Perſonal Eſtate for the Payment of his Debts, and my Lord Chancellor refuſed to ſupply the Want of a Surrender as to his Copyhold, becauſe it did not ſufficiently appear to have been his Intention to charge thoſe. Abr. Eq. 124. That Equity will not in Favour of a Wife ſupply the Want of a Surrender for Payment of Debts when the Heir at Law would be diſinherited thereby. Abr. Eq. 124.

3. Equity

3. Equity will ſupply the Want of a Surrender in Favour of younger Children againſt an Heir at Law; but if the Caſe be ſo circumſtanced, that by that Means the younger Children would be in a better Condition than the Heir at Law, Equity will not interpoſe. 1 Vern. 232. adjudged, and that there were ſeveral Precedents of the Kind. 2 Vern. 163. S. P.

As where a Man deviſed his Copyhold, being of the Nature of *Borough Engliſh*, to his eldeſt Son, and deviſes Houſes to his youngeſt; which Houſes were ſoon afterwards burnt down, and never entered upon by the Heir in *Borough Engliſh*; and as this Caſe was circumſtanced, the Court would not ſupply the Want of a Surrender in favour of the (*a*) eldeſt Son. 2 Vern. 265. *Cooper* and *Cooper* decreed. *Page 472

(*a*) Such eldeſt Son intitled to the ſame Favour that a younger Child is againſt an Heir at Common Law. 2 Vern. 163.

Nor will Equity ſupply the Want of a Surrender in Favour of a Grandchild, much leſs in Favour of any other collateral Relation. Salk. 187. pl. 6. decreed by my Lord *Sommers*, That the Want of a Surrender ſhould be ſupplied in Favour of a Grandſon, it depending on the ſame Law of Nature and Reaſon; but reverſed in the Houſe of Lords. Preced. Chan. 475. S. C. cited, and the Law and Practice now according to the Judgment of Reverſal. *Contra* Will. Rep. 61.

Alſo in Caſe of a natural Daughter, the Court of Chancery refuſed to ſupply the Want of a Surrender; for though the Father might have great Affection for ſuch Child, and might by the Law of Nature be obliged to provide for it, yet ſuch a one was not to be conſidered as a Child in Law, nor will ſuch Affection raiſe an Uſe at Law for ſuch Child; for in a Civil Society, where the Solemnities of Marriage are eſtabliſhed, it would be abſurd in the Courts to allow Privileges to Children not born within thoſe Rules. Abr. Eq. 123. *Furſaker* and *Robinſon*. Gilb. Eq. Rep. 139.

4. If Copyhold Lands are in Mortgage, the (*b*) Mortgagor may deviſe the Equity of Redemption without any Surrender, for he has no Eſtate in them whereof he can make any Surrender. Preced. Chan. 322. agreed by Counſel on both Sides.

(*b*) *Ceſtui que Truſt* of a Copyhold Eſtate, having an equitable Intereſt only, may deviſe it without Surrender. 2 Vern. 585, 680. S. P. *per Cur'*. 3 Will. Rep. 358. pl. 96, 361.

5. In Caſe of a Deviſe to a charitable Uſe, the Courts of Equity ſupply the Want of a Surrender, and go upon the Word *appoint* in the Statute of *Charitable Uſes*. *Vide* Title *Charitable Uſes*.

6. In Caſe of Neceſſity, as where the King, or Lord of a Manor grants the Fee-ſimple of the Copyhold Eſtate to one in Fee, there the Copyholders cannot convey, becauſe the Alienee hath no Court in which he can make Surrenders, *&c.* but leſt this ſhould turn to the Prejudice of the Copyholders, Chancery ſupplies the Defect, and makes good the Alienation. 2 Co. 17. 4 Co. 25. Cro. Eliz. 252, 443.

3. What Perſons may Surrender.

All Perſons who may make Grants, or convey their Eſtates, may by Surrender paſs Copyhold Lands; if an Infant ſurrenders Copyhold Lands, he may at his full Age diſagree, and enter thereupon; for this is not a Conveyance of equal Solemnity with a Feoffment, which works a Diſcontinuance, and which notwithſtanding the Infant may avoid at his full Age. Leon. 95. Poph. 39. *Vide* Head of *Infants*.

A Feme Covert may ſurrender Lands, being ſolely examined by the Steward; and if there be a Cuſtom for her to be examined before two Tenants out of the Manor, it is good. Cro. Eliz. 717.

If there are two Jointenants, and one of them ſurrenders his Moiety to the Uſe of his laſt Will, and dies before the Surrender is preſented, having made his Will, this is a Severance of the Jointure, for being preſented it relates to the Time of the firſt Surrender. Co. Lit. 59. b. Rol. Abr. 501. S. C.

Yelv. 144. Brownl. 143. S. C.

A Copyholder ſurrenders to the Uſe of another, who before Admittance ſurrenders to another who is admitted, no Intereſt is hereby veſted in him, for the firſt Surrendree had (*a*) nothing in him to give over, and the Admittance of the ſecond Surrendree did not amount to an Admittance of the firſt.

(*a*) But an Heir before Admittance may ſurrender to another, becauſe he hath a legal Eſtate and Intereſt in him. 4 Co. 22. b. Cro. Ja. 36.

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Rol. Abr. 500. Cro. Eliz. 662. S C. Yelv. 145. and Brownl. 143.

* If there be Baron and Feme Copyholders, to them and the Heirs of the Baron, and the Baron dies, the Heir may ſurrender his Reverſion into the Hands of two Tenants of the Manor (who by Cuſtom have Power to take Surrenders) before Admittance, and (*b*) during the Life of the Feme, and this is a good Surrender; for the Reverſion was caſt upon him by Deſcent before any Admittance.

S. P. (*b*) If there be Tenant for Life of a Copyhold, the Remainder in Fee, he in Remainder may ſurrender his Eſtate, if there be no particular Cuſtom to the contrary. 3 Leon. 239. 4 Leon 9.—Tenant for Life, Remainder for Life to another, he in Remainder enters upon Tenant for Life, and ſurrenders; nothing paſſes, for he is a Diſſeiſor, and hath no Cuſtomary Eſtate in him which can paſs by Surrender. Mod. 199. 2 Mod. 32. 2 Danv. Abr. 199. pl. 8. 205. pl. 5.

4. What Perſons may accept ſuch Surrenders, and make admittance.

Moor 236. Co. Lit. 58. b. 2 Leon. 45. Owen 27. Co. 140. Poph. 71. Moor 112.

A Copyholder may ſurrender to a Diſſeiſor, Abator, Intruder, Tenant at Sufferance, or any others that have defeazible Titles, and their Admittance will be good, and ſhall (*c*) bind him who hath Right, for that ſuch particular Tenants are compellable to do, and it was no more than the rightful Lord muſt have done.

3 Leon. 239. 4 Leon. 9. 2 Rol. Rep. 181. Rol. Abr. 503. 4 Co. 240. b. Vent. 360. (*c*) *A.* was Tenant for Life of a Copyhold, the Remainder to *B.* for Life; and *B.* ſurrendered to the Uſe of the Diſſeiſor of the Manor *ut Dominus inde, &c.* 2 Mod. 287. *dubitatur*, Whether the Right of *B.* was extinct, becauſe *A.* continuing always in Poſſeſſion, the Diſſeiſor had gained no Reverſion in this Copyhold Tenement, and by Conſequence was not capable of taking a Surrender thereof to his own Uſe. 1 Vent. 350. *adjornatur*. *Vide* Skin. 28. pl. 4. 2 Show. 153. pl. 135.

Co. Lit. 59. b. Rol. Abr. 503.

If Leſſee for Life, Years, or at Will, a Guardian, *&c.* accept a Surrender, and their Intereſt determine, the next Lord ſhall be compelled to admit.

Cro. Eliz. 717.

A Surrender to the Steward, to the Uſe of the Steward, is good, to give the Steward an Intereſt, for the Surrender is in Truth to the Lord, and not to the Steward.

5. What Words or Acts amount to a Surrender.

(*d*) Jones 42. Winch 57, 67. (*e*) Hutt. 65.

(*d*) Any Words ſpoken in Court, expreſſing the Copyholder's Intention of ſurrendering, and that he deſigns not to hold it any longer, will amount to a Surrender; as (*e*) if he ſays, that he is weary of his Copyhold, and requeſts his Lord to take it again, this is a *(f)* ſufficient Surrender.

Rol. Abr. 502. 3 Bulſt. 80. *(f)* My Lord *Coke* ſays, That the Word *Surrend'* is *Vocabulum artis* and therefore where a Surrender is requiſite, no other Words will ſupply the Want of it; as the Words, *give, grant*, or the like. Co. Copyh. 102. But *Q.*

Rol. Abr. 502. Hutt. 81.

But to ſay that he renounces his Copyhold, is no Surrender, becauſe he limits it to Nobody; ſo if he ſays, that he is content to ſurrender, yet it is no Surrender; for he at only expreſſes his Inclination to do it, not that he actually doth it.

A. Lo

A. Lord of a Manor whereof *B.* was a Copyholder in Fee, and the Lord pretended that his Copyholder had forfeited, and thereupon entered into Communication with him about it, and it was agreed, That *B.* ſhould pay 5*l.* to the Lord; and that in Conſideration thereof *C.* ſhould enjoy the ſaid Cuſtomary Lands (except a Wood) for his Life, and alſo of *A.* his Wife, *durante Viduitate*, and that *C.* ſhould have Election, whether he would have thoſe Lands aſſured to him by Copy or by Bill, and he choſe by Bill, which was accordingly done; the Court held this a good Surrender for Life only, * and that the Lord had the Wood diſcharged of the Cuſtomary Intereſt, the (*a*) Communication amounting to a Surrender. Leon. 191. *Page 474

(*a*) *Note*; the Communication does not appear to have been in Court; and Q. Whether any Words ſpoken out of Court will amount to a Surrender?

Copyholder in Fee comes into Court, and there accepts a Copy to himſelf for Life, then to his Wife for Life, then to his Son for Life; this is tantamount to a Surrender to theſe Uſes; but he hath his old Reverſion in him; for there is no Ground to make a Surrender of that by Conſtruction, becauſe he hath made no Diſpoſition of it. 3 Bulſt. 80. *Shephard* and *Adams* Rol. Abr. 501. S. C. And there ſaid, That it was no Surrender, for that a Copyhold cannot be ſurrendered by a Surrender in Law, but only by actual Surrender.——But in other Places in Roll. as Rol. Rep. 265. Rol. Abr. 171, 172. the S. C. it is as in Bulſt. held to be a Surrender, and the Reverſion ſtill in the Copyholder.

If *A.* being ſeiſed in Fee of a Copyhold Manor, grants certain Cuſtomary Lands, Parcel thereof to *B. Habend'* to *B. C.* and *D.* for their Lives ſucceſſively, as they are named in the Grant, at the Will of the Lord according to the Cuſtom of the Manor, and *B.* is admitted; and within the Manor there is a Cuſtom, that the firſt Perſon in ſuch Copy named may ſurrender all the Lands, and thereby determine and deſtroy the Title and Eſtate of the other Perſons therein named; and *A.* and *B.* covenant to levy a Fine of the Manor, and of the Cuſtomary Lands, by Name, to the Uſe of a Stranger in Fee, and the Fine is levied accordingly, yet this does not amount to a Surrender within the Cuſtom, ſo as to bar the Eſtate of *B.* and *C.* for the Cuſtom extends only to the Copyhold Eſtate, and that cannot (*b*) paſs by the (*c*) Fine. Raym. 402. adjudg'd, and affirmed upon a Writ of Error.

(*b*) But the Right to it may be extinguiſhed by Fine. Carter 24. (*c*) If the Copyholder joins with his Lord in a Feoffment of the Manor, his Copyhold is thereby extinct. Godb. 11. *Vide Poſt*, Letter (K). 481.

6. What Acts amounts to an Admittance.

Any Thing that expreſſes the Lord's Conſent to a Surrender, amounts to an Admittance; for if his Conſent to take the Surrendree as his Tenant appears, it does not ſeem material whether it be done by a *Dominus conceſſit & admiſſus eſt*, or by other Acts which amount to as much. 3 Bulſt. 219.

Therefore if a Copyholder ſurrenders to the Uſe of another, and after the Lord, having Notice thereof, accepts the Rent from the Surrendree, this by Implication and Conſtruction of Law amounts to an expreſs Admittance. Rol. Abr. 505. *Freſwell* and *Welch*.

Note; This Caſe is differently reported in ſeveral Books; in 3 *Bulſt.* 215, 237. S. C. Acceptance of Rent from the Hands of the Tenants, into whoſe Hands the Surrender was made, doth not amount to an Admittance of *Ceſtui que uſe*, for the Lord may take the Rent of them, without deſigning any Thing thereby to a third Perſon; but had it been ſhewn that the Lord had accepted the Rent as of his Copyholder, then it had been a good Admittance. Cro. Jac. 403. S. C. reports it, That Acceptance of Rent of *Ceſtui que uſe* is no Admittance; but by Godb. 268. S. C. that it is an Admittance, the Lord knowing of the Surrender; *ſecus* if he accepts it as a Duty generally. In Bridg. 49, 52. S. C. it does not appear the Lord had Notice of the Surrender when he accepted the Rent. *Vide* 2 Sid. 61. S. P. *per Twiſden arguend'* admitted, and Style 146. S. P. *per Roll.* Ch. Juſt.

So

3 Bulſt. 239. *arguendo.*

So if a Fine be (*d*) accepted of one as of a Copyholder, this amounts to an Admittance.

(*d*) *Secus* if the Steward had only aſſeſſed the Fine. 3 Bulſt. 239. *arguendo.*

But if a Copyholder in Fee ſurrenders to the Uſe of *B.* in Fee, and *B.* ſurrenders to the Uſe of *C.* for Life, who is admitted, the Admittance of *C.* ſhall not by Implication be taken to be an Admittance of *B.* for the Admittance ought to be of a Tenant certainly known by the Steward, and entered on a Roll by itſelf.

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Yelv. 144, 145 *Wilſon* and *Weddal*, adjudged. Brownl. 143. S. C. But *vide* Rol. Abr. 505. Cro. Eliz. 504. *cont'*, and 3 Bulſt. 237. S. P. *dubitatur.*

Bridg. 81, 82. adjudged. Poph. 127. S. C. adjudged. 3 Bulſt. 237. *adjornatur*; and after ended by Mediation of Friends.

If a Copyholder, according to the Cuſtom of the Manor, ſurrenders into the Hands of two Cuſtomary Tenants to the Uſe of *J. S.* and his Heirs, and this is preſented at the next Court, and by the Steward entered in the Rolls of the Court, in theſe Words, *viz. ad hanc Curiam compertum eſt per Homagium*, that the Copyholder *ſurſum reddidit*, &c. *ad uſum J. S. & Hæredum ſuorum*, and the Steward afterwards delivers a Copy thereof to *J. S.* yet this does not amount to an Admittance; for here is no Act done by which it appears the Lord had conſented that *J. S.* ſhould be admitted, or that he ſhould have the Land according to the Surrender.

(*a*) Hob. 181. Noy 29.

If a Woman that hath Right to her Free Bench, comes into court, and prays to be admitted, and is (*a*) denied, (ſuppoſing nothing veſts in her before Admittance) the Law will ſupply the Admittance.

If the Steward refuſes to admit, but the Surrendree enters, and occupies the Land; in an Ejectment brought by the Lord, he may well plead Not guilty. Yelv. 16.

7. Of the Conſtruction to be made, when the Surrender, Preſentment, and Admittance differ.

Co. Copyh. 110. 4 Co. 28. b.

If *A.* ſurrenders for Life, and the Admittance is in Fee, the Eſtate of the Copyholder is according to the Surrender, not according to the Admittance; for the Lord hath only a cuſtomary Power to make Admittances according to the Surrender; and ſo far as he executes that Power the Admittance is good; but where he goes beyond that Power, he acts without a Warrant, and then his Acts are void.

Co. Copyh. 110.

So if the Surrender be abſolute, and the Admittance conditional, the Admittance is good, and the Condition void; for when the Lord acts according to his Power in one Thing, but beyond it in another, for what he acts according to his Power he hath a Warrant; but for what he acts beyond it he hath no Warrant, and ſo it is void.

4 Co. 25. Rol. Abr. 501.

If a conditional Surrender be preſented, and the Steward in entering thereof omits the Condition, (*b*) upon ſufficient Proof thereof the Surrender ſhall not be avoided, but the Roll ſhall be amended.

(*b*) So the Miſ-entry of the Date of the Court ſhall not prejudice the Copyholder, but he may give in Evidence the Truth of the Matter, and ſhall not be bound by the Rolls. Leon. 290.

Co. Copyh. 110.

If the Surrender be to the Uſe of *J. S.* and the Lord admits *J. N.* this is void; and he afterwards may admit *J. S.* So if he admits *J. S.* and a Stranger, *J. S.* takes all, for the Stranger's Admittance is void.

Lex Cuſtom. 237. 4 Co. 29. Cro. Jac. 403.

If a Surrender be made, and there is a wrong Preſentment of this Surrender, if the Admittance is according to the Surrender, it is (*c*) good.

(*c*) For an Admittance upon a Surrender without any Preſentment at all, is good and a void Preſentment is as none. Co. Copyh. 105.

8. O

8. Of the Time of making the Surrender, Preſentment, and Admittance, and where they ſhall be effectual, though any of the Parties die before they are completed

By the general Cuſtom of Manors every Surrender ought to be preſented on the next Court-Day after it is made; but by the ſpecial Cuſtom it may be good if done on the ſecond or third Court-Day; the Reaſon hereof is to prevent Diſputes, and for the Security of Purchaſers, who may be otherwiſe defeated, if it were admitted to have an old Surrender trumped up, and preſented at any Time. Co. Copyh. 105. Style 275.

* If a Copyholder in Fee ſurrenders out of Court, and dies before it is preſented in Court, yet the Surrender being preſented after his Death, according to the Cuſtom, is good. *Page 476

4 Co. 29. Cro. Jac. 403. S. P. 3 Bulſt. 214. S. P. adjudged. Rol. Abr. 501. S. P.

So if the Cuſtomary Tenants, by whoſe Hands the Surrender was, die, yet if the Surrender be preſented upon good Proof thereof, it will be ſufficient. Co. Lit. 62. Cro. Jac. 403. 3 Bulſt. 214.

adjudged, the Cuſtom being found generally, that it muſt be preſented at the next Court, without ſaying by whom. 4 Co. 29. b.

So if he to whoſe Uſe the Surrender was, die before Admittance, yet his (a) Heir ſhall be admitted; for upon Admittance the Eſtate is in *Ceſtui que Uſe* from the Surrender, by Relation. 4 Co. 25. a. 29. b.

(a) So if Tenant for Life dies, he in Remainder ſhall be admitted. 2 Sid. 38, 61. 4 Co. 25. a. 29. b. Dyer 192.

(H) Of the Operation of the Surrender in paſſing the Eſtate: And herein,

1. Of the Perſons to take, and what ſhall be ſufficient Certainty in the Deſcription of them.

SUrrenders have the ſame Operation and Effect in paſſing Copyhold Eſtates, as Grants have at Common Law, and muſt regularly be directed by the Rules and Maxims of the Common Law, in the transferring thereof. Co. Copyh. 97. Cro. Jac. 376.

If a Copyholder ſurrenders to the Uſe of the right Heirs of *J. S.* he being (b) alive, the Surrender is void; for it cannot take Effect *in Præſent:* as he would have it. Leon. 101.

(b) If a Man ſurrenders to the Uſe of his own right Heirs, whether the Lord ſhall not hold it till his Death, *Qu.* and *vide* Co. Copyh. 97. Lit. Rep. 17, 18.*—If a Surrender be made to the Uſe of *B.* and his Heirs, to the Uſe of ſuch Perſon as *A.* ſhould name by his Will. *Q.* Whether ſuch Perſon can take? † 2 Bulſt. 274.

* *Qu.* If the Lord might not hold as a Truſtee?

† It ſhould ſeem he might, the Surrenderor to be Tenant for Life.

If

Poph. 125. adjudged. Cro. Jac. 434. S. C. 2 Rol. Abr. 67. S. C.

If *B.* a Copyholder, ſurrenders into the Hands of the Lord, by the Hands of Tenants, according to the Cuſtom, *&c.* without ſaying to whoſe Uſe the Surrender ſhall be; and at the next Court *B.* is admitted, *Habend'* to him and his Wife in Tail, the Remainder to the right Heirs of *B.* the ſubſequent Admittance explains the general Surrender, and the Wife ſhall take by the Surrender, though not named in the Premiſſes, but in the *Habendum* only; though it was agreed it was otherwiſe in Feoffments and Grants at Common Law.

Co. Copyh. 9. Rol. Rep. 109, 138. 253. *Vide* Moor 637. *cont'.*

A Man may ſurrender Copyhold Lands immediately to the Uſe of an Infant *in Ventre ſa mere*; for a Surrender is a Thing executory, and nothing veſts before Admittance; and therefore if there be a Perſon to take at the Time of the Admittance, it is ſufficient, and not like a Grant at Common Law, which putting the Eſtate out of the Grantor, muſt be void, if there be Nobody to take.

*Page 477 Cro. Jac. 374.

A Copyhold is granted to the Father and his Son, he having but one Son, this Grant is good, for the apparent Certainty of it; but if the Father has ſeveral Sons, or if a Surrender be to the Uſe of a Man's Couſin * or Friend, or to the Uſe of *J. S.* or *J. N.* all theſe Surrenders are void for Incertainty.

Co. Copyh. 95. *vide*; And whether ſuch Uncertainty may be helped by any Averment.

Co. Copyh. 95.

If a Surrender be made to the Lord, without expreſſing any Uſe, it ſhall be to the Uſe of the Lord; for it cannot be imagined that the Surrender was made to no End or Purpoſe whatſoever.

2. What ſhall be ſaid to paſs by the Surrender.

In this likewiſe the ſame Rules obtain as in the Expoſition of Grants; for a Man may, with the ſame Certainty in a Surrender, deſcribe whatever he intends to paſs, as he may in any other Conveyance.

3 Leon. 18.

A Man ſeiſed of Copyhold Lands, deviſed Part thereof to his Wife for Life, the Remainder to his Brother and his Heirs; and afterwards, in the Preſence of three Perſons of the Court, ſaid to them, I have made my Will as I will have it, and here I ſurrender all my Copyhold Lands into your Hands accordingly; in this Caſe, only thoſe mentioned in his Will ſhall paſs; for he had Reſpect to that in making his Surrender, and he ſaid, he ſurrendered all his Copyhold Sands accordingly; which ſhewed his Intent was to paſs thoſe Lands that were deviſed by the Will only.

Dyer 251.

A. covenant with *B.* to aſſure him all his Copyhold Lands, and after he ſurrenders divers Parcels by Name, and ſome by Buttals and Boundings; at the next Court the Surrender is preſented and inrolled, but with this Addition, by the Name of all his Copyhold Land, there no more ſhall paſs than what was (*a*) named in the Surrender.

(*a*) A Surrender of a Houſe *cum pertinentiis* will paſs only the Houſe, Orchards, Yards, and not the Lands; for Copyhold and Freehold, as to this, muſt be conſtrued alike. Cro. Jac. 526. adjudged. Kitchen 81. Co. Copyh. 93.

3. What Eſtate or Intereſt paſſes by the Surrender.

4 Co. 21. b. Rol. Abr. 828.

A Copyholder having a Fee-ſimple, according to the Cuſtom of the Manor, may make what Diſpoſition of it he pleaſes, and may ſurrender it abſolutely, or for any limited Time.

2 Rol. Rep. 109, 138. 253. Co. Copyh. 97.

But ſuch Diſpoſition is not to receive the ſame favourable Interpretation that Wills and Deviſes do at Common Law; for a Man may as well order a Sur-

a Surrender in his Life-time, according to the Rules of Law, as he may any Deed to paſs a Freehold Eſtate.

Therefore, if a Copyholder in Fee ſurrenders to the Uſe of *A.* and *B.* and the longer Liver of them; and that for Want of Iſſue of *A.* the Lands ſhould remain to the youngeſt Son of *J. S.* in this Caſe *A.* has but an Eſtate for Life, for an Eſtate-tail in Copyhold Lands ſhall not paſs by Implication. Cro. Car. 366. Brownl. 127. Noy 152. adjudged.

So if a Copyholder ſurrenders, (*a*) *habend' a tempore mortis* of the Copyholder, to the Uſe of another and his Heirs, this is merely void; for a Copyholder in Fee can no more ſurrender, *habend'* after his Death, than a Tenant in Fee can convey his Lands, *habend'* after his Death; for then he ſhould leave a particular Eſtate in himſelf, which is (*b*) againſt the Rules of Law. Cro. Jac. 376. *Sympſon* and *Southern*, adjudged. Bulſt. 272, 273. S. C. Rol. Rep. 109, 137, 253. S. C adjudged. Godb. 264. S. C. adjudged, That a Surrender can no more commence at a Day to come, than a Livery.

(*a*) So if he ſurrenders *Poſt mortem ſuam in manus Domini ad uſum, &c.* 4 Leon. 8. Cro. Eliz. 29. Rol. Rep. 254. Bulſt. 274. Godb. 451.

(*b*) For this *vide* Rol. Abr. 828.

If the Limitation of the Uſe be (*c*) general, then *Ceſtui que uſe* taketh but an Eſtate for Life, for Copyhold Eſtates, as a neceſſary Conſequence upon the Cuſtom, ſhall be directed by the Rules of Law, unleſs within the Manor there be a ſpecial Cuſtom to the contrary; as that *ſibi & ſuis*, or *ſibi & aſſignatis*, or ſuch like Words, ſhall create a Fee. 4 Co. 29. b.

(*c*) The Surrender was to the Uſe of a Stranger for ever, and the Lord admitted the Surrendree, *habend'* to him and his Heirs, and what Eſtate he had. Godb. 137. *dubitatur.*

* If *A.* be Tenant for Life, the Remainder to *B.* in Fee of Copyhold Lands, and *B.* ſurrenders to the Uſe of *A.* for his Life, the Remainder to *C.* this ſhall enure as an immediate Settlement upon *C.* and not by Way of Remainder; for though it is void as to *A.* and his Eſtate is not increaſed thereby, yet being in the Nature of a Limitation of an Uſe, the Intereſt veſts in *C.* immediately. *Page 478 Sand. 149. Sid. 360. 2 Keb. 341. S. C. adjudged.

4. Of the Power and Authority of the Lord and Steward, and therein of the Difference of their Acts.

Every Lord of a Copyhold Manor hath, as (*d*) incident to ſuch Manor, a Court, which he is (*e*) compellable to hold for determining of the (*f*) Controverſies of his (*g*) Tenants, accepting their Surrenders, &c.

(*d*) If there be an Honour conſiſting of ſeveral Manors, and there are ſeveral Copyholders belonging to the ſeveral Manors, though there is but one Court held for them, yet they are *Quaſi* ſeveral and diſtinct Courts. Cro. Car 366. Jones 342. S. C. (*e*) Not by Action on the Caſe, but by *Subpœna* in Chancery. Cro. Jac. 368. 2 Bulſt. 336. (*f*) A Copyholder ſurrenders to the Uſe of *A.* in Truſt, that he ſhall hold the Land until he hath levied a certain Sum of Money, and that afterwards he ſhall ſurrender to the Uſe of *B.* the Money is levied, *A.* refuſes to ſurrender, *B.* exhibits a Bill to the Lord of the Manor againſt *A.* who, upon hearing the Cauſe, decrees againſt *A.* That he ſhall ſurrender; *A.* refuſes, the Lord may ſeiſe, and admit *B.* for he is Chancellor in his own Court. 1 Leon. 2. (*g*) But where he is a Party intereſted himſelf. Salk. 185, 186.

The Lord himſelf may make Admittances or Grants at any Place (*b*) out of the Manor, for he is not confined any more than any other Perſon, from granting an Eſtate at Will where he pleaſes. 4 Co. 26. b. Co. Lit. 59. a. b.

(*b*) But a Copyholder cannot ſurrender to the Lord into the Hands of Tenants, *&c.* out of Court, without a particular Cuſtom. Co. Lit. 59.

But there being only Cuſtom which enables the Steward to make ſuch Admittances or Grants, that which he doth he muſt do (*i*) upon the Manor, 4 Co. 26. b. 27. a.

(*i*) But of

Manor, (*g*) unleſs there be a Cuſtom to keep a Court out of the Manor, which will enable him, as well as the Cuſtom to do it upon the Manor.

this there are Diverſity of Opinions.

By Co. Copyh. and 4 Co. 26, 27. Rol. Abr. 527. The Steward cannot make any Grants or Admittances at a Court held off the Manor. By Cro. Eliz. 103. If the Lord grants the Freehold of the Copyhold Lands, the Grantee may hold a Court where he will to make Admittances and Grants. By Co. Copyh. 121. Leon. 289. Rol. Abr. 505. The Steward may make Admittances at a Court holden off the Manor. By Cro. Jac. 526. Surrenders to the Steward out of Court, adjudged good; and by 1 Salk. 184. a Steward of a Manor with Power to make a Deputy makes *B.* his Deputy: *B.* by Writing under his Hand and Seal makes *C.* his Deputy to take a Surrender of *G.* *C.* takes the Surrender out of Court, and well. Ld. Raym. 658. Comb. 84, 85. 12 Mod. 466. There is as much Reaſon that the Steward ſhould take Surrenders out of the Manor as the Lord; *per Cur'.*

(*g*) As if a Lord being ſeiſed of two or three Manors, hath Time out of Mind, within one of his Manors, kept Courts for all his ſaid Manors, *&c.* Co. Lit. 58. Cro. Car. 367.

4 Co. 30. b Cro. Jac. 536. Godb. 142. Leon. 227.

A Steward retained by Parol is a good Steward to (*h*) all Intents and Purpoſes, either to take Surrender or make Admittances upon voluntary Grants; but if the Retainer be (*i*) general, the Lord may diſcharge him at Pleaſure.

(*h*) Things of Neceſſity done by a Steward, though he acts by a counterfeit Authority, or one that is voidable, are good; as Admittances upon Deſcent or Surrender; for if in Shew and Appearance he is Steward, it is ſufficient, for he acts only as Cuſtom's Inſtrument. Co. Copyh. 124. But voluntary Grants by ſuch a Steward are not good; ſo if a Lord commands his Steward not to grant ſuch Lands by Copy, and he doth, it is void; ſo if in his Grants he diminiſhes the antient Rents and Services. Co. Copyh. 125.——Alſo if one, who has no Manner of Pretence or Colour for keeping Courts, aſſumes the Steward's Place, whatever he doth will be void, eſpecially if a Precept be not given to the Bailiff of the Manor to give him Warning. Co. Copyh. 125, 126. (*i*) But a general Retainer by Patent is for Life. 4 Co. 30.

Co. Copyh. 129. Noy 2, 29.

A Steward cannot *de Cummuni Jure* make an Under-Steward, unleſs he have Power by his Patent, or be an Infant, that hath the Office by (*k*) Deſcent, or a Perſon of that Quality, that it will be a Diſgrace to him to hold the Courts; as if he be an Earl, *&c.*

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(*k*) The Grant of a Stewardſhip to an Infant in Reverſion, *exercend' per ſe vel per ſufficend' deputat' ſuum*, held good. Cro. Car. 556.

Cro. Eliz. 48. Leon. 289. S. C. ill reported.

A Lord of a Manor makes a Steward *ad exequend' per ſe vel ſufficient' Deputat' ſuum*, who makes *A.* his Deputy *hac vice* to take a Surrender of Baron and Feme, to the Uſe of the Baron and Feme for their Lives, Remainder over in Fee, *& ulterius ad faciend' & exequend' quantum in me eſt*; it was held, that the Deputation (*l*) *pro hac vice* was good, and that, by Force of the Words *& ulterius, &c.* the Lord was to grant the Copyhold to the Baron and Feme for Life, with Remainder over, notwithſtanding the Conditional Surrender to the Deputy.

(*l*) A Copyholder being in *Ireland*, the Steward of a Man made a Commiſſion to one to receive a Surrender from him there; and it was held a good Surrender, 4 Leon. 111.——If one cannot come into Court to ſurrender in Perſon, the Lord may appoint a ſpecial Steward to go to him and take the Surrender. Leon. 36.

(I) Of

(I) Of Fines payable by Copyholders: And herein,

1. Where a Fine ſhall be ſaid to be due, and by whom, and to whom payable.

A Fine may be due by Cuſtom on every Change of the Tenant, whether by Act of God or the Party, and on every Change of the Lord, by Act of God (*b*) only. Co. Lit. 59. b. Rol. Abr. 562.

(*b*) For a Cuſtom to have a Fine on the Change of the Lord of the Manor, by Alienation or Demiſe, is againſt Law; for by this Means the Tenant might be oppreſſed by a Multitude of Fines. Co. Lit. 56. b.

If a Copyholder in Fee ſurrenders to the Uſe of one for Life, and Tenant for Life dies, he may enter without any new Admittance, or paying any Fine, for he has his old Eſtate in him. Rol. Abr. 505. 9 Co. 107. Co. Copyh. 157.

If a Copyholder in Fee, ſurrenders to the Uſe of one for Life, the Remainder to another for Life, Remainder to another in Fee, by this but (*c*) one Fine is due, for the particular Eſtates and Remainders are but one Eſtate. Rol. Abr. 505. Moor 358, 465. Cro. El. 504. S. C. 3 Lev. 308. S. P. adjudged.

(*c*) Unleſs there be a particular Cuſtom to the contrary; but becauſe after the Death of the particular Tenant the Remainder Man had prayed to be, and was admitted; it was at firſt doubted whether he had not waved the Benefit of the Admittance of the particular Tenant, and whether therefore he ſhould not pay a Fine. Mod. 103, 120. 11 Mod. 73. pl. 4. 107. pl. 5. Fitzgib. 287. Will. Rep. 63. pl. 13, 66. 2 Ld. Raym. 1024, 1224, 1226, 1228. 3 Will. Rep. 63. 2 Vern. 226. Stra. 445. 4 Co. 22. b. 3 Keb. 29.

Tenant for Life, and he in Remainder join in a Grant of their Copyhold, but one Fine is due; for if a Surrender be made, and after a Recovery is had by Plaint, in Nature of a Writ of Entry in the Poſt, for the better Aſſurance, &c. but one Fine is due. 3 Leon. 9.

Tenant in (*d*) Dower, or by the Courteſy, of Copyhold Lands where the Cuſtom allows of ſuch Eſtates, ſhall pay a Fine. Co. Copyh. 154, 155.

(*d*) In Caſe of a Widow's Eſtate, it is ſaid to be reſolved and agreed in *Lex Cuſtomar.* 156. That no Fine is due; but Q. of this; for though the Eſtate be adjudged in the Woman, yet that is no Argument ſhe ſhall pay no Fine, for the Eſtate is in the Heir by Deſcent, and yet he ſhall pay a Fine.

If there be a Cuſtom for a Copyholder's Lands to be extended, the Extendor, upon his Admittance ſhall pay a Fine. Co. Copyh. 154, 155.

If there are two Jointenants of Copyhold Lands, and one dies, the Survivor ſhall have all without Admittance or paying a Fine. Co. Copyh. 158.

* 2. At what Time payable. *Page 480

No Fine is due, either upon a (*a*) Deſcent or Surrender, till Admittance, for that is the Cauſe of the Fine; and therefore, if (*b*) after the Tenant deny to pay, it is a Forfeiture. Rol. Abr. 506. 4 Co. 28. a. Hob. 135.

Co. Copyh. 160. (*a*) And therefore if the Heir waves the Poſſeſſion, and refuſes to be admitted he ſhall pay no Fine. Sid. 58. If the Heir, as he may, ſurrenders before Admittance. Q. Whether the Lord be obliged to admit the Surrendree before the Heir has paid his Fine, and if he does, what Remedy the Lord has afterwards for ſuch Fine. *Vide* 4 Co. 22. b. 23. b. Leon. 174. (*b*) If the Fine be uncertain, the Tenant is not bound to pay it preſently, becauſe he could not tell what it would be; but he muſt pay it in convenient Time, or elſe the Lord may appoint a Day for him to pay it in; but a Fine certain he muſt pay preſently upon Admittance. 4 Co. 28. a. 13 Co. 2 Co. Copyh. 160.——But by Cro. Eliz. 779. Moor 622. When a Fine is certain, the Heir ought to tender it upon his Prayer to be admitted.

Although

4 Co. 22. Mod. 120. 11 Mod. 73. pl. 4. 107. pl. 5. Fitzgib. 287. Will. Rep. 63. pl. 13. 66.

Although the Admittance of Tenant for Life, is an Admittance of him in Remainder to veſt the Eſtate in him; yet the Lord, where by Cuſtom he is intitled to a Fine from ſuch Remainder Man, ſhall not have it before the Death of Tenant for Life, for then the Remainder Man becomes his Tenant.

3 Will. Rep. 63. 2 Ld. Raym. 1024, 1224. Stra. 445.

3. Of the Certainty and Reaſonableneſs of the Fine.

Co. Lit. 59. b. 60. a.

Fine (*c*) uncertain muſt be (*d*) reaſonable, and (*e*) their Reaſonableneſs ſhall be diſcuſſed (*f*) by the Juſtices, (*g*) upon the true Circumſtances of the Caſe, for (*h*) if the Fine is unreaſonable, the Copyholder is not bound to pay it.

(*c*) A few Inſtances of uncertain Fines ſhall not deſtroy the Cuſtom for Fines certain. Godb. 265. For there are ſcarce any Copyholds on the Rolls of which it does not appear, that ſometimes more, and ſometimes leſs has been paid. Lit. Rep. 252. *Vide* 2 Bulſt. 32. (*d*) What ſhall be adjudged a reaſonable Fine or not, *vide* 13 Co. 3. Rol. Rep. 75. Cro. Car. 196. Cro. Jac. 671. And where Lords ſhall be reſtained in Equity from demanding arbitrary and unreaſonable Fines. 2 Chan. Rep. 134. 2 Vern. 367. Abr. Eq. 120. (*e*) The Lord is not bound to aver or ſhew that the Fine aſſeſſed is reaſonable; but it is on the Copyholder's Part to ſhew the Circumſtances of the Caſe, to make it appear to the Court to be unreaſonable. Hob. 135. (*f*) For this *vide* Rol. Abr. 523. 2 Rol. Abr. 578. (*g*) Appearing upon Demurrer, or upon Evidence to a Jury, upon Confeſſion or Proof of the yearly Value of the Land. 4 Co. 27. (*h*) 4 Co. 27. b. S. P.

13 Co. 3. *Vide* 2 Bulſt. 32.

Two Years Value for a Fine for an Admittance upon a Surrender, was adjudged to be unreaſonable; but in Caſes where Copyholds are only for Life, and come into the Lord's Hands, there the Intereſt paſſes from the Lord, and ſo *Arbitrio Domini res æſtimari debet*; but in Caſe of a Surrender he is only an Inſtrument.

Carth. 12. adjudged between *Parkins* and *Titus*. 2 Show. 507. pl. 471. Skin. 247. pl. 2. Comb. 43. 3 Lev. 255. 3 Mod. 132. S. C. Lord Raym. 45, 409. 2 Vern. 367. Pre. Ch. 568. 3 Will. Rep. 151, 155. pl. 38, 157. Stra. 654. Forteſc. 41. 2 Stra. 1042, 1070.

A Cuſtom to pay on Admittance *tantam denariorum ſummam, quantam terræ vel tenementa valebant tempore talis admiſſionis, & non amplius*, is a good and reaſonable Cuſtom, although objected, that the Value of Land is uncertain, and it would be in the Power of the Tenant to make the Fine of a very low Value, by not cultivating the Land.

4 Co. 28. a. *Hubard* and *Hammond*. Cro. Eliz. 779. Moor 622. S. C. Reſolved by the Name of *Dalton* and *Hammond*.

Where a Copyholder hath ſeveral Parcels of Land by ſeveral Tenures, the Lord ought to aſſeſs and demand his Fine ſeverally for both; for the Fine for one may be reaſonable, and for another unreaſonable; and if ſuch a Copyholder ſurrenders to the Uſe of another, and he is admitted *tenend' per antiqua ſervitia*, the Fine muſt be ſeverally aſſeſſed.

2 Stra. 1042. Fines are to be ſet according to the improved Value.

2 Stra. 1070. A Fine certain may be alledged as a reaſonable Fine.

(K) Of the Extinguiſhment of the Copyhold: And herein,

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1. Where the whole Copyhold ſhall be extinguiſhed or ſuſpended.

IF a Copyholder in Fee (*a*) accepts a Leaſe for Years of the (*b*) ſame Land from the Lord, this determines his Copyhold Eſtate. 2 Co. 16. b. Godb. 11, 101. Moor 184. and *vide* 2 Leon. 72. Lev. 70. Latch 213. Cro. Jac. 84. 3 Bulſt. 81. Brownl. 32. 4 Co. 31. (*a*) So if the Lord leaſes the Copyhold to another, and the Copyholder accepts an Aſſignment from the Leſſee, his Copyhold is extinct. 2 Co. 17. Leon. 170. And. 191. Goulſ. 34. Rol. Abr. 510. S. C. (*b*) But if he takes a Leaſe for Years of the Manor, that is only a Suſpenſion of his Copyhold during the Term. *Per* Cro. Jac. 84. Sav. 70. But *per* Cro. Eliz. 7. Moor 185. it is extinguiſhed.——But the Leſſee may regrant the Copyhold again to whom he pleaſes. 4 Co. 31. b.——If the Copyholder joins with his Lord in a Feoffment of the Manor, his Copyhold is thereby extinct. Godb. 11. 2 Term Rep. 705.

If a Copyholder accepts to hold of his Lord by Bill under the Lord's Hand, this determines his Copyhold; ſo if he accepts an Eſtate for Life by Parol, if Livery be made; otherwiſe not, for elſe nothing but an Eſtate at Will paſſes, which cannot merge an Eſtate at Will. And. 199. Latch. 213.

If a Copyholder releaſes to his Lord, this extinguiſhes the Copyhold; ſo if the Lord ſell the Freehold of the Inheritance of the Copyhold to another, and then the Copyholder (*c*) releaſes to the Purchaſer, this extinguiſhes the Copyhold Intereſt. Hutt. 81. Keb. 808. Leon. 102. Cro. Eliz. 21. Gilb. Ten. 301.

(*c*) For tho' a Releaſe cannot in its own Nature paſs away a Poſſeſſion, yet it may amount to a Signification of the Tenant's Mind to hold the Land no longer; and the Rule is, That any Thing amounting to a Determination of the Copyholder's Will to hold no longer, extinguiſhes his Copyhold. *Vide* the Authorities *ſupra*.

If *A.* is Tenant in Tail of a Copyhold, and it is found, that by the Cuſtom it cannot be barred but by Seiſure of the Lord, for Forfeiture, & *non aliter nec alio modo*, and *A.* accepts a Feoffment of his Copyhold Lands, the Copyhold is ſuſpended but not deſtroyed, *quoad* his Iſſue; but if *A.* afterwards levies a Fine of the Land, though the Copyhold Intereſt cannot paſs, yet it may be barred and extinguiſhed by the Fine. Carter 6, 22, 23. *Taylor* and *Shaw* adjudged. If one ſeiſed of a Manor in Right of his Wife, lets Lands by Indenture for Years, this doth not deſtroy the Cuſtom as to the Feme; for after the Death of her Huſband ſhe may demiſe it by Copy again. Cro. Eliz. 459.—A Copyholder intermarries with the Feme Seignoreſs, this is no Extinguiſhment, but only a Suſpenſion. Sav. 66. Co. Copyh. 172.—So if the Copyholder hath the Manor in Execution. Co. Copyh. 172.

If a Copyholder bargains and ſells his Copyhold to the Leſſee for Years of the Manor, his Copyhold is thereby extinguiſhed. Hutt. 65. Winch S. C. adjudged.

1 Jones 41. S. C. adjudged; for that in reſpect of the Lord his Eſtate may be determined by any Act that ſhews it to be the Will of the Tenant to hold no longer by Copy.

If a Copyhold is in the Hand of a Subject, who after becomes King, the Copyhold is extinct; for it is below the Majeſty of a King to perform ſuch ſervile Services; yet after his Deceaſe the next that hath Right ſhall be admitted, and the Tenure revived. 2 Sid. 82. 4 Co. 24. Cro. Eliz. 252. adjudged, & *vide* 2 Leon. 208. 4 Co. 26. b. Cro. Eliz. 103. 2 Com. Dig. 486. 2 Term Rep. 415.

The Severance of the Freehold, and Inheritance of the Land held by Copy of the Manor, does not (*d*) extinguiſh or determine the Copy- 2 Co. 17.

(*d*) But ſuch Copyholder cannot after alien otherwiſe than by Decree in Chancery; by which it is ſaid, The Intereſt in the Land is not bound, but the Perſon only. 4 Co. 25. a. Cro. Eliz. 252.

hold

hold Eſtate; for the Cuſtom hath eſtabliſhed his Eſtate, ſo that the *Page 482 * Lord cannot ouſt him ſo long as he pays and performs his Cuſtoms and Services.

4 Co. 26. b. adjudged. *Vide* Cro. El. 395, 443. S. C. By the Report of which it appears he had Copyholds in other Places.

If a Lord of a Manor having (*a*) many antient Copyholds in a Town, grants the Inheritance of all thoſe Copyholds to another, the Grantee may keep a Court for the cuſtomary Tenants, and accept Surrenders, and make Admittances and Grants; for though it is not a Manor in Law for want of Freeholders, yet as to the Copyhold Tenants, the Grantee hath ſuch a Manor that he may keep Courts.

(*a*) Diverſity where the Inheritance of many, and whereof one ſingle Copyhold only is granted. 4 Co. 27. a.

2. Where Part only, or what is incident to it, ſhall be extinguiſhed.

Sav. 66. Co. Copyh. 172.

If a Copyholder hath had Time out of Mind, *&c.* a Way over another's Copyhold, and he purchaſes the Inheritance of his own Copyhold, yet the Way remains.

8 Co. 63. Moor 811. S. C. adjudged. Brownl. 231. S. C. adjudged, becauſe the Leaſe being for Years, the Trees excepted remained Parcel of the Manor; otherwiſe if the Leaſe had been for Life.

If the King is ſeiſed of a Manor, Parcel of the Duchy, in which by the Cuſtom Copyholders may take Fire-wood, *&c.* growing upon their Copyholds, to be ſpent in their Houſes, and for Fences, *&c.* and by Leaſe under the Duchy Seal demiſes the Manor, *exceptis omnibus Boſcis, ſubboſcis, arboribus & Maerem'*, *&c.* for twenty-one Years, and after grants the Reverſion *& præmiſſa ſic except'* to *J. S.* and his Heirs, and after the Aſſignee of the Leſſee makes a voluntary Grant of a Copyhold for Life, according to the Cuſtom of the Manor, this Grantee ſhall have the Eſtovers; for the Eſtate of the Copyholder is not derived out of the Eſtate of the Lord, for he is but an Inſtrument to make the Grant; but by the Cuſtom of the Manor it is eſtabliſhed and made firm to the Grantee.

8 Co. 63. reſolved *per Cur'*. Moor 812. S. C. Brownl. 211. S. C.

So if Copyholders for Life, according to the Cuſtom, have uſed to have Common in the Waſte of the Lord, or Eſtovers in his Woods, or other Profit apprender in any Parcel of the Manor, and the Lord aliens his Waſtes or Woods, *&c.* to another in Fee, and after grants a Copyhold Meſſuage, *&c.* for Life, ſuch Grantee ſhall have Common, Eſtovers, *&c.* notwithſtanding the Severance; for the Title of the Copyholder is Paramount, and the Cuſtom unites the Common, which are but as Acceſſories or Incidents, ſo long as the Meſſuage, *&c.* being the Principal, is maintained by the Cuſtom.

Cro. Jac. 253. *Marſham* and *Humber* adjudged. Yelv. 189, 190. Noy 126.

If by Cuſtom all the Copyholders for Life have Common in the (*b*) Waſte of the Lord, and the Lord grants and confirms to one of them and his Heirs, all his Copyhold Meſſuage and Land *cum Pertinentiis*, he ſhall not have Common; for by the Cuſtom that was annexed to his cuſtomary Eſtate, which being deſtroyed by his own Act in making it a Freehold, his Common is deſtroyed alſo, and cannot continue without (*c*) ſpecial Words.

Bulſt. 2. Brownl. 220. 2 Brownl. 209. S. C. adjudged. Moor 667. adjudged; though the Lord granted the Meſſuage, *&c.* and all Common thereto appertaining, for the Common appertained to the cuſtomary Eſtate, which is determined. 2 Brownl. 211. cited. Cro. Jac. 253. cited. (*b*) Otherwiſe if they have Common in the Soil of a Stranger. 2 Sid. 84. *per Glin.* Hob. 190. (*c*) *Viz.* All Commons before uſed. Bulſt. 2. *Vide* 2 Vern. 250. where it was decreed, That the Copyholder ſhould enjoy the Common before, though it was extinct at Law; and *vide* Title *Common*.

* (L) Of Forfeiture: And herein, *Page 483

1. Of Forfeiture for Non-attendance at Court, and not doing Service.

IF a Copyholder, being (*a*) duly ſummoned, refuſes to appear in Court, it is a (*b*) Forfeiture of his Copyhold; for unleſs the Copyholders attend there can be no Court held. Rol. Abr. 506.

(*a*) By ſome Opinions a general Warrant within the Pariſh is ſufficient; but now by the better Opinion, a general Notice is not ſufficient, but there muſt be a perſonal Summons to make a Forfeiture. Mo. 350. 3 Bulſt. 80. Bulſt. 268. Cro. Eliz. 505. Noy 58. Stile 251. (*b*) The Forfeiture is a Determination of the Will, and the Eſtate is immediately in the Lord, as in his Reverſion, and he may grant it to another before Seiſure. Lev. 26. adjudged. Jones 249.—Where there may be Relief in Equity againſt a Forfeiture. *Vide* Abr. Eq. 121. Chan. Ca. 95. Skin. 142. pl. 13. Preced. Chan. 574 to 586. 2 Vern. 537, 664.

But if a Copyholder is in Debt, and is afraid to be arreſted, or is a Bankrupt and keeps his Houſe, it is a good (*c*) Excuſe for his not coming. Co. Copyh. 159.

(*c*) So is Weakneſs, or a great Office. Co. Copyh. 159.

Alſo if the Lord comes to the Copyholder, and requires him to do his (*d*) Services, and the Copyholder anſwers, If they are due he will do them, but it ſhall be tried at Law firſt, whether they are due by Law; this is no Forfeiture, being no wilful Refuſal. *Stile* 241. Rol. Abr. 506. Rol. Rep. 429. 3 Bulſt. 80, 268.

4 Co. 21. b. (*d*) For the Non-performance of Services the Lord may either diſtrain or ſeiſe the Land. Noy 135.

So if the Copyholder ſays, If it be a Court he will appear at it, (*e*) if not, he will not; this is no Forfeiture. Stile 241.

(*e*) But if there were no Controverſies about the Court, but that is only uſed as a Shift, then it ſeems a Forfeiture; and *vide* 1 Leon. 104. That continual Default at Court amounts to a wilful Refuſal.

If the Jury or Homage refuſe to preſent the Articles according to their Oath, this is a Forfeiture of the Copyholds. Dyer 211. Rol. Abr. 506. Where it is neceſſary that the Cauſe of Forfeiture ſhould be found by the Homage. *Vide* 3 Leon. 108. Godb. 47. Palm. 417. Latch 227. 2 Vent. 38.

2. Of Forfeiture for Non-payment of Rent.

If a Copyholder be to pay a certain Rent yearly by his Copy to his Lord, and the Lord comes upon the Land and demands his Rent at the Day, and the Copyholder being preſent (*f*) refuſes to pay it, this is a Forfeiture. Rol. Abr. 506.

(*f*) Non-payment at the Day is no Forfeiture without a Refuſal to pay. Moor 622. Lit. Rep. 268.——And *Note*, That for Non-payment of Rent, Fines, &c. where a Value may be ſet on them, and a Compenſation made the Lord for any Laches in Point of Time, &c. Equity will relieve. *Vide* Prec. Chan. 568, 569.

My Lord *Coke* ſays, That (*g*) if the Lord demand his Rent of the Copyholder, and he ſays, that he wants Money, and intreats the Lord Co. Copyh. 162.

(*g*) But this Caſe does not ſeem to be Law, it is contradicted by a ſolemn Reſolution; for his deſigning to pay, ſignifies the Continuance of his Will, and cannot any way amount to a wilful Refuſal. Rol. Abr. 506. Moor 623. Latch 122. Cro. Eliz. 505. But if he appoints him to pay it at a Day after, at a certain Place within the Manor, and he neglects, this is a Forfeiture. Latch 122. cited. N. Dyer 211. in Margine.

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to forbear till he be provided, that this is a Forfeiture, and that (*b*) if
*Page 484 * the Lord makes a continual Demand upon the Land, and the Copyholder is not there, this is a Forfeiture; but if he demand once, and nobody is there, this is no Forfeiture.

(*b*) This likewiſe ſeems not to be Law, being only a Denial at Law, which cannot amount to a wilful Refuſal; for which *vide* Hob. 135. Noy 58. Latch 14, 122. Rol. Abr. 506. Cro. Eliz. 350, 505.

Lit. Rep. 268. A Widow had Copyhold Lands, and divers Perſons came for the Rent, whom ſhe put off with Delays; at laſt comes a young Gentleman and demands it; ſhe anſwered, That ſhe did not know him, but if he would dance before her, if ſhe liked his Dancing ſhe would pay him; this Denial was adjudged no Forfeiture, not being wilful.

3. Forfeiture in the Copyholder's taking upon him to diſpoſe of the Copyhold, and make Leaſes.

Co. Lit. 59. a. Co. Copyh. 163. If a Copyholder takes upon him to convey his Copyhold Eſtate to a Stranger, it is a Determination of his Will, and conſequently a Forfeiture; for thereby he would introduce a Tenant on his Lord without his Admittance, and alſo deſtroy the Evidence of its being Copyhold.

Co. Lit. 59. a. (*a*) If a Man bargains and ſells his Copyhold, it is ſaid to be a Forfeiture, though the Deed be not inrolled; for this would determine an Eſtate at Will. Rol. Abr. 507. But if a Charter of Feoffment of his Copyhold Eſtate, or a Leaſe for Life, but makes (*b*) no Livery, it is no Forfeiture, becauſe nothing paſſes till then.

(*b*) That if he makes a Letter of Attorney to give Livery, it is a Forfeiture. Rol. Abr. 507.

Co. Copyh. 163. But by Lex Cuſtom. 206. it was otherwiſe adjudged in the Caſe of *Bird* and *Kirk*, and Mod. 199, 200. 2 Mod. 32. adjudged no Forfeiture; for the Lord is Party to it, and can take no Advantage of it. My Lord *Coke* ſays, That if Tenant for Life of a Copyhold ſuffer a Recovery by Plaint in the Lord's Court, as a Copyholder of Inheritance, this is a Forfeiture.

Moor 184. Salk. 186. pl. 5. 187. If a Copyholder makes a Leaſe for Years not warranted by the Cuſtom, and without the Lord's Licence, this is a Forfeiture, but yet it is no Diſſeiſin; for ſuch a Leaſe is good againſt every Body but the Lord.

Cro. El. 498. Rol. Abr. 507. Alſo a Leaſe for Years by Parol to commence *in futuro*, is a Forfeiture, becauſe of the unlawful Contract made to the Lord's Diſheriſon.

Moor 292. Het. 122. Cowp. 481. 2 Term Rep. 705.

Bulſt. 189. A Leaſe, that will amount to a Forfeiture, ought to have a certain Beginning and certain End, or elſe the Leaſe is void, and carries but an Eſtate at Will at moſt, which is no Forfeiture.

But for this *vide* Rol. Abr. 508, 510. Bulſt. 189, 215. Jones 249. Cro. Jac. 301, 308. If a Copyholder for Life makes a Leaſe for a Year, and then makes another Leaſe to the ſame Perſon for another Year, to commence one Day after the firſt Year, and then ſurrenders his Copyhold to the Lord; this ſecond Leaſe not being warranted by the Cuſtom is a Fofeiture, for the Land is charged with a double Intereſt, the one *in præſenti*, and the other *in futuro*.

3 Term Rep. 162.

Cro. Jac. 311. By the better Opinion of the Book; but the Judgment was given principally on another Point. But if *A.* makes a Leaſe of his Copyhold to one for a Year, and then (*c*) covenants that the Leſſee ſhall enjoy it *de Anno in Annum*, this is no Forfeiture, being only a Covenant and not a Leaſe.

(*c*) For though theſe Words by Conſtruction may make a Leaſe where the Lands may be let; as in Cro. Car. 207. Cro. Jac. 95 yet it would be an injurious Conſtruction to make Words, which only import a Covenant, a Leaſe and ſo a Forfeiture. 2 Keb. 267. And this ſeems to be Law, though it has only the Authority of *Ke*

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*4. Of Forfeiture in committing Waſte; and herein of the Lord's and Tenant's Intereſt in the Trees. *Page 485

If a Copyholder (*a*) erects a new (*b*) Houſe upon the Land without Licence, it is no Forfeiture; becauſe it is for the Melioration of the State of the Lands; but then this Houſe muſt be ſubject to all the Cuſtoms of Copyhold Land, and therefore if he pulls it down again it is a Forfeiture. Rol. Abr. 507. Hut. 103. Lit. Rep. 266. 4 Leon. 241.

(*a*) That turning plowed Lands to hop Ground or a Piſcary, is a Forfeiture. Cro. Eliz. 5, 492.—Whether a Copyholder in Fee may dig for Mines. Sid. 152. *Q. & vide* Winch 8. *Vide* Title *Waſte*. (*b*) *Secus* if he erects a Mill. Latch 123. N. Dyer 211. Bulſt. 50, 51. adjudged.

Waſte (*c*) voluntary or permiſſive, is a Forfeiture of Copyhold Lands, unleſs there be a Cuſtom to cut Trees, *&c.* Co. Lit. 63. a. (*c*) Voluntary Waſte is a

Forfeiture by the Common Law, but negligent Waſte is not, without a Cuſtom. Noy 51.—By Owen 18. it is adjudged, That permiſſive Waſte, without any ſpecial Cuſtom, is a Forfeiture.—But this muſt be underſtood of Waſte in letting the Houſe decay, *&c.* for if a Stranger, or the Copyholder's Leſſee commit Waſte in cutting down Trees, it is no Forfeiture, for every Forfeiture ought to be the wilful Act of the Copyholder, ſo as it may amount to a Determination of his Will. 4 Co. 27. a. Lit. Rep. 267, 268. Rol. Abr. 508. But Moor 49. Dalſ. 49. *cont'*.

By the Common Law, every Copyholder may take Houſe-bote, Hedge-bote, Fire-bote, and Plough-bote on the Copyhold Lands, though this Power may be reſtrained by Cuſtom, as that a Copyholder ſhall not take it, unleſs by the Aſſignment of the Lord, or his Bailiff. 13 Co. 68. Rol. Abr. 508. Godb. 172. 2 Brownl. 329. But Ld. Raym. 551. Com. Rep. 71. pl. 44. 11 Mod. 18. pl. 5. 12 Mod. 379. The Caſe in *Croke* denied to be Law.

Cro. Eliz. 5. *cont'*, but ſaid, that a Cuſtom to take is good; but *vide* 2 Salk. 638. pl. 6.

The Lord of the Manor may cut down the Timber Trees growing upon the Copyhold Lands, provided he leave (*d*) ſufficient for Houſe-bote, *&c.* alſo by Cuſtom, where a Copyholder of (*e*) Inheritance may take the Shrowds of Trees, by Cuſtom he may cut them down; for otherwiſe the Timber may ſtand and rot, and no Body be the better for it. 13 Co. 68. Leon. 272. Where it is Treſpaſs for cutting Trees. (*d*) A Copyholder for Life alledged that his Houſe was in Decay, and that there was not ſufficient, *&c.* and on Demurrer it was adjudged in *B. R.* that the Copyholder had an Intereſt in Trees, that the Fruit, Acorns, *&c.* belonged to him; and Judgment accordingly; but reverſed in the Houſe of Lords; for as the Tenant could not cut down the Timber, if the Lord could not, it muſt rot. 2 Salk. 638. pl. 6. And *vide* 8 Co. 64. That if a Copyholder be intitled to Shrowds of the Trees by Cuſtom, if the Lord takes the Body, an Action on the Caſe lies againſt him. (*e*) But a Cuſtom that every Copyhold Tenant may cut down Trees at their Will and Pleaſure, is unreaſonable. *Vide* Winch, Cro. Jac. 30. Cro. Car. 220. Bulſt. 50. Noy 2. Rol. Abr. 560, 650.

Where a Copyholder may take Trees for Reparation, the Loppings and Top belong to him, and though he cannot repair with them, he may ſell to help to defray the Charges. 3 Bulſt. 281. Style 233. Moor 94.

If a Copyholder cut down Trees for Repairs, and employs ſome, and keeps the Reſt ready to be employed in Reparations, this is no Forfeiture; for he could not, perhaps, preciſely know what would do. Rol. Abr. 508. Cro. Eliz. 499.

Moor 508. S. C. adjudged, though employed five Years after cut down, and after an Entry for a Forfeiture.

But if a Copyholder cuts Trees to repair his Houſe, and after does not employ them accordingly, but ſuffers them after the Cutting, to be rotten and periſh; this is a Forfeiture. 2 Rol. Abr. 508. Moor 392. S. P. *per Cur'*.

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* 5. Forfeiture by Incloſure.

Lit. Rep. 267. Chan. Preced. 57.

Incloſing Copyhold Lands one from another, and alſo defacing Land-Marks, are Forfeitures; for by theſe Means the Evidence of their being Copyhold will be deſtroyed.

Hut. 102. adjudged. Hetl. 5. S. C. *adjornatur.* Lit. Rep. 267. S. C. adjudged; becauſe by the Cuſtom the Copyholder may be amerced till, &c. ſo that the Lord had another Remedy: But it was reſolved, that notwithſtanding the Gaps, this was an Incloſure againſt the Cuſtom.

But if *A.* is ſeiſed in Fee of fifteen Acres, by Copy of Court-Roll, and there is a Cuſtom within the Manor, that the Lord hath had a Fold-courſe within the Manor for 500 Ewes, in the Field in which the fifteen Acres lie, from *Michaelmas* to *Lady-Day*, and that no Copyholder might incloſe without the Licence of the Lord; and that if any incloſed without Licence, then a reaſonable Fine ſhould be aſſeſſed by the Lord, or his Steward, if the Lord would accept thereof; and if not, that then the Copyholder ſo incloſing ſhould be puniſhed at every Court till he opened the Incloſure; and *B.* incloſes the fifteen Acres, with an Hedge and Fence of Quickſet three Feet deep and ſix Feet broad, and leaves four Spaces of nine Feet broad in the ſaid fifteen Acres; this is no Forfeiture, becauſe a Prejudice only to the Lord's Fold-courſe; and that which makes a Forfeiture ought to be ſo to the Copyhold Tenement, and this is no Incloſure, becauſe all is not incloſed; and Forfeitures, which are odious in Law, ſhall be taken ſtrictly.

6. Forfeiture for Treaſon and Felony,

Co. Copyh. 150, 164. 13 Co. 3. Leon. 1.

If a Copyholder commits Treaſon or (*a*) Felony, it is a Forfeiture of his Copyhold to the Lord, without any particular Cuſtom; otherwiſe a Copyholder becoming a Traitor or Felon, would have no Puniſhment in his Poſterity.

(*a*) If convicted of Manſlaughter, and allowed his Clergy, does not forfeit. Lev. 263. 2 Keb. 451. Nor for Outlawry, unleſs it be for a Capital Crime. Lit. Rep. 234. Hetl. 127. and *vide* Leon. 99.

(*b*) 1 Lev. 263. 2 Keb. 251. (*c*) 1 Bulſt. 13. 2 Brownl. 217 to 220.

By an Attainder of Treaſon or Felony, of common Right the Copyhold is forfeited, (*b*) but not by a Conviction only; but (*c*) by Cuſtom it may be forfeited for Treaſon or Felony, even without a Conviction.

Godb. 267. 2 Vent. 38. 2 Jones 189. 5 Co. 117. Lev. 34.

Lev. 94. *Strode* and *Deniſon*, adjudged upon a Writ of Error, and the firſt Judgment affirmed accordingly. Skin. 8, 9. S. C. *adjornatur.*

If a Copyhold is granted to *A.* for Life, and after according to the Cuſtom, the Reverſion is granted to *B.* for Life *immediate poſt mortem forisfacturam ſive aliam determinationem ſtat' prædict' A.* and *A.* is attainted of Felony, by this his Eſtate is determined; for being in the Eye of the Law but an Eſtate at Will, his Will is determined by the Attainder, for by the Attainder he cannot hold an Eſtate, and *B.* may take Advantage thereof without any Entry made by the Lord.

7. In what Caſes a Forfeiture of Part, ſhall be a Forfeiture of the Whole.

4 Co. 27. a.

Where a Copyhold is held by one Tenure, it is ſaid, that a Forfeiture of any Part is a Forfeiture of the Whole, for there is a Condition in Law annexed to the whole Eſtate.

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* Therefore if such a Copyholder commits Waste in cutting down a single Tree, this is a (*a*) Forfeiture of his whole Copyhold; for by the cutting of the Tree which is to be employed in repairing the Houses, &c. the whole Copyhold is impaired. *Page 487

Rol. Abr. 509.

(*a*) But Q. For though committing Waste in Part of the House may be a Forfeiture of the whole House, yet it seems unreasonable, that committing Waste in one Acre, should be a Forfeiture of the Whole; but *vide* Title *Waste*.

Also it is said, That if a Copyholder makes a Feoffment of an Acre of Land, Parcel of his Tenement, that this is a Forfeiture of the Whole. 4 Co. 27. a. but *vide* 1 Rol. Abr. 509. *cont'*, and that if a Copyholder by Licence lets for Years, and the Lessee makes a Feoffment, he only forfeits his Lease. Hob. 177.

But if a Copyholder hold three several Acres by three several Copies, and commits Waste in one Acre, he shall forfeit that Acre only; for though they are all in one Hand, yet every Acre is severally held, and to every Acre there is a several Condition in Law tacitly annexed. 4 Co. 27. *Tewerner* and *Cromwel*.

So if such Copyholder, that holds three Acres, by three several Copies, surrenders to the Use of *A.* and his Heirs, and the Lord admits *A. tenend' per antiqua servitia inde prius debita & de Jure consueta*, and after *A.* commits Waste in one Acre, he shall forfeit that Acre only, for the *Tenend'* continues the several Tenures, though the Parcels are now all put in one Copy. 4 Co. 28.

So if several Copyholds escheat to the Lord, and he grants them again *tenend' per antiqua servitia* to one, and he commits a Forfeiture in Part, this extends not to the Whole. 4 Co. 28. b. *per Curiam*. 3 Leon. 109. S. C. and

S. P. *per Cur'*, Cro. Eliz. 353. S. C. and S. P. adjudged; there being to each Parcel a several *Habendum* and *Reddendum*.

8. Who shall be affected by a Forfeiture, or take Advantage thereof.

If there be a Tenant for Life, the Remainder in Fee of a Copyhold, and the Tenant for Life commits a Forfeiture, (*b*) this shall not bind the Remainder. Rol. Abr. 509. Cro. Eliz. 598, 880.

Roy 42. *vide* Moor 49. and Dalf. 49. *cont'*. (*b*) But by the special Custom it may bind the Remainder. 9 Co. 107. 2 Wilf. 13, 16. Cowp. 702. 1 Term Rep. 738.

But though this shall not affect the Remainder Man, yet if there be a Copyholder for Life, the Remainder to another for Life, or in Fee, and the first Copyholder commits a Forfeiture, he in Remainder shall not (*c*) enter, but the Lord shall hold it during the Life of the first Copyholder, for Copyhold Estates are not like those at Common Law, where in such Case, the Estate for Life being ended, he in Remainder might enter immediately. 9 Co. 107. Rol. Abr. 568.

(*c*) But if there be a Copyholder for Life, and the Lord makes a Lease to commence after the End, Forfeiture, or Determination of the Estate for Life, the Copyholder commits a Forfeiture, the Lord will not enter, the Lessee may. 2 Leon. 73. 9 Co. 107.

If a Surrender be made to the Use of *A.* for Life, the Remainder to *B.* in Fee, and *A.* suffers three Proclamations to pass, and makes no Claim, yet shall not *B.* forfeit his Remainder, for the Custom shall be taken strictly. Cro. Eliz. 879.

If a Copyholder leases for Years by Licence of the Lord, and after the Lessee makes a Feoffment, this shall forfeit (*d*) only his Estate, and not the Estate of the Copyholder. Rol. Abr. 509. *Vide* Hob. 177. Palm. 384.

Rol. Rep. 372. (*d*) If a Copyholder makes a Lease for a Year, and another Lease in Reversion not warranted by any Custom, though this second Lease be a Forfeiture, yet the first Lease is good. Rol. Abr. 508. Cro. Car. 234.

*Page 488 * If a Copyholder Tenant in Tail commits a Forfeiture, his Iſſue is bound by it.

Co. Copyh. 135. *Vide* Sid. 314. 2 Sand. 422.

Rol. Abr. 509. Leſſee for Years ſhall take Advantage of a Forfeiture committed by a Copyholder of the Manor, for he is *Dominus pro tempore*.

Brownl. 132. Cro. Eliz. 499. Rol. Abr. 509. If there be a Lord of a Manor, in which there are Copyholders Tenants of the Manor, and the Lord grants to a Stranger the Freehold of a Copyhold in Fee; though by this the Tenement is divided from the Manor, and not demiſable by Copy again, yet the (*a*) Grantee of the Freehold ſhall take Advantage of a (*b*) Forfeiture committed (*c*) after by the Copyholder, for he ought to pay his Rent to the Grantee.

(*a*) So if the Grantee makes a Leaſe for Years of the Freehold, the Leſſee ſhall take Advantage of a Forfeiture committed after. Rol. Abr. 510. Cro. Eliz. 499. Moor 393. Owen 63.—After the Leaſe made, and before the Commencement of it. Moor 393. (*b*) Such Forfeitures as accrue by Reaſon of the Cuſtom, are diſcharged, but not Forfeitures at Common Law; as Waſte, &c. Moor 393. Owen 63. 4 Co. 24. b. 25. a. (*c*) But not of a Forfeiture committed before the Grant; for the Grant of the Freehold made by the Lord before Entry, implies an Aſſent that the Copyholder ſhall continue his Eſtate, and ſo is in Nature of a Confirmation. Owen 63. & *vide* Latch 227. Palm. 416.—The Copyholder commits Treaſon, and the Lord aliens the Manor; and after the Copyholder is attainted by Act of Parliament, whether the Alienee ſhall take Advantage of the Forfeiture, 2 Vent. 38, 39. *dubitatur*.†

† Why not as the Lord aliened all his *Right*, &c. eſpecially as it muſt be taken for granted, the Copyhold was actually diveſted out of the Copyholder.

Cro. Jac. 301. Bulſt. 190. S. C. Mod. 200. If a Copyholder commits a Forfeiture, and the Lord of the Manor dies before Entry or Seiſure for the Forfeiture, he in Reverſion or Remainder ſhall not take Advantage of the Forfeiture committed before his Time.

S. P. reſolved *per Cur*'. The ſucceeding Lord ſhall not take Advantage of Waſte done in the Time of the preceding Lord; but if there be Lord and two Coparceners Copyholders, and one makes a Feoffment in Fee of her Part, and then the Lord makes a Leaſe of the Manor; though the Leſſee can take no Advantage of the Forfeiture, yet the Heir of the Leſſor may. Palm. 446. Latch 227. adjudged. Q. The Diverſity between a Feoffment and other Forfeitures; and Q. If the Leſſor outlives the Leaſe, whether he may take Advantage of the Forfeiture‡.

‡ As to the laſt Q. See the Note above.

Salk. 186. pl. 5. *Eaſtcourt* and *Weeks*, adjudged by *Treby*, Ch. J. *Nevil* and *Blenco*, *cont*' *Powel*; who held alſo, That where there are two Coparceners, and one will take Advantage of Forfeiture, and the other not, there muſt be an Apportionment. *Vide* Title *Coparceners*. If a Copyhold Manor deſcends on two Coparceners, and a Copyholder commits Waſte, and makes a Leaſe, which are agreed to be Forfeitures, and after one of the Siſters dies, the Surviving Coparcener ſhall not take Advantage of the Forfeiture; for the Election to take Advantage of the Forfeiture muſt be made by them both, which cannot be after the Death of one of them.

9. What Perſons ſhall be excuſed from a Forfeiture.

Cro. Eliz. 499. Moor 393. Rol. Abr. 509. 3 Term Rep. 262. There were ſeveral Caſes, in which Feme Coverts and Infant Copyholders, &c. were obliged, on Pain of forfeiting their Copyholds, to obſerve the Cuſtoms of the Manor.

As if the Huſband denied to pay Rent, or do Suit, this was held a Forfeiture for ever; for the Lord muſt have his Services.

So if the Husband commits (*a*) Waste, and dies, this shall bind the Wife. Rol. Abr. 509. Palm. 384.

2 Rol. Rep. 372. (*a*) *Secus* if he made a Lease, unless she did any Thing to confirm it after his Death. Cro. Car. 7. Palmer 383. 2 Rol. Rep. 344, 361, 372. Godb. 345. Rol. Abr. 509. Cro. Eliz. 149.

Also in Copyhold Manors, where the Custom is, that the Heir shall come in and be admitted, and if he doth not, Proclamation shall be made for him to come in, and so on in the two next Courts, otherwise that the Lord should seise as forfeited; it was held, That a Feme Covert was bound; and by some Opinions, the Lord, after such Proclamations, might seise the Copyhold of an Infant Heir till he came in and was admitted, and might receive the mesne Profits without being answerable for them. But for this *vide* 8 Co. 100. Style 387. Cro. Jac. 101, 226. Leon. 100. 4 Leon. 30. Comb. 118.

31. Carth. 41 to 45.

* But now by 9 *Geo.* 1. *cap.* 29. it is enacted, "That no Infant or Feme "Covert shall forfeit any Copyhold Messuages, &c. for their Neglect or "Refusal to come to any Court or Courts, to be kept for any Manor "whereof such Messuages, &c. are Parcel, and to be admitted thereto; "nor for the Omission or Denial to pay any Fine or Fines imposed or set "upon their or any of their Admittances to any such Copyhold Mes-"suages, &c." But *vide* the Statute, and the Remedies therein appointed for the Lord for his Fines, &c. *Page 489

10. Where the Forfeiture shall be said to be dispensed with.

If the Tenant appears not in Court after personal Warning, and the Lord (*b*) amerces him, (*c*) this is a Dispensing with the Forfeiture. Brownl. 149. (*b*) Although it is not

threated or levied, Leon. 104. (*c*) Acceptance of Rent after a Lease made, is a Dispensation; so is the Accepting of any Services. Keb. 15.——If the Lord does not enter before the Tenant repairs, the Forfeiture is purged; also it hath been adjudged, that employing Trees in Repairs five Years after they were cut down, was a Purgation of the Forfeiture. 2 Sid. 8.

But if a Copyholder makes a Lease for Years, and after surrenders to the Use of the Lord, and he (*d*) not having Notice of the Lease accepts the Surrender; this is no Dispensing with the Forfeiture. Cro. Car. 233. Jones 249. adjudged.

Rol. Abr. 510. S. C. (*d*) But the Lord shall be presumed to have Notice of the Failure of Suit of Court, Non-payment of Rent, &c. 2 Vent. 38.

If he that is *Dominus pro tempore* of the Manor, admits one to a Copyhold, he thereby dispenses with all precedent Forfeitures, not only as to himself, but also as to him in Reversion, (*e*) for such new Grant and Admittance amounts to an Entry for the Forfeiture and a (*f*) new Grant. Lev. 26. adjudged. Keb. 25. S. C. adjudged.

(*e*) Winch 67. Cro. Jac. 101. (*f*) If a Copyholder commits a Forfeiture, and then he that hath Right releases to him; this is a Dispensation, for now he hath, as it were, another Estate, of which he hath committed no Forfeiture. Moor 393. *Latch* 227.

But the Lord by Wrong or Disseisin cannot by such Admittance purge the Forfeiture as to the rightful Lord. Lev. 26. *per Curiam.*

(M) Copyholds, where and how to be ſued for and recovered.

Co. Lit. 60. a. 4 Co. 21. b. Moor 68. (f) Shall make their Plaint in the Lord's Court, and make Proteſtation to follow it in Nature of one of the King's Writs, as Formedon, Aſſiſe, &c. Co. Lit. 60. a. Co. Copyh. 142, 143.

IN all Real Actions, or that concern the Realty, a Copyholder cannot (f) implead or be impleaded any where but in the Lord's Court, for there being a Court for that Purpoſe, and the Lord Judge thereof, it is his Duty and Intereſt to determine the Controverſies of his Tenants, and therefore not cogniſable at Common Law.

Co. Copyh. 143. (g) If Leſſee for Years of a Copyholder cuts down the Trees, the Copyholder ſhall ſue in the Lord's Court to puniſh this Offence. Co. Copyh. 143. Where a Copyholder may have Caſe againſt the Lord or a Stranger, for an Injury done the Common belonging to his Copyhold, *vide* Rol. Abr. 106. 2 Leon. 201, 202. 2 Brownl. 146.

But Actions (g) merely Perſonal, the Copyholder may ſue at Common Law.

*Page 490 Cro. Eliz. 524. Rol. Abr. 374. (b) For otherwiſe he would be Judge and Party. Salk. 186. pl. 5.

* The Lord of the Manor (b) may plead or be impleaded, and avow for the Rent or Services of his Copyholder in any Court of *Weſtminſter*, for he hath an Eſtate at Common Law in the Rent, and it is due to him, on the ſame Grounds in Law as the Rent of Freehold-Lands.

Co. Lit. 60. a. 4 Co. 21. b. Moor 68. F. N. B. 12. (i) Or ſuch Judgment may be reverſed by a Bill in Chancery. Lane 98. Rol. Abr. 373.——But a Bill exhibited in Chancery to compel the Lord to receive a Petition for reverſing a common Recovery was diſmiſſed. Vern. 367. And the Diſmiſſion affirmed in the Houſe of Lords; for common Recoveries not being Adverſary Suits, but common Aſſurances, Equity ought rather to ſupply Defects, than aſſiſt in annulling them. Show. P. C. 67. (k) Where the King is Lord, the Tenant may be relieved by Bill or Petition to the King in the Exchequer-Chamber. Rol. Abr. 539. Lane 98.

If upon a Plaint in the Lord's Court an erroneous Judgment be given, no Writ of falſe Judgment lies, in Reſpect of the Baſeneſs of the Eſtate, being in the Eye of the Law but an Eſtate at Will, (i) but he ſhall have a Petition to (k) the Lord in Nature of a Writ of falſe Judgment, and therein aſſign Errors, and have Remedy according to Law.

Leon. 2. (l) And may do Right according to Conſcience. Owen 63. Dalſ. 70. Rol. Abr. 539. 4 Co. 30. b.—So if a Surrender be made to the Uſe of another, without expreſſing what Eſtate he ſhall have, a Cuſtom, that the Lord may grant it in Fee to him for whoſe Uſe the Surrender was made, is good; for he is Chancellor in his own Court, and therefore reaſonable that he ſhould determine a Thing left thus uncertain. Cro. Eliz. 39

If a Copyholder ſurrenders to the Uſe of *B.* upon Truſt, that he ſhall hold the Land until he hath levied certain Money, and that after he ſhall ſurrender to the Uſe of *C.* the Money is levied, and *B.* is required to make a Surrender to the Uſe of *C.* and refuſes, and *C.* exhibits his Bill to the Lord of the Manor againſt *B.* if *B.* refuſes, the Lord may ſeize, and admit *C.* to the Copyhold; for in ſuch Caſes he is (l) Chancellor in his own Court

4 Co. 26. (m) If the

A (m) Leſſee of a Copyholder for a Year ſhall maintain an Ejectment for the Common Law warrants his Term, and therefore gives him Remedy

in caſe he be ouſted; ſo may Leſſee by (*n*) Licence; alſo where by Cuſtom a Copyholder may make a Leaſe, ſuch Leſſee may maintain an Ejectment.

Lord commits the Cuſtody of the Body and Lands of an

Infant according to Cuſtom, till, *&c.* and the Committee is ejected, he may have an *Ejectione Cuſtodiæ.* Leon. 328. Cro. Eliz. 224. 2 Com. Dig. 530. 1 Term Rep. 600. 2 Term Rep. 198.

(*n*) For by the Licence, the Lord gives up his Power of judging or determining about the Leaſe: But Q. Whether a Leaſe without Licenſe, and not warranted by the Cuſtom, being good againſt all Perſons except the Lord, the Leſſee may maintain an Ejectment; and *vide* Cro. Eliz. 462, 676. Moor 569. pl. 776. Owen 18. Stile 380. Hetl. 127. By which it ſeems he may; but Cro. Eliz. 395, 469. Moor 50. Brownl. 40. *cont.**

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* But we conceive the former Caſes to be Law, *viz.* that ſuch Leſſee may maintain Ejectment; the Leaſe, as we apprehend, not being *ipſo facto* void, but voidable only, and that by the Lord, who perhaps may never avoid it.

If the Wife of a Copyholder in Fee, by ſpecial Cuſtom, recovers Dower by Plaint in the Court of the Manor, and 50*l.* Damages, an Action of Debt will not lie at Common Law for the Damages.

4 Co. 30. b. Moor 410. S. C. by three Judges againſt one;

and at another Day it was held by three Judges, that the Action lay, becauſe the Court Baron could not award Execution for ſo great Damages, though they were well aſſeſſed there. Cro. El. 426. S. C. *adjornatur.* Rol. Abr. 609.

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* CORONERS. *Page 491

CORONERS are ſo called, (*a*) becauſe they deal principally with Pleas of the Crown, and are very (*b*) antient Officers at (*c*) Common Law; who, in former Days, were the principal (*d*) Conſervators of the Peace within their Counties: There ſtill ought to be a certain Number of them in every County, in ſome more, in others leſs, according as the Uſage hath been.

(*a*) 4 Inſt. 271. 2 Inſt. 31. (*b*) 2 Inſt. 3. S. P. C. 48.—49. (*c*) By the Common Law, the Chief Juſtice of the King's Bench is the Sovereign Coroner of *England*, 4 Co. 101.——And the Judges of this Court are Sovereign Coroners. 4 Inſt. 73. (*d*) And the Coroner may now bind any Perſon to the Peace who makes an Affray in his Preſence. 2 Hawk. P. C. 33. F. N. B. 397. 2 Inſt. 175. 4 Inſt. 271. 57. 2 Sid.

(A) Of the Qualifications, and Manner of chuſing and appointing a Coroner. 491.
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(F) Where

(F) Where the Act of one Coroner shall be as effectual as if done by them all. 497.
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(A) Of the Qualifications, and Manner of chusing and appointing a Coroner.

BY *Westm.* 1. made 3 *Ed.* 1. *cap.* 10. it is enacted, "That through "all Shires sufficient Men shall be chosen to be Coroners, of the "most loyal and wise (*a*) Knights, which know, will, and may best "attend upon such Offices, and which lawfully shall attach and present "Pleas of the Crown."

(*a*) In antient Time none under this Degree were chosen. 2 Inst. 32, 176. The Statute of *Merton*, made before this Act, supposes them to have been Knights. 23 Ass. pl. 7.—And in the Writ *De Coronatore exonerando*, his not being a Knight is mentioned as a sufficient Cause for the Discharge of a Coroner. Register 177. F. N. B. 164. 4 Inst. 271. But as the chief Intent of this Statute was to prevent the chusing of Persons of mean Ability, it seems the Design of it is sufficiently answered, by chusing Men of Substance and Credit; and as the constant Usage for several Ages past has been accordingly, it seems to be no Objection at this Day, that the Person chosen is not a Knight. 2 Leon. 160. 2 Hawk. P. C. 42, 43.

By the 14 *E.* 3. *stat.* 1. *cap.* 8. it is enacted, "That no Coroner be "chosen unless he have Land in Fee sufficient in the same County, "whereof he may answer to all Manner of People."

*Page 492 * By the 28 *E.* 3. *cap.* 6. it is enacted, "That all Coroners of the "Counties shall be chosen in the full Counties, by the (*b*) Commons of "the same Counties, of the most meet and lawful People that shall be "found in the same Counties, to execute the said Office; (*c*) saving "always to the King, and other Lords who ought to make such Coroners, "their Seignories and Franchises."

(*b*) But none but Freeholders have Votes. F. N. B. 164. S. P. C. 19. 2 Hawk. P. C. 43. For none but such are Suitors to the County-Court. 2 Inst. 99. 2 Rol. Abr. 121. (*c*) Such Franchise may be claimed by the King by Prescription; but it is a Privilege of so high a Nature, that no one can well intitle himself to it otherwise than by Grant from the Crown. Co. Lit. 114. a. 2 Hawk. P. C. 44.

2 Hawk. P. C. 43. Although they are chosen by the County, yet it must be pursuant to the King's Writ issuing out of and returnable into Chancery; but as their Authority proceeds from the Election, it does not determine by the Demise of the King: Hence also, if they prove insufficient to answer the 2 Inst. 174. Fines and Duties incumbent on them, the County, as their Superior, shall answer for them.

2 Hawk. P. C. 43. The Writ for the Election of a Coroner first recites the Death or Discharge of one or more former Coroners, and then commands the Sheriff to cause one other, or more as the Case is, to be chosen in a full County-Court, by the Assent of the County, according to the Form of the Statute in that Case made and provided; who having taken his (*d*) Oath in the usual Manner, may do all Things which belong to the Office of a Coroner, &c. and then it concludes with commanding the Sheriff to (*e*) certify to the Court the Name of the Person chosen.

(*d*) Shall be administered to him by the Sheriff. 2 Hawk. P. C. 43.

(*e*) See the Form of such Certificate in Rast. Ent. 133.

(B) In

(B) In what Places he hath Jurisdiction.

A Coroner hath no Jurisdiction of Offences committed on the (*e*) open Seas, between the High and Low-water Mark, when the Tide is in; but he hath an Authority over Offences committed in such Places when the Tide is out. 3 Inst. 113. 5 Co. 107. 2 Hawk. P. C. 45.

(*e*) By some it is laid down as a Rule, That he may inquire of a Felony committed on the Arms of the Sea, where a Man may see from the one Side to the other. Owen 124. Moor 892. H. P. C. 171. S. P. C. 51. And by others, his Power is confined to such Parts of the Sea, where a Man standing on the one Side may see what is done on the other. Fitz. Coron. 399. 4 Inst. 140. 2 Rol. Abr. 169. *Vide* Title *Jurisdiction of the Admiralty Court.*

At Common Law, the Coroner of the County could not intermeddle with Offences done within the Verge of the King's Court; nor the Coroner of the Hostel or King's House, with those committed in the County without the Verge; which proved inconvenient, by Reason of the Removal of the King's Court before an Inquest could be taken. 2 Inst. 550. 2 Hawk. P. C. 45.

By the Statute of *Articuli super Chartas, cap.* 3. it is ordained, "That "from thenceforth in Cases of the Death of Men, whereof the Coroner's "Office is to make View and Inquest, it shall be commanded to the "Coroner of the County, That he, with the Coroner of the King's "House, shall do as belongeth to his Office, and inrol it, *&c.*" * *See the last Clause under this Head.

If an Indictment, taken before the Coroner of the County and the Coroner of the King's House, does not appear, on the Face of it, to have been of an Offence within the Verge, it is insufficient; for it shall not be said to be good, as taken before the Coroner of the County; and void as taken before the other; for it was taken intirely before them both, and perhaps the Coroner of the House was the principal Actor, and the Jury mostly swayed by his Directions. 4 Co. 46. *Wyat* and *Wigges.* 2 Inst. 550. 2 Hawk. P. C. 45. c. 9. s. 16.

* If the same Person be Coroner of the County, and also of the King's House, an Indictment of Death within the Verge, taken before him as Coroner both of the County and of the King's House, is good †. *Page 493

4 Co. 46. a. 3 Inst. 134. 1 Leon. 160. S. C. but no Resolution. 2 Hawk. P. C. S. C. c. 9. s. 17. agreed, because the Mischief is remedied as well when both Offices are in the same Person, as when they are in divers.

† But it must be laid to be within the Verge, 2 Hawk. P. C. c. 9. s. 16.

By the 33 *H.* 8. *cap.* 12. it is enacted, "That all Inquisitions upon "the View of Persons slain within any of the King's Palaces or Houses, "or any other House or Houses, at such Time as his Majesty shall hap-"pen to be there demurrant or abiding in his Royal Person, shall be taken "by the Coroner for the Time being of the King's Household, without "any adjoining or assisting of another Coroner of any Shire within this "Realm, by the Oath of twelve or more of the Yeomen, Officers of "the King's Household, returned by the two Clerks Controllers, the "Clerks of the Check, and the Clerks Marshals, or one of them for the "Time being of the said Household; to whom the said Coroner of the "same Household shall direct his Precept, which Coroner shall be from "Time to Time appointed by the Lord Great Master, or Lord Steward "for the Time being; and that the said Coroner shall certify under his "Seal, and the Seals of such Persons as shall be sworn before him, all "such Inquisitions before the said Lord Master, or Lord Steward."

(C) Of

(C) Of his Authority and Duty in taking Inquisitions.

BY the 4 *E.* 1. *st.* 2. commonly called the Statute *De Officio Coronatoris*, it is enacted, "That the Coroner, upon Information, shall go to the "Place where any be slain, or suddenly dead, or wounded, and shall "forthwith command four of the next Towns, or five or six, to appear "before him in such a Place; and when they are come thither, the Co- "roner, upon the Oath of them, shall inquire in this Manner, that is, "to wit, If they know where the Person was slain, whether it were in "any House, Field, Bed, Tavern, or Company, and who were there; "likewise it is to be inquired who were culpable, either of the Act, and "who were present, either Men or Women, and of what Age soever "they be (if they can speak, or have any Discretion) and how many "soever be found culpable by Inquisition, in any the Manors aforesaid, "they shall be taken and delivered to the Sheriff, and shall be commit- "ted to the Gaol; and such as be founden and be not culpable, shall be "attached until the coming of the Justices, and their Names shall be "written in the Coroner's Rolls: If it fortune any such Man to be "slain, which is found in the Fields, or in the Woods; First, It is to be "inquired, whether he were slain in the same Place or not; and if he "were brought and laid there, they shall do as much as they can to fol- "low their Steps that brought the Body thither, whether he were "brought upon an Horse or in a Cart; it shall be inquired also, if the "dead Person were known, or else a Stranger, and where he lay the "Night before; and if any be found culpable of the Murder, the Co- "roner shall immediately go into his House, and shall inquire what "Goods he hath, and what Corn he hath in his Grange, and if he be "a Freeman, they shall inquire how much Land he hath, and what it "is worth yearly; and further, what Corn he hath upon the Ground; "and when they have thus inquired upon every Thing, they shall cause
Page 494 "* all the Land, Corn and Goods to be valued in like Manner, as if they "should be sold incontinently; and thereupon they shall be delivered to "the whole Township, which shall be answerable before the Justices "for all; and likewise of his Freehold, how much it is worth yearly, "over and above the Service due to the Lord of the Fee, and the Land "shall remain in the King's Hands until the Lords of the Fee have made "Fine for it; and immediately upon these Things being inquired, the "Bodies of such Persons being dead or slain, shall be buried; in like "Manner, it is to be inquired of them that be drowned or suddenly "dead, and after such Bodies are to be seen, whether they were so "drowned or slain, or strangled by the Sign of a Cord tied strait about "their Necks, or about any of their Members, or upon any other Hurt "found upon their Bodies; whereupon they shall proceed in the Form "aforesaid; and if they were not slain, then ought the Coroner to attach "the Finders, and all other in Company.

"Also all Wounds ought to be viewed, the Length, Breadth, and "Deepness, and with what Weapons, and in what Part of the Body the "Wound or Hurt is, and how many be culpable, and how many Wounds "there be, and who gave the Wounds; all which Things must be inrolled "in the Roll of the Coroners; also Horses, Boats, Carts, *&c.* whereby "any are slain, that properly are called Deodands, shall be valued and "delivered unto the Towns, as before is said."

I

In the Conſtruction of this Statute, the following Points ſeem to be agreed on;

That the Statute being wholly Directory, and in Affirmance of the Common Law, the Coroner is not thereby reſtrained from any Branch of his Power, nor excuſed from any Part of his Duty not mentioned in it, which was incident to his Office before; and therefore though the Statute mentions only Inquiries of the Death of Perſons ſlain, drowned or ſuddenly dead, yet the Coroner ought alſo to inquire of the Death of thoſe who die in Priſon.

2 Hawk. P. C. 47. Fitz. Coron. 421. 3 Inſt. 52, 91. Bro. Coron. 168. S. P. C. 51.

An Inquiſition of Death, by the Oaths of lawful Men of the County, is (*a*) ſufficient, without ſaying that they were of the next Towns; ſo (*b*) that it appears at what Place, and by what Jurors, by Name, it was taken, and that ſuch Jurors were ſworn.

(*a*) 1 Sid. 204. Keb. 727, 744. *cont.* Latch 166.

Poph. 210. Co. Ent. 354. (*b*) Cro. Eliz. 31. 2 Hawk. P. C. 47.

It is clearly (*c*) agreed, that the Inqueſt ſhall be taken on the View of the dead Body, although the Statute be ſilent in this Matter; and that an Inqueſt otherwiſe taken by the (*d*) Coroner, is void.

(*c*) Fitz. Coron. 107. S. P. C. 51. 2 Lev. 141.

Latch 166. Noy 87, 2 Hawk. P. C. 48. (*d*) Therefore where the Body cannot be found, or is ſo putrified that a View would be of no Service, the Coroner without a ſpecial Commiſſion, cannot take the Inqueſt; but in ſuch Caſes it ſhall be taken by Juſtices of Peace, or other Juſtices authorized, by the Teſtimony of Witneſſes. H. P. C. 170. Vent. 352. 2 Hawk. P. C. 48.

If a dead Body, whereon an Inqueſt ought to be taken, be interred, or ſuffered to putrify, before the Coroner hath viewed it, the Gaoler or Town-ſhip ſhall be amerced.

Fitz. Coron. 329, 339, 421. H. P. C. 170. S. P. C. 51. 1 Keb. 278.

Alſo it hath been (*e*) reſolved, that a Coroner may lawfully, within *(f)* convenient Time after the Death, take up a dead Body out of the Grave, in order to view it, not only for the Taking of an Inqueſt, where none hath been taken before, but alſo for the Taking of a good one, where an inſufficient one hath been taken before.

(*e*) 21 E. 4. 70. b. 2 R. 3. pl. 5. S. P. C. 51. H. P. C. 170. Bro. Coron. 167.

(f) As the Space of fourteen Days. 2 Hawk. P. C. 48. and in Carth. 72. where the Coroner, after an Inquiſition that was quaſhed for Inſufficiency, took a ſecond *ſuper viſum Corporis* a Year after the Body had been buried; and the Court refuſed to quaſh it, for *factum valet quod fieri non debet*; and *nota*, that this ſeems to be a Matter Diſcretionary in the Court into which the Inquiſition is returned.

* It is not neceſſary that the Inquiſition be taken in the very ſame (*g*) Place where the Body was viewed; and it hath been reſolved, that an Inquiſition taken at *D.* on the View of the Body lying dead at *L.* may be good.

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Latch 166. *Vide* Poph. 209.

2 Hawk. P. C. 48. S. C. (*g*) But the Coroner cannot by Way of Puniſhment, for not finding according to the Evidence, adjourn the Jury to Places at a great Diſtance from where the Fact was committed; but an Adjournment to the Aſſiſe is proper and well enough. Comb. 386. *per Holt* Ch. Juſt.

A Coroner cannot inquire of any Acceſſories after the Fact; and therefore it hath been reſolved that an Indictment of *J. S.* before a Coroner, for having received and comforted one who hath been Guilty of a Murder, is void.

4 H. 7. 18. b. Keilw. 67. Daliſ. 32. Moor 29. pl. 95.

But he may make Inquiry of the Acceſſories before the Fact; and alſo may inquire whether any ſo Guilty have fled for the ſame; for which they forfeit all their Goods and Chattels.

2 Hawk. P. C. 48. 2 Lev. 141.

A Coroner may, and ought to inquire of all the Circumſtances of the Party's Death, and alſo of all Things which occaſioned it; and (*b*) therefore it is ſaid, that if it be found by his Inqueſt, that the Perſon deceaſed was

Keilw. 61. 2 Hawk. P. C. 48. (*b*) Allen 51.

was killed by a Fall from a Bridge into a River, and that the Bridge was out of Repair, by the Default of the Inhabitants of ſuch a Town, and that thoſe Inhabitants are bound to repair it, the Townſhip ſhall be amerced.

If the Coroner neglects to find on Inquiſition, other Juriſdictions may do it. *Bur. Rep.* 19.

(*c*) S. P. C. 51. H.P.C.171. According to (*c*) ſome Opinions, a Coroner *ex officio* hath no Power to take any Indictment, except of the Death of a Man.

4 Inſt. 271. 2 Inſt. 147. But by others, he ought to inquire of the Breakers of Houſes. Britton 3. 2 Hawk. P. C. 50.——And by the 4 E. 1. ſt. 2. *De officio Coronatoris*, he may inquire of Rape, and the Breach of a Priſon.——And by the ſaid Statute, a Coroner ought to inquire of Treaſure that is found, who were the Finders, and likewiſe who is ſuſpected thereof; and that it may be well perceived, where one liveth riotouſly, haunting Taverns, and hath done ſo of long Time; hereupon he may be attached for this Suſpicion, by four or ſix or more Pledges, if he may be found.——Alſo it is ſaid that a Coroner may inquire of Royal Fiſhes, as Sturgeons, Whales, S. P. C. 51. Bracton 120. 2 Hawk. P. C. 50.

(D) Of Traverſing and Quaſhing ſuch Inquiſitions.

(*d*) 13 Ed. 4. c. 3. pl. 7. and 2 Hawk. P. C. 49. that this Opinion is now exploded.

THE Law gives ſuch high Credit to an Inquiſition of Death, found before a Coroner, that (*d*) antiently the Judges would not receive a Verdict, acquitting a Perſon of the Death of a Man found againſt him by the Coroner's Inqueſt, unleſs the Jury finding ſuch Acquittal, had alſo found what other Perſon did the fact, or by what other Means the Party came to his Death; becauſe it appeared by the Coroner's View, on Record, that a Perſon was killed.

13 H. 4. 13. pl. 6. 5 Co. 109. Dyer 238. H. P. C. 29. 2 Inſt. 147. 3 Keb. 366, 564. 2 Lev. 141.

Alſo it has been formerly held, that if a Perſon were ſlain, and upon the Coroner's Inqueſt *ſuper viſum corporis*, it were found that *J. S.* fled, though *J. S.* were afterwards acquitted both of the Felony and Flight, yet he forfeited his Goods; for the Coroner's Inqueſt is ſo ſolemn, that it is not traverſable; alſo when the Goods are once lawfully veſted in the King, by that Inqueſt the Property of them cannot be deveſted.

But by 2 Hawk. P. C. 54. This Opinion is harſh and unreaſonable, that a Man ſhall be liable to forfeit all his Goods, which may perhaps be all that he is worth, by an Inqueſt taken in his Abſence, without either hearing him, or giving him an Opportunity of defending himſelf.

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Vide 2 Hawk. P. C. 53. and the Authorities there cited.

* The Coroner's Record of an Abduration, or of the Confeſſion of Breaking Priſon, or of the Confeſſion of a Felony by an Approver, eſtops the Party, not only from traverſing the Confeſſion, but alſo from alledging that it was taken from him by *Dureſs*, &c. And it is ſaid, that if the Party plead that he is not the ſame Perſon, he ſhall be concluded by the Coroner's Recording that he is the ſame Perſon; yet in theſe Caſes, it ſeems, that the Judge may in Diſcretion, to inform his Conſcience, take an Inquiry from the People living next the Place, of the whole Circumſtances of the Matter.

S. P. C. 34. 2 Hawk. P. C. 53.

If it be found by a Coroner's Inqueſt, that a Murder was committed in ſuch a Town, and that the Murderer eſcaped untaken, the Townſhip cannot traverſe ſuch Eſcape, becauſe it makes them only liable to an Amercement, & *de minimis non curat lex*.

Alſo

Alſo it is ſtrongly holden in ſome Books, that an Inqueſt of Self-Murder, found before a Coroner, cannot be traverſed; but the contrary Opinion being alſo holden by Books of as great Authority, and ſeeming alſo to be more agreeable to the general Tenor of the Law, in other Caſes, it ſeems to be the better Opinion, that ſuch Inqueſt being moved into the *King's Bench* by *Certiorari*, may be there traverſed by the Executor or Adminiſtrator of the Perſon deceaſed; or, in caſe the Coroner's Inqueſt find him to have been a Lunatick, by the King or the Lord of the Manor. Bro. Coron. 151. 2 Lev. 141, 152. 2 Keb. 859. 2 Jones 198. Vent. 278. 3 Keb. 564, 566, 604, 800. Skin. 45. pl. 16. 2 Hawk. P. C. 54. Bur. Rep. 18.

(*a*) If a Coroner appear to have been corrupt in taking an Inqueſt, it ſeems that a *Melius inquirend'* ſhall go to ſpecial Commiſſioners, who ſhall proceed not on View, but upon Teſtimony, and the Coroner ſhall have nothing to do with ſuch Inqueſt; but (*b*) where his Inqueſt is quaſhed for want of Form only, he ſhall take a new one in like Manner, as if he had taken none before. (*a*) Cro. Eliz. 371.

3 Keb. 800, 856. Mod. 82. Salk. 190. 2 Keb. 859. Vent. 181, 352. 3 Mod. 80, 100, 238. 12 Mod. 112, 496. 2 Ld. Raym. 1248. Andr. 231. Stra. 22. 2 Stra. 1073, 1097. *cont.* 2 Jones 198. (*b*) 2 Rol. Abr. 32. pl. 5. 21 E. 4. 70. b. Salk. 190. 2 Hawk. P. C. 88, 109.

If the Inquiſition ſhall be quaſhed in the Court of *King's Bench*, the Coroner by Leave of the Court may take up the Body again, and take a new Inquiſition. Stra. 167, 533.

(E) Of his Power, as to Bills of Appeal, Appeals of Approvers, and the Abjuration of a Felon.

BY the Common Law, the Coroner might, without the Concurrence of any other, receive an Appeal of Felony or Mayhem, on the Plaintiff's finding ſufficient Pledges to the Sheriff for the Proſecution; but it being provided by *Weſtm.* 1. *cap.* 10. that the Sheriff ſhall have Counter-Rolls with the Coroner, it ſeems that no Appeal, ſince that Statute, is well commenced before the Coroner, unleſs the Sheriff be preſent to take a Counter-Roll of the Proceedings; yet the Coroner ſeems ſtill to be the only Judge. 2 Hawk. P. C. 50, 51.

A Coroner cannot receive a Bill of Appeal of an Offence done out of the County, becauſe there can be no Trial thereof by the County; but he may receive the Appeal of an Approver, or take the Abjuration of one who confeſſes a Felony done in any County; becauſe after ſuch Confeſſions there is no need of any Trial. H.P.C. 171. S. P. C. 52. 2 Hawk. P. C. 51.

A Coroner may certainly award Proceſs, till the Exigent on a Bill of Appeal before him, and ſuch Proceſs ſhall be awarded by him only, and not by him and the Sheriff jointly, and he may proceed thereon till Outlawry; but ſince *Magna Charta*, by which it is enacted, *cap.* 17. *That no Sheriff, Conſtable, Coroner, or other Bailiff of the King, ſhall hold Pleas of the Crown*, he cannot proceed to the Trial of the Appellee. 2 Hawk. P. C. 51. and ſeveral Authorities there cited.

* An Appeal before the Coroner may be removed into the *King's Bench* or *Chancery*, by *Certiorari* directed to the Coroners and Sheriff, but not by one directed to the Sheriff only. *Page 497 H.P.C. 171. 2 Inſt. 176.

The Coroner may receive the Appeal of an Approver, for an Offence in the ſame or in a different County; and if the Appellee be in the ſame County, he may award Proceſs againſt him to the Sheriff till it come to the *Exigent*; but if the Appellee be in a foreign County, the Coroner cannot award 2 Hawk. P. C. 52.

award Proceſs againſt him, but muſt leave it to the Juſtices of Gaol-Delivery, or others before whom the Appeal is afterwards recorded.

2 Hawk. P. C. 52. A Coroner may take the Confeſſion and Abjuration of a Felon, and alſo the Confeſſion of any Felony by an Approver. And as to Abjuration, it is to be obſerved, that at the Common Law, if a Perſon accuſed of any Felony, (except Sacrilege) whether in the ſame or any other County, for which he was liable to Judgment of Death, and not charged with Treaſon, had fled to any Church or Church-yard, and within forty Days confeſſed himſelf Guilty before the Coroner, and declared all the particular Circumſtances of the Offence, and thereupon taken the Oath in that Caſe provided, (the Subſtance whereof was, that he abjured the Realm, and would depart as ſoon as poſſible at the Port which ſhould be aſſigned him, and never return without Leave from the King, *&c.*) he ſaved his Life, if he obſerved the Terms of the Oath, by going with all convenient Speed the neareſt Way to the Port aſſigned, *&c.* but he was attainted of the Felony by ſuch Abjuration, without more, and conſequently forfeited his Lands, Goods, *&c.* And now by 21 *Jac.* 1. *cap.* 28. it is enacted, *That no Sanctuary, or Privilege of Sanctuary, ſhall be admitted or allowed in any Caſe.*

(F) Where the Act of one Coroner ſhall be as effectual as if done by them all.

(a) S. P. C. 53. a. 14 H. 4. 34. (a) WHere-ever Coroners are authorized to act as Judges, as in the Taking of an Inquiſition of Death, or receiving an Appeal of Felony, *&c.* the Act of any one of them who firſt proceeds in the Matter, is of the ſame Force as if all had joined in it; but it is ſaid, that after ſuch Proceeding by one of them, the Act of any other will be void; alſo it is certain that (*b*) where Coroners are impowered only to act miniſterially, as in the Execution of a Proceſs directed to them, upon the Default or Incapacity of the Sheriff, all their Acts will be void wherein they do not all join.

(*b*) 39 H. 6. 40. b. Comb. 435. *& Quære.*

(G) Of Fees that he may lawfully take.

BY *Weſtm.* 1. *cap.* 10. it is enacted, "That no Coroner demand or "take any Thing of any Man to do his Office, upon Pain of great "Forfeiture to the King."

Vide 2 Inſt. 176. That this Statute was made in Affirmance of the Common Law.

But it is enacted by 3 *H.* 7. *cap.* 1. "That a Coroner have for his Fee, "upon every Inquiſition taken upon the View of a Body ſlain, 13*s.* 4*d.* "of the Goods and Chattels of the Slayer and Murderer, if he have any "* Goods; and if he have no Goods, of ſuch Amercements as ſhall "fortune any Townſhip to be amerced for the Eſcape of the Murderer, "*&c.*"

*Page 498 By 25 Geo. 2. c. 29. for every Inquiſition (not taken upon View of a Body dying in Gaol) he ſhall have 20*s.* and 9*d.* for every Mile he ſhall be compelled to travel from his uſual Place of Abode to take ſuch Inquiſition; to be paid by Order of Juſtices in Seſſions, out of the County Rates; for which Order no Fee ſhall be taken. See the Act for Exception to the Coroner of the King's Houſhold, *&c.*

But

But the Coroners endeavouring to extend this Statute to Perſons ſlain by Miſadventure, it was enacted by 1 *H.* 8. *cap.* 7. " That upon a Requeſt " made to a Coroner to come and inquire upon the View of any Perſon " ſlain, drowned, or otherwiſe dead by Misfortune, the ſaid Coroner ſhall " diligently do his Office, without taking any Thing therefore; upon Pain " to every Coroner that will not endeavour himſelf to do his Office, (as " afore is ſaid) or that taketh any Thing for doing his Office upon every " Perſon dead by Miſadventure, for evey Time forty Shillings*.

But ſee preceding Note, *ante* 497.

(H) Of diſcharging him, and for what Miſdemeanors puniſhed.

IF any Coroner be ſo far engaged in any other publick Buſineſs in the County, that he cannot have Leiſure enough to attend the Office of a Coroner, or if he be choſen Verderor of a Foreſt, or if he have not ſufficient Lands in the ſame County whereon to live according to his State and Degree; or if he be diſabled, either by old Age or any inveterate Diſeaſe, as the Palſy, or the like, to execute his Office as he ought; and, as ſome ſay, if he follow any common Trade, he (*a*) may be diſcharged by the Writ *De Coronatore exonerando*, which being directed to the Sheriff, after a Recital of the particular Cauſe of the Diſcharge of ſuch Coroner, commands him to cauſe another to be choſen in his Room.

F.N.B.163. S. P. C. 48. 8 Co. 41. 2 Inſt. 32.

(*a*) *Vide Godb.* 105. That by chuſing another, the Power and Authority of the firſt, *ipſo facto*, ceaſes.

But if any Writ of this Kind be grounded on an untrue Suggeſtion, the Coroner may procure a Commiſſion from the Chancery to inquire of the Truth of it, and to return the Inquiry before the King into Chancery; and if upon ſuch Commiſſion the Suggeſtion be diſproved, the King may make a *Superſedeas* to the Sheriff, that he do not remove ſuch Coroner, or if he have removed him, that he ſuffer him to execute the Office as he did before.

Regiſter 117. b. 178. a. F.N.B.164. S. P. C. 49.

If a Coroner be remiſs in coming to do his Office when he is ſent for, &c. he ſhall be (*b*) amerced by Virtue of the above-mentioned Statute *De Coronatoribus*.

S. P. C. 51. Salk. 377. pl. 21. H.P.C.170. (*b*) That if he returns a wrong Preſentment, an Information will be granted againſt him. Comb. 386.

Alſo by the 3 *H.* 7. *cap.* 1. " If any Coroner be remiſs, and make not " Inquiſitions upon the View of the Body ſlain or murdered, he ſhall forfeit " for every Default one hundred Shillings."

And by the 1 *H.* 8. *cap.* 7. it is enacted, " That if any Coroner ſhall " not endeavour himſelf to do his Office upon any Perſon dead by Miſ- " adventure, he ſhall forfeit forty Shillings."

Alſo by the 3 *H.* 7. *cap.* 1. it is enacted, " That if any Coroner do " not certify his Inquiſition, he ſhall forfeit one hundred Shillings."

And by 25 Geo. 2. c. 29. If any Coroner not appointed by an annual Election, or whoſe Office is annexed to any other Office, ſhall be convicted of extorting more than his lawful Fees, or of wilful Neglect of his Duty, or Miſdemeanor in his Office, the Court may adjudge him to be amoved from his Office; and ſee the Statute for the Manner of chooſing another.

CORPO-

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And herein,

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4. What Things they may take in Succession. 508.
5. Where they shall be liable in their natural Capacities. 509.

(F) Of the Dissolution of Corporations. 509.

(A) Of the Nature and different Kinds of Corporations.

CORporations are of several Natures, all of them instituted for the better Government of a People combined together, and living under a regular System of Laws.

Of Corporations some are Sole and some are Aggregate; a Sole Corporation consists of one Person only, as the (a) King; so a Clergyman, by being made (b) a Bishop, Prebend, Parson or Vicar, is (c) said to be a Sole Corporation.

10 Co. 29. b. 31. b. Rol. Abr. 512.

(a) Who is a Corporation Sole by the Common Law, and has thereby several Privileges and Prerogatives distinct from a common Person, *vide* Tit. *Prerogative*. (b) These are founded by the King, and are under Ecclesiastical Government, yet the Common Law takes Notice of them, though not originally.——(c) If he holds his Possessions singly, he is a Corporation Sole; but yet if with others he makes a Chapter, he is thereby Member of a Corporation Aggregate; so the same Person, by being Incumbent of the same Preferment, may be both a Corporation Sole, and a Member of a Corporation Aggregate. Comp. Incumb. 372.

A Corporation Aggregate is an (*a*) Artificial Body of Men, compoſed of divers conſtituent Members *ad inſtar Corporis humani*, the Ligaments of which Body Politick or Artificial Body are the Franchiſes and Liberties thereof, which bind and unite all its Members together; and the whole Frame and Eſſence of the Corporation conſiſt therein. *Page 500 4 Mod. 54. Carth. 217. Show. 280.

(*a*) And is ſaid to be inviſible and immortal, and can only be created by Act of Parliament or the King's Charter; for though ſome Corporations are ſaid to be by Preſcription, yet ſuch Preſcription always ſuppoſes an original Grant from the Crown, which being loſt or worn out by Time, yet having run out into a Preſcription, ſtill continues to unite them. 45 E. 3. 2, 3. Co. Lit. 130. 2 Bulſ. 233. *Vide* in the Argument of *Quo Warranto* againſt the City of *London*, 115. Kelw. 138.

Alſo Corporations are ſaid to be Eccleſiaſtical or Lay; of Eccleſiaſtical Corporations ſome were called (*b*) *regular*, as Abbots, Priors, &c. other *ſecular*, as Biſhops, Deans, &c. Co. Lit. 250. a. 3 Inſt. 202.

(*b*) Thoſe lived under certain Rules, and had vowed true Obedience, wilful Poverty, and perpetual Chaſtity; but are now diſſolved. Co. Lit. 93.

Of Lay Corporations ſome are ſaid to be for general Government; as thoſe of Mayor and Commonalty, &c. ſome for a particular Purpoſe, as for the Advancement of (*c*) Learning, (*d*) Charity, or ſome (*e*) particular Trade or Branch of Buſineſs: Theſe receive their Sanction from the Crown, and muſt be by the King's Licence; though a private Perſon may be Founder, and may give them Laws to which they muſt ſquare themſelves in their future Conduct.

(*c*) Which by the Civil Law are called Colleges or Univerſities, yet are conſidered as Lay Corporations. Carth. 92. (*d*) Such are Hoſpitals. (*e*) As *Trinity-Houſe* for regulating Navigation, *South-Sea* Company, &c. *Vide* Tit. *Mandamus*.

(B) By whom, and in what Manner created.

THE King, by Virtue of his Prerogative, is the (*f*) only Perſon that can erect either an (*g*) Eccleſiaſtical or (*h*) Lay Corporation.

(*f*) The Pope could not have founded or incorporated a College, &c. here, but it ought to have been done by the King himſelf. 4 Co. 107. b. (*g*) 5 Co. 26. a Cawdry's Caſe. (*h*) 49 E. 3. 4. 49 Aſſ. 9. Bro. Preſcription 12. 10 Co. 33. b.

Yet the King may give Power to a common Perſon to name the Corporation, and the Perſons it is to conſiſt of; but when he hath ſo done, this Corporation does not take its Eſſence from the common Perſon, but from the King. 10 Co. 33. b.

Alſo by the 3 *Eliz. cap.* 5. every Perſon ſeiſed of an Eſtate in Fee-ſimple, may by Deed inrolled in the High Court of Chancery erect an Hoſpital or Houſe of Correction, which ſhall be incorporated, and have perpetual Succeſſion, and ſhall be viſited by ſuch Perſons as ſhall be nominated by the (*i*) Founders thereof, &c. *Vide* 2 Inſt. 720. This Statute expounded.

(*i*) By the Common Law, he that gives the firſt Poſſeſſion to the Corporation, is the Founder. 38 Aſſ. 22. 50 Aſſ. 6. Bro. Corody 12. 1 Co. 33. b.—But if the King and a common Perſon give Poſſeſſions to a Corporation at one and the ſame Time, the King only ſhall be the Founder by his Prerogative. 5 Aſſ. 6.

In the creating a Corporation, the Law does not ſeem to require any ſet Form of Words to be made uſe of, as *incorporo fundo, erigo*, &c. but any Words (*k*) equivalent will be ſufficient. 10 Co. 30. Stile 198.

(*k*) As *conſtituimus* the Men of ſuch a Town a Corporation, *viz.* Mayor, &c. 2 Rol. Abr. 197.

The King may grant to the Commonalty of *D.* that they ſhall be incorporate by the Name of Mayor, &c. and that they may chuſe a Mayor, &c. and this is a good Corporation, though the Election of a Mayor is *in* (*a*) *futuro*: for there is a Diverſity between a Power, Li-
*Page 501 * berty, Franchiſe, or other Thing newly created, which may take Effect *in futuro*, and an Eſtate or Intereſt which none can take without a preſent Capacity.

(*a*) By a ſpecial Act of Parliament it was enacted, that there may be built one meet Houſe, &c. that the ſame may be called, &c. and the Lord, &c. may be Governors, &c. and the ſaid Governors, &c. ſhall for ever hereafter be incorporated, &c. it was reſolved, that no Hoſpital was incorporated by this Act, becauſe all the Words are *de futuro*. Co. 23, 24.

(*b*) Rol. Rep. 226. (*c*) 2 Brownl. 100. A Patent procured by ſome few Perſons only, ſhall not (*b*) bind the Reſt, nor (*c*) can the Inhabitants of a Town be incorporated without the Aſſent of the major Part of them.

3 Mod. 13. (*d*) Of antient Time the Inhabitants of a Town were incorporated when the King granted to them to have *Guildham Miseratoriam. Reg.* 219. 10 Co. 30. As it is the King's Charter that creates Corporations, ſo ſuch Charter (*d*) may mould and frame them as it ſhall think fit.

21 E. 4. 56. 7. E. 4. 3. 2 H. 7. 13. (*e*) If the King grants *Hominibus de Iſlington* to be diſcharged of Toll, this is a good Corporation to this Intent but not to purchaſe. 21 E. 4. 59——Where the King, in giving Lands to the Inhabitants of a Town on a Suppoſition that they were incorporated, ſhall be ſaid to be deceived in his Grant, and the Grant void. 1 Rol. Abr. 513. Co. Lit. 3. a. Lane 21.——By the Foreſt Law, a Grant of a Privilege within a Foreſt, to all the Inhabitants, being Freeholders within this Foreſt, is good. 4 Inſt. 297. (*f*) By this they have Capacity to take, but not to grant the Lands to another. Cro. Eliz. 35. (*g*) Where a Charter made to Aliens may incorporate them *quoad* the King and not *quoad* others. Rol. Rep. 148, 296. (*h*) But if the King releaſes the Rent, the Corporation is *ipſo facto* diſſolved. Dyer 100. pl. 70. If the King grants Lands to the Men or Inhabitants of *D.* *hæredibus & ſucceſſoribus ſuis*, rendering (*e*) Rent (*f*) for any Thing touching (*g*) theſe Lands, (*h*) this is a Corporation, but not to other Purpoſes.

10 Co. 31. 49 E. 3. 4. 49 Aſſ. 8. Moor 584. Sid. 291. 2 Keb. 52, 63, 88. Salk. 192. pl. 5. One Corporation may be made out of another; but it muſt be by the King's Charter; therefore where the Mayor and Commonalty of *London* preſcribed to make another Corporation in the City; though their Cuſtom are confirmed, yet it was held not to be good, without the King's Charter.

(C) Of the Names of Corporations: And herein

1. Of the Name in its Creation.

5 E. 4. 201. Leon. 207. Dyer 106. 11 Co. 21. Perk. 8. THE Names of Corporations are given of Neceſſity; for the Name is, as it were, the very Being of the Conſtitution; for though it is the Will of the King that erects them, yet the Name is the Knot of their Combination, without which they could not perform their Corporate Acts; for

it is no Body to plead and be impleaded, to take and give, until it hath (*a*) got a name. 27 H. 6. 3. Hob. 32. Lit. 201.

11 Co. 20. Owen 35. Dalf. 78. (*a*) 2 Bendl. 2. 10 Co. 28. 2 Inft. 666. that the Name of a Corporation is as the Name of Baptiſm, which cannot be changed. ‡

‡ This means by the Corporation itſelf, for the King may grant and the Corporation accept a new Charter by a different Name.

The Names of Corporations are uſually taken, firſt, from the Perſons of which they conſiſt; ſecondly, from the Uſe and Deſign of their Being; thirdly, from the Names of the Patrons that firſt procured their Inſtitution; fourthly, from the Place where they reſide; fifthly, from the Names of Saints.

But though a Corporation muſt have a Name, yet that muſt be underſtood to be either expreſſed in the Patent, or implied in the Nature of the Thing; as if the King ſhould incorporate the Inhabitants of *Dale* with Power to chuſe a Mayor annually, though no Name be given, yet it is a good Corporation, by the Name of Mayor and Commonalty. So the City of *Norwich* is incorporated to be a Mayor and Sheriffs, by the Charter of *Henry* the Fourth, and are called Mayor, Sheriff and Commonalty. Salk. 191. pl. 3. *Per Holt.* Ch. Juſt. *Page502

Alſo the King may incorporate a Town by a Name, and after by another Name, and then they ſhall uſe their Name according to their ſecond Corporation; and (*b*) yet they ſhall continue their (*c*) Poſſeſſions they had before by the other Name. 21 E. 4. 59. Fitz. Grant 30. S. C. (*b*) So a Debt to the Corporation remains, though their Name is changed by a new Charter. 3 Lev. 238. (*c*) And all other Franchiſes and Privileges. 4 Co. 87. b.

So a Corporation may be incorporated by one Name, and Power given them to ſue and purchaſe Lands by another Name. Jones 261. *College of Phyſicians* and *Butler*. Lit. Rep. 168, 212, 350. Cro. Car. 256. S. C.

The College of Phyſicians were incorporated by the Name of the Preſident, College or Commonalty of the Faculty of Phyſick; and afterwards in the Patent it was granted that the Preſident of the College ſhould ſue and be ſued in Behalf of the College. The College brought an Action againſt Dr. *Salmon*, upon the Statute for practiſing without Licence, under the Seal of the College, and declared by the Name of the Preſident and College, or Commonalty; and the Court allowed to ſue by either; and ſo were the Precedents; for though it was a rare Inſtance that the Corporation ſhould be incorporated by one Name, and have Leave to ſue by another Name; yet when it is ſo, it is very natural and proper. 5 Mod. 327. *College of Phyſicians* v. *Dr. Salmon*. 2 Salk. 451. S. C. pl. 2. Ld. Raym. 680.

2. How far the Name may be varied from, in Grants by or to a Corporation.

Although the Names of Corporations are not merely arbitrary Sounds, yet if there be enough ſaid to ſhew that there is ſuch an artificial Being, and to diſtinguiſh it from all others, the Body Politick is well named, though the Words and Syllables are varied from; and this the rather in Grants, which are to have a favourable Conſtruction. 10 Co. 125. Gouldſ. 122.

So if the Name be expreſſed by Words, (*d*) ſynonimous, it is ſufficient; as if a College be inſtituted by the Name of *Guardianus & Scholares Domus* 10 Co. 125. (*d*) So if the Grant be

made by *Præpoſitus & Socii*, where it ſhould be *Scholares*, it is good. 11 Co. 20.——So if *J. S.* Abbot of *B.* makes a Leaſe by the Name of *J. S. Clericus de B.* 11 Co. 21.

ſive Collegii Scholarium de Merton, and they make a Leaſe by the Name of *Cuſtos & Scholares*, it is good.

10 Co. 125. The Caſe of the Mayor and Burgeſſes of *Lynn Regis*.

If there be a Corporation founded by the Name of *Mayor and Burgenſes Burgi Dom' Regis de Lynn Regis*, and an Obligation is made to them by the Name of *Mayor and Burgenſes de Lynn Regis*, without ſaying *Burgi Dom' Regis*, it is well enough; for the Parties are ſufficiently expreſſed; and all Boroughs are founded by the King.

Hob. 124. Stra. 614.

If a Houſe be founded by the Name of *Miniſter Dei pauperis Domus*, and a Leaſe be made by the Name of *Miniſter pauperis domus Dei*, this is well enough; for the ſame Deſign is ſpecified by both Names.

10 Co. 125.

But if a Houſe be founded by the Name of *Guardianus & Scholares Domus ſive Collegii Scholarium de Merton*; and a Leaſe be made by them, by the Name of *Guardianus & Scholares Domus ſive Collegii de Merton*, it is a material Variance of the Name, ſince they have not expreſſed the Deſign of the Houſe, which is a ſubſtantial Part of the Name.

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11 Co. 20. *Arrat's* Caſe.

* But if a College be inſtituted by the Name of *Aula Scholarum Reginæ*, to be governed by a Provoſt, and they are confirmed by the King, by the Name of *Præpoſitus & Scholares Aulæ Reginæ*, and they make a Grant of an Advowſon by that Name, this is good; for that College would never have a Name according to the Words of the firſt Charter, for then it would be a ſole Corporation, which is contrary to the general Convenience of ſuch a Body, for the Name would be *Præpoſitus Scholarum Aulæ Reginæ*, which cannot be intended, and the Word *Scholares* is not required as in the former Caſe; and the placing it where it is confirms the Eſtabliſhment; and this Confirmation of the King, and common Appellation, are good Interpreters of the original Intent of the Name.

Co. 124.

Edward the Fourth incorporated the Dean and Canons of *Windſor*, by the Name of *The King's Free Chapel of St. George the Martyr*; and in the Time of *Philip* and *Mary* they made a Leaſe, by the Name of *The Dean and Canons of the King's and Queen's Free Chapel, &c.* this was held a material Miſtake of the Name; for it takes its Name from the Founder, that is here miſtaken, and the Name of a different Perſon ſubſtituted in his Room.

Poph. 57.

If a Corporation be founded by the Name of the Dean and Chapter of the Cathedral Church in *Oxford*, and they make a Leaſe by the Name of the Dean and Chapter of the Cathedral Church in the Univerſity of *Oxford* this is well enough; for the (*a*) Place of the ſituation is well and ſufficiently ſhewn.

(*a*) A Corporation muſt be named of ſuch a Place as will diſtinguiſh its Situation from others. *Vide* 10 Co. 29. b. 32. b. 2 Brownl. 244. And. 196. Rol. Abr. 513.

10 Co. 124. (*b*) So if a Corporation be inſtituted in Honour of *St. George the Martyr*, and in the Leaſe they omit the Word *Martyr*, it is well enough; for the Name of Dedication is but an empty Sound, and no otherwiſe requiſite than to diſtinguiſh the Corporation from all others. Poph. 59.

If the Prior of *St. Michael of Coventry* makes a Leaſe by the Name of *The Dean of Coventry*, this is good; ſo (*b*) if they had granted an Annuity or Corody, and the Name of the Saint had been omitted.

Cro. Eliz. 816.

If there be an immaterial Addition, this does not hurt; as if *The Preſident and Scholars of Corpus Chriſti College in Oxford* make a Leaſe by the Name of *Preſident and Scholars of Corpus Chriſti College in Oxon Com' Oxon*, this is good; for *utile per inutile non vitiatur*.

Leon. 307. Dyer 106. 11 Co. 21.

In Deviſes, if the Name of the Corporation be miſtaken, yet if there be Words ſufficient to ſhew that the Teſtator could only mean and intend ſuch

an one, it will be ſufficient; as a Deviſe to *George Biſhop of Norwich*, when his Name is *John*, &c. Perk. 8. Owen 35. Daliſ. 78.

But if a Deviſe be to the Abbot of *St. Peter*, where it is really the Abbot of *St. Paul*, the Deviſe is void; for here the Saint's Name is the only Specification of the Party in the Deviſe, which is miſtaken. Hob. 33. 19 H. 8. 8.

3. How far it may be varied from in Pleading and Judicial Proceedings.

There is a Difference between Writs, Declarations, &c. and Obligations and Leaſes, &c. for if the Name of a Corporation be miſtaken in a Writ, a new Writ may be purchaſed of common Right; but if it were fatal if miſtaken in Obligations and Leaſes, the Benefit of them would be wholly loſt; and therefore one ought to be ſupported, though not the other; as (a) where *John Abbot of N.* granted Common of Paſture to *J. S.* by the Name of *William Abbot of N.* this was held good; but if this Name had been thus miſtaken in a Writ, it had been fatal. 6 Co. 65.

(a) A Corporation was inſtituted by the Name of *Præfecti & Guardianorum naupegor' de Rederiffe*, and an Action brought by the Name of *Præfati Gardianis &* Sociis, and held ill. 2 Bulſt. 233. *Tipling* and *Pexal*, and 11 Co. 21.—In pleading a Leaſe by a Dean and Chapter, the Name of the Dean muſt be ſhewn. Co. Lit. 3. a.

• There is alſo a Difference between an ancient Corporation and a Corporation newly erected; for an ancient Corporation, by Uſe, may have a ſpecial Name differing in Subſtance, but otherwiſe of a Corporation created within Memory; for this regularly can only have the Name by which it is inſtituted. •Page 504 Hob. 211. Noy 54. 2 Brownl. 292. Latch. 229. 3 Mod. 6. 11 Co. 94. Dyer 279.

If the Advowſon of Popiſh Recuſants Convict be given to the Chancellor and Scholars of the Univerſity of *Oxford*, and they bring their Action by the Name of the Chancellor, Maſters and Scholars of the Univerſity of *Oxford*, this is well brought; for a Corporation by Act of Parliament may take by another Name than that by which it was inſtituted; for in Acts of Parliament, the Subject and Deſign of the Legiſlature muſt be reſpected; and thoſe that have the Power wholly to change the Name of Things, have certainly Power to alter it in any Act of theirs; and all inferior Juriſdictions are bound to ſupport the Senſe of the Law, and not to deſtroy it, if it hath any Meaning. 10 Co. 87. *Chancellor of Oxford's* Caſe.

A Parſon muſt be impleaded by Chriſtian and Surname, and not *John*, Parſon of *D.* &c. but in other ſole Corporations, the Chriſtian Name only is ſufficient; as *John*, Biſhop of *Canterbury*; *Thomas*, Abbot of *D.* &c. 2 Inſt. 666. Yelv. 34, 49. 2 Inſt. 666.

But where the Corporation is aggregate of many capable Perſons, as Mayor and Commonalty, Dean and Chapter, &c. none of them in pleading are named by their proper Chriſtian and Surnames; and the Reaſon is, becauſe, in the firſt Place, the Death of the Individual is a good Plea in Abatement, for a new Succeſſor comes in his Place, that was not Party to the former Writ; but Bodies aggregate are immortal and invariable; and therefore the Parties to the firſt Writ are always the ſame. Skin. 2. pl. 2.

If a Writ is brought by the (b) Warden and College of *All Souls*, for Lands, &c. *quod clamant eſſe jus & hereditatem ſuam*, this is well enough, though it is not ſaid *Jure Collegii*; for they have no other Capacity. Cro. Eliz. 232. Leon. 153. And. 272. S. C.

(b) If a Parſon pleads he was ſeiſed, he muſt ſay *Jure Eccleſiæ*, for that he hath two Capacities; *ſecus* of an Abbot, Dean and Chapter, &c. Leon. 153. *per Anderſon.*—So in Caſe of a Biſhop, it muſt be ſhewn *quo Jure*. 2 Lev. 68. Vent. 223.—Where it cannot be alledged that a Man was ſeized *Jure Præſentati*, but ought to be *Jure Cantariæ*, *vide* Cro. Car. 215.—If a Dean and Chapter, being Parſons *impariſonee* of the Church of *D.* demand the whole Church, &c. they ſhall ſay they were ſeiſed *Jure Eccleſiæ de D.* Plow. 503.

If

Cro. Car. 574. *Healing* and *The Mayor of London.* Cowp. 407, 841. Doug. 114. 1 Term Rep. 782.

If the Corporation be named by their Name, and afterwards miſtaken; as if Judgment be given in an Action of Debt, that the Mayor or Commonalty and Citizens ſhould recover the Debt and 6*l.* Coſts *eiſdem Major' Communitati* adjudged (omitting *civibus*) was held to be Error: But afterwards upon Motion in *C. B.* and upon Examination of the Doggett Roll (where it was well entered) it was awarded to be amended.

3 Term. Rep. 749.

(D) What Things are incident to a Corporation.

3 Mod. 13. Rol. Abr. 513.

A Corporation is a Creature of the Charter that conſtitutes and gives it Being, and preſcribes Bounds and Limits to its Operations, beyond which it cannot regularly proceed; yet there are ſome Things (*a*) incident to a Corporation, and which it may do without any expreſs Proviſion in the Act of Incorporating.

(*a*) That when a Corporation is duly created, all other Incidents are tacitly annexed. 10 Co. 30. b. that it is incident to ſue and be ſued, to purchaſe and ſell; but *vide* Tit. *Mortmain*, and 10 Co. 30. Rol. Abr. 515. Hob. 211.

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* As if the King creates a Corporation, and does not give any expreſs Power in the Letters Patent to make Laws, yet this Power is incident to the Corporation, and included in their Incorporation; for a Body Politick cannot be governed without Laws, but theſe By-Laws (*b*) ought always to be ſubject to the Laws of the Realm, as ſubordinate thereto.

10 Co. 31. Hob. 211. Moor 584. 5 Mod. 439.

(*b*) That every By-Law, by which the Benefit of the Corporation is advanced, is a good By-Law, for that very Reaſon, that being the true Touchſtone of all By-Laws. Carth. 482. *per Holt, vide* Tit. *By Laws.*

Antient Corporations have, as incident to them, a Power of (*c*) electing Members; but in newly erected Corporations, the Charter that gives them Being, muſt provide for their Continuance and Succeſſion.

12 Co. 120. 3 Mod. 14.

(*c*) If the King creates a Corporation of a Mayor and eight Aldermen, with a Clauſe in the Patent, *Quod ſuper mortem vel remotionem alicujus Aldermanni liceat majori & cæteris Aldermannis infra octo dies proximè poſt mortem vel remotionem, &c.* to elect another Alderman into his Place, though no Election be within eight Days after the Death of an Alderman, yet they may elect an Alderman at any Time after. Rol. Abr. 513, 514. And now *vide* the 11 Geo. 1. c. 4. and for the Manner of electing, 9 Ann. c. 20. 3 Bulſt. 71. Salk. 190. pl. 1. and Tit. *Officers.*

Rol. Abr. 515. Godb. 439. & *vide* the Statute 33 H. 8. c. 27.

If a Corporation be created of a Mayor and eight Aldermen, with a Clauſe in the Patent, that if any of the Aldermen die, or be removed, that it ſhall be lawful for the Mayor, and the Reſt of the Aldermen, within eight Days after the Death or Removal, to elect another in his Place, though it is not limited that they, or the greater Number of them, may elect, yet the greater Number may elect.

Rol. Abr. 515.

And if in the above Caſe, the Mayor, at the Time of the Death of an Alderman, be abſent from *London* till after the eight Days, and the Aldermen, within eight Days, come to the Deputy, and require him to make an Aſſembly of them to elect another within the eight Days, and he refuſes, and thereupon the greater Part of the Aldermen aſſemble themſelves without the Mayor or his Deputy, and elect an Alderman; this is a void Election, for the Mayor (*d*) ought to be preſent at it, by the Words of the Grant.

(*d*) But for this *vide* 3 Mod. 15. and how it is now remedied where the Mayor, or other Officer, who ought to preſide wilfully or accidentally abſents himſelf, by the 11 Geo. 1. c. 4. *

* By this Statute, where the Election is omitted, the Court of King's Bench is to award a *Mandamus*

Alſo

Alſo where a Charter impowers a Corporation to chuſe officers, it impliedly obliges the Perſons choſen to undergo and to ſtand to the Nomination; for by accepting of any Letters Patent, there is an Obligation on the Parties accepting to perform all Things thereby required, as to undergo all Charges, Offices, &c. 5 Mod. 440.

Corporations have alſo divers Franchiſes, &c. as Felons Goods, Waifs, Eſtrays, Treaſure-Trove, Deodands, Courts and Cogniſance of Pleas, Return of Writs, Fairs, Markets, Exemptions from ſerving in Offices or on a Jury, Exemptions from payment of Toll, the Aſſiſe of Bread and Beer, a Pillory and Tumbrel, the Office of a Juſtice of Peace, Coroner, Clerk of the Market, &c. but theſe muſt be mentioned in the Charter, and granted by expreſs Words. 14 H. 8. 5. 19 H. 6. 52. 39 E. 3. 35. Lev. 159. Keb. 840. Raym. 113.

And if there be Letters Patent, which grant to the Body Politick an Exemption from Tolls or Privileges of Fairs, (a) Commons, &c. all the particular Members ſhall take Advantage of theſe Grants. 5 Mod. 440. 6 Mod. 52.

(a) But a Corporation of a Town cannot preſcribe for the Freeholders of the Town. 2 Keb. 25.

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*(E) How Corporations differ from natural Perſons: And herein, *Page506

1. Of Grants made by and to them.

ALthough a Corporation Aggregate is ſaid to be inviſible, immortal, and to exiſt only in Suppoſition and Intendment of Law, yet ſuch an artificial Body are by their Creation (b) capable of (c) purchaſing and parting with their Poſſeſſions. 45 E. 3. 2, 3.

(b) Such Corporations are not capable of a Protection *proſecutur'* or *moratur'*, becauſe the Corporation itſelf is inviſible, and reſteth only in Conſideration of Law. Co. Lit. 130. 2 Bulſt. 233.—It hath not been known that a Corporation hath been bound in a Recogniſance or Statute Merchant. Moor 68. pl. 182.*—They cannot do Homage or Fealty, becauſe they muſt be done in Perſon. Co. Lit. 66. b. 4 Co. 11. a. 10 Co. 32. b. (c) But they cannot retain, without a due Licence, in *Mortmain*. Co. Lit. 99. *vide* Tit. *Mortmain*.

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* *Sed qu.* if it might not legally be done, under the Common Seal.

But a Dean without the Chapter, a Mayor without his Commonalty, the Maſter of a College or Hoſpital without his Fellows, cannot purchaſe or grant, or make any Contract that will bind the Corporation. 21 E. 4. 12. Moor 51.

If a Remainder be limited to ſuch a Corporation as the King ſhall next erect, this is no good Remainder, though a Corporation be erected before the particular Eſtate determine; for though a Remainder limited to the eldeſt Son of *J. S.* in ſuch a Manner be good, yet this Body of Men is only capable of taking when they are *in eſſe*. *Vide* Tit. *Remainder and Reverſion.*

If a Feoffment or Grant be made by Deed to a Mayor and Commonalty, or any other Corporation Aggregate of many Perſons capable to purchaſe, they have a Fee-ſimple without the Word *Succeſſors*, (d) becauſe in Judgment of Law they never die. Co. Lit. 9.

(d) So if Lands are given to the King by Deed inrolled, without the Word *Succeſſors* or *Heirs*, a Fee-ſimple paſſeth. Co. Lit. 9.

If a Leaſe be made to a Corporation Aggregate for the Life of the Leſſor, this is a good Eſtate for Life, becauſe the Life of the Leſſor, which is 21 E. 4. 76. Rol. Abr. 843.

is wearing and will determine, is the Meaſure of its Continuance; but if a Leaſe be made to a Corporation Aggregate for their own Lives, this is no Eſtate for Life, but a Fee-ſimple; for the Leaſe being made to them as a Body Politick, which hath a continued Succeſſion, and never dies, a Leaſe made to them during their Lives, is equal to a Grant made to them while they continue a Body Politick, which, by Reaſon of the perpetual Succeſſion of its Members, is in Law looked upon to be for ever.

Co. 122, 126. (c) Whether they may be an Executor, *vide* 1 Rol. Abr. 915.*

A Corporation cannot be ſeized to the (c) Uſe of another; and therefore it is ſaid, that if one by Licence, without a valuable Conſideration, make a Feoffment, levieth a Fine, or ſuffers a Recovery, or the like, to a Corporation, to the Uſe of *J. S.* that the Corporation ſhall have it to their own Uſe.

* In Danv. 3. V. 365. it is ſaid a Mayor and Commonalty may be Executor, cites 12 E. 4. 9. b. admitted. Wentw. Off. Exec. 24, 25. S. P.

Leon. 30.

If *A.* grants to the Mayor and Burgeſſes of *D.* the Moiety of a Yard-Land, in the Waſte of ——— without deſcribing in what Part it ſhould be, or how it is bound, the Corporation cannot make their Election by Attorney, but are firſt to reſolve on having the Land, and then they make a ſpecial Warrant of Attorney, reciting the Grant to them, and in which Part of the ſaid Waſte their Grant ſhould take Effect, and according to ſuch Direction the Attorney is to enter.

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* 2. How they are to ſue and be ſued.

Co. Lit. 66. (a) They cannot be eſſoigned.

Corporations Aggregate muſt ſue and defend by (a) Attorney; and therefore the (b) proper Proceſs againſt them is a *Diſtringas*.

Dalſ. 121. pl. 154.—cannot be outlawed. 10 Co. 32. b—No Attachment lies againſt a Corporation. Raym. 152.——(b) Where on ſuch Proceſs the Court will order the Sheriff to return good Iſſues. Salk. 191. pl. 2.

2 Vern. 396. Preced. Chan. 128.

After Service of a Writ of Execution of a Decree againſt a Corporation, the next Proceſs is a *Diſtringas*, and after that a *Sequeſtration*, which being once awarded, they can never after come and pray to enter their Appearance, as they might have done on the *Diſtringas*, which iſſues for that very Purpoſe to compel them to appear; but the Appearing being paſt, the Proceſs muſt go, becauſe the Appearance being only in Favour of Liberty, can be of no Service to a Corporation, which cannot be committed.

Brownl. 175. (c) Cannot be declared againſt, as *in Cuſtodia Mareſchalli.*

A Corporation Aggregate cannot diſtrain in their own Perſons, but by their Bailiff, and therefore no (c) Replevin lies againſt them by the Name of their Corporations.

6 Mod. 183. Ld. Raym. 79. 12 Mod. 559, 672. 3 Will. Rep. 426. Stra. 612. 2 Ld. Raym. 1532. Stra. 614. Cannot ſue as a Common Informer. 2 Stra. 1241.

3. What they may do without Deed.

Co. Lit. 94. b. 6 Co. 38. b. Cro. Car. 170.

Aggregate Corporations, conſiſting of a conſtant Succeſſion of various Perſons, can regularly do no Act without Writing; therefore Gifts (d) by and (e) to them, (f) muſt be by Deed.

2 Sand. 305. Raym. 194. (d) They cannot attorn without Deed. 6 Co. 38. b. (e) A Gift to a Dean and Chapter, or other Corporation Aggregate, muſt be by Deed. Co. Lit. 94. b.—But an Abbot, Biſhop, Parſon, &c. or other ſole Body Politick, might have been infeoffed without Deed. Co. Lit. 94. b.—(f) Where if pleaded, the Thing is done, it muſt be intended by Deed. Cro. Jac. 411. 2 Saund. 305.

A Cor-

A Corporation Aggregate cannot, without Deed, command their Bailiff to enter into certain Lands of their Leaſe for Years, for a Condition broken. Rol. Abr. 514. Cro. Eliz. 815. 2 Rol. Abr. 699. S. C. & *vide* Cro. Jac. 411. Cro. Car. 269.

But a Corporation may employ one in ordinary Services without Deed, as a Butler, Cook, &c. but not to appear for them in an Aſſiſe, or any other Act which concerns their Intereſt or Title. Vent. 47. Mod. 18.

So a Man may avow the taking Cattle Damage-feaſant, as Bailiff to a Corporation, without having any Precept in Writing. 3 Lev. 107.

Alſo a Corporation Aggregate may appoint a Bailiff to diſtrain without Deed or Warrant, as well as a Cook or Butler; for it neither veſts nor deveſts any Sort of Intereſt in or out of the Corporation. Salk. 191. pl. 3.

So if the Sheriff makes a Warrant to a Corporation that hath Return of Writs to arreſt a Man, they may by Parol make a Bailiff to execute it. Moor 552.

If a Leaſe for Years be made to a Corporation Aggregate of many, they cannot make an (*a*) actual Surrender thereof, but by Deed under their Seal. 10 Co. 68.

(*a*) But if they accept a new Leaſe thereof, this is a Surrender in Law of their firſt Leaſe. 10 Co. 68. b.

If the Churchwardens of *S.* are incorporated, &c. and the King leaſes, &c. to them for twenty-one Years, and, in Conſideration of a Surrender thereof, leaſes to them for fifty Years, they may with their own Hands, and without Writing, (*b*) deliver the firſt Letters Patent into Chancery to be cancelled. 10 Co. 68. *Page 508

(*b*) A Dean and Chapter in their Chapter Houſe acknowledged a Deed of Grant of their Lands to the King, without making an Attorney. Moor 676. held clearly by *Egerton* Lord Keeper, that it might be done, as well as to put their common Seal to a Deed without Attorney; but *vide* Leon. 184. Rol. Rep. 82.

In *Ejectment*, the Plaintiff declared upon a Demiſe made to him by the Aldermen and Burgeſſes of ——— without ſetting forth that it was by Deed, or under the Seal of the Corporation, and on a Writ of *Error*, it was held well enough; and that this being a fictitious Action to try the Title, the Demiſe need not (*c*) now be ſet out to have been by Deed. Carth. 390. *Patrick* v. *Balls*.

(*c*) Where in an Ejectment for Tithes, the Demiſe not being by Deed, the Judgment was arreſted. Cro. Jac. 613. *Swadling* and *Piers*.

If a *Mandamus* be directed to the Mayor and Commonalty of *T.* the Return may be made in the Name of the Corporation, without the Common Seal, or the Hand of the Mayor ſet to it; for though a Corporation cannot do an Act *in pais* without their Common Seal, yet they may do an Act upon Record, by which they are eſtopped to ſay it is not their Act. Salk. 192. pl. 4. & *vide* Skin. 154. pl. 2. Seal of a Corporation, put to a Deed by a Perſon who is not Mayor, does not make it the Deed of the Corporation. 12 Mod. 423.

4. What Things they may take in Succeſſion.

A Corporation Aggregate may take any Chattel, as Bonds, Leaſes, &c. in its Political Capacity, which ſhall go in Succeſſion, becauſe it is always in Being. Co. Lit. 46. b. Rol. Abr. 515.

But (*e*) regularly, no Chattel ſhall go in Succeſſion, in Caſe of a Sole Corporation. Co. Lit. 46. b. Hob. 64. Dyer. 48.

Co. Lit. 9. a. (*c*) But a Sole Corporation by Cuſtom may be enabled by the ſame Cuſtom to take a Chattel in Succeſſion, as the Chamberlain of *London*, whoſe Succeſſor by Cuſtom may have Execution of a Bond or Recognizance acknowledged to his Predeceſſor for Orphanage Money. 4 Co. 65. Cro. Eliz. 464, 682.

Therefore

Therefore if (*d*) a Leaſe for Years be made to a Biſhop and his Succeſſors, and the Biſhop dies, this ſhall not go to his Succeſſors, but to his Executors.

Co. Lit. 46. b. (*d*) The Ornaments of the Chapel of the Predeceſſor belong to the ſucceeding Biſhop, and are merely in Succeſſion, though other Chattels, in caſe of a Sole Corporation, belong to the Executors of the deceaſed, and go not in Succeſſion. 12 Co. 105.——So the antient Jewels of the Crown ſhall go to the Succeſſor, and are not deviſable by Teſtament. Co. Lit. 18. b.——But may be diſpoſed of by Patent. Cro. Car. 344.

(*e*) 19 H. 6. 44. Rol. Abr. 515. where the Succeſſor of an Abbot ſhall recover Damages in a Writ of Entry, though it is otherwiſe in caſe of a Biſhop, and other ſole ſecular Bodies Politick. 2 Inſt. 286.

If a (*e*) Maſter of an Houſe, that hath a Covent and Common Seal, recovers in an Annuity, and after Arrearages incur, and after he dies, the ſucceeding Maſter ſhall have the Arrearages, and not the Executor of the Predeceſſor, becauſe the Executor could not make a Teſtament.

19 H. 6. 44. Rol. Abr. 515.

But if a Parſon recovers an Annuity, and after Arrearages incur, and after the Parſon dies, the Executor of the Parſon ſhall have the Arrearages, and not the Succeſſor, becauſe he could make a Teſtament.

Rol. Abr. 515. *Atkins* and *Gardner*. Cro. Jac. 359. Noy 121. Brownl. 93. S. C.

By the Charter granted to the College of Phyſicians, and confirmed in Parliament, the Offenders in practiſing Phyſick in *London*, without Admiſſion by the College of Phyſicians, ſhall forfeit 5*l*. for every Month, *unum dimidium Regi & alterum dimidium dicto Præſidenti & Collegio*; on this Charter it was held, that if the Preſident of the College recovers in Debt againſt an Offender, and dies, the Succeſſor ſhall have a *Scire facias* to execute it, and not the Executor; for the Predeceſſor recovered it as due to him and the College.

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* 5. Where they ſhall be liable in their Natural Capacities.

Vide Tit. *Diſſeiſin.*

If a Corporation Aggregate diſſeiſe to the Uſe of another, they are Diſſeiſors in their natural Capacity, and the Perſons who committed the Wrong ſhall be charged therewith, and not the Corporation, which conſiſting of a conſtant Succeſſion of various Perſons, and as a Corporation, can regularly do no Act without Writing.

Salk. 192. pl. 4.

If a Mayor, or any other Member of a Corporation, procure a falſe Return to be made to a *Mandamus*, they may be proceeded againſt in their private Capacities.

Lev. 237. —Where a Corporation granted an Annuity, and was afterwards diſſolved. *Vide* Owen 73. 2 And. 107. liable to the

If the Maſter and Wardens of the Company of Woodmongers enter into Bond thus, *viz. Noverint, &c. Magiſtrum & Guardianos, &c. teneri, &c.* and the Common Seal is thereto, and it is ſigned as uſual, by the Principal of the Company, and indorſed *Sigillat' & deliberat' in præſentia, &c.* and the Corporation is diſſolved after, yet they ſhall not be (*f*) charged in their natural Capacity.

(*f*) Where in Equity the private Members of a Company were made Company's Debts, where the Company had no Goods. 2 Vern. 396.

(F) Of the Diſſolution of Corporations.

(*g*) Rol. Abr. 514.

(*g*) IF all the Members of an Aggregate Corporation die, the Body Politick is diſſolved; but if the King makes a Corporation conſiſting of twelve Men, to continue always in Succeſſion, and when any of them die, the

the others may chuſe another in his Place; (*c*) if three or four of them die, (*d*) yet all Acts done by the Reſt ſhall be ſufficient.

(*c*) 10 Co. 30. b. Rol. Abr. 514. S. P. — If any Corporation Aggregate, as Mayor and Commonalty, or Dean and Chapter, make a Feoffment and Letter of Attorney to deliver Seiſin, this Authority does not determine by the Death of the Mayor or Dean, but the Attorney may well execute the Power after their Death, becauſe the Letter of Attorney is an Authority from the Body Aggregate, which ſubſiſts after the Death of the Mayor or Dean; but if the Dean or Mayor be named by their own private Name, and die before Livery, or be removed, Livery after ſeems not good. Co. Lit. 52. b. 2 Rol. Abr. 12. 14 H. 8. 3. 11 H. 7. 19. (*d*) But if the Body Politick wanteth its Head, nothing can be done during the Vacation; as in Caſe of a Dean and Chapter, Mayor and Commonalty, when there is no Dean or Mayor. Co. Lit. 264. & *vide* Moor 52. Daliſ. 55.——The Maſter of a College cannot deviſe Lands to the Houſe of which he is Head. Daliſ. 31. 4 Leon. 223.

Alſo a Corporation may be diſſolved by Miſuſer or Abuſer; for as all Franchiſes flow from the Bounty of the Crown, ſo there is a tacit or implied Condition annexed to ſuch Grants, which if broken forfeits the whole Franchiſe.

2 Inſt. 222. 20 E. 4. 5. But for this *vide* the Arguments in the great Caſe of the *Quo Warranto* againſt the city of *London*, which was brought againſt the whole Corporation. 1. For that the Common Council had petitioned the King, upon a Prorogation of Parliament, that it might meet on the Day on which it was prorogued, and had charged the Prorogation as that which occaſioned a Delay of Juſtice. 2. That the Corporation had impoſed new Taxes on their Wharfs and Markets, which was an Invaſion of the Liberty of the Subject, and contrary to Law; and the Judgment in that Caſe was that the Franchiſe ſhould be ſeiſed into the King's Hands; but *vide* 2 *W. & M.* ſ. 1. c. 8. by which this Judgment is declared to be void and illegal; and *vide* the Caſe of Sir *James Smith*, Show. 280. 4 Mod. 52. 12 Mod. 17, 18. 10 Mod. 174. who being choſen an Alderman of the City of *London*, after the ſaid Judgment (which was never recorded) the Queſtion was, whether he was duly elected, ſo as to be obliged to take the Oaths preſcribed by 1 *W. & M.* c. 8. and it was reſolved, that though a Corporation might be forfeited, yet that the Proceedings and Judgment in the *Quo Warranto*, againſt the City, did not diſſolve the Body Politick, or make their ſubſequent Acts void; and conſequently that Sir *James* not taking the Oaths purſuant to the 1 *W. & M.* c. 8. was a ſufficient Cauſe to remove him from the Place of Alderman. See Skin. 310. Show. Rep. 280.

* If the Members of a Corporation refuſe or neglect to chuſe ſuch Officers, as they are obliged to chuſe by their Charter, this is a Forfeiture, and conſequently a Diſſolution of the Corporation.

*Page 510 Carth. 483. but *vide* 11 Geo. 1. c. 4.

A Corporation may be diſſolved by ſurrendering the Charter, but a Surrender of an old Charter is void, for Want of Inrolment.

Salk. 191. 12 Mod. 247.

If a Prior and Convent, *concurrentibus his quæ in jure requiruntur*, are tranſlated to an Abbot and Convent, or to a Dean and Chapter, though the Name is changed, yet the Body is not diſſolved.

Co. Lit. 102. b.

Though a Dean and Chapter had ſurrendered (*e*) all their Poſſeſſions to the King, yet their Corporation continued, and they remained a Chapter of the Biſhop to aſſiſt him in Spiritual Matters, &c. for all their Poſſeſſions were from the Biſhop, and a Prebend, though he hath no Poſſeſſion, hath *Stallum in choro & vocem in Capitulo.*

3 Co. 75. b. (*e*) But there cannot be a Guardian of a Chapel, when the Chapel and all the Poſſeſſions thereof are aliened. 3 Co. 75. a. 10 Co. 32. for there cannot be a Guardian of Nothing.

If Lands are given to a Corporation, which is (*b*) afterwards diſſolved, the Donor ſhall have the Lands again; for the Law annexes ſuch a Condition in every Grant to a Body Politick.

Co. Lit. 13. a. Godb. 211. Rol. Abr. 816.

(*b*) A Debt due to a Corporation ſtill remains, though their Name is changed by a new Charter. 3 Lev. 238.——If a Corporation bind themſelves in a Bond, and are afterwards diſſolved, they ſhall not be charged in their natural Capacities. Lev. 237. & *vide* Owen 73. 2 And. 107.

COSTS.

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(H) **Of Costs in the Several Steps and Proceedings of a Cauſe.** 524.
(I) **Costs how aſſeſſed or taxed.** 525.

(A) Of

(A) Of the firſt Introduction of, and giving the Plaintiff Coſts de incremento.

THERE were no Coſts at Common Law; but if the Plaintiff did not prevail he was amerced *pro falſo clamore*; if he did prevail, then the Defendant was *in miſericordia*, for his unjuſt Detention of the Plaintiff's Right, and therefore was not puniſhed with the *expenſa litis*, under that Title. 2 Inſt. 288.

But it being thought exceeding hard that the Plaintiff, for the Coſts which he was out of Pocket in obtaining his Right, could not have any Amends.

By the Statute of *Glouceſter*, made 6 *E.* 1. *cap.* 1. by which in an Aſſiſe, *&c.* Damages, upon the Inſufficiency of the Diſſeiſor, are given againſt him that is found Tenant, and Damages are given in a Writ of *Mort d'anceſtor, Aiel, &c.* reciting that whereas before that Time, Damages were not taxed but to the Value of the Iſſues of the Land, it is provided the Demandant may recover againſt the Tenant the (*a*) Coſts (*b*) of his Writ, together with his Damage; and that this Act ſhall hold Place (*c*) in all Caſes where the Party is to recover Damages.

(*a*) This extends to all legal Coſts of Suit, but not his Expences of Travel, Loſs of Time, *&c.* 2 Inſt. 288.—In a Writ by Journeys Accounts*, the Plaintiff ſhall recover his Coſts of the firſt Writ, and the Proceedings thereupon. 2 Inſt. 288. *Secus* if the firſt Writ was naught though the Plaintiff's Default. 2 Inſt. 288. as if brought againſt one Jointenant only. Kelw. 127. (*b*) If Judgment arreſted, the Plaintiff, in a new Action, ſhall not recover the Coſts of the firſt. Cro. Car. 545. (*c*) Where a Man before, or by this Act, did not recover Damages, though ſingle, double or treble, are given by a ſubſequent Act, the Plaintiff ſhall recover no Coſts. 10 Co. 116. a.—As in a *Quare Impedit*†. 2 Inſt. 289. 10 Co. 116. a. Kelw. 26. a.—*Decies tantum.* 10 Co. 116. b.—So in an Action upon 5 E. 6. c. 14. of Ingroſſers, 10 Co. 116. b.—But in all Caſes where Damages were recovered before, or by this Act, the Plaintiff ſhall recover his Coſts alſo. 10 Co. 116. b.

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* That is a new Writ, which the Party hath, where the former abated, without the Default of the Demandant, or Plaintiff. See Com. Dig. 1 V. 86.

† *Cont.* where the Church was full at the Time of the *Quare Impedit*. Skin. 25. otherwiſe no Coſts. Barnes 139.

This was the Original of Coſts *De incremento*; for when the Damages were found by the Jury, the Judges held themſelves obliged to tax the moderate Fees of Counſel and Attornies that attended the Cauſe.

And this was done in (*d*) all Real Actions in which there were Damages at Common Law, and alſo in all Perſonal Actions; for even in an Action of Debt, there are Damages given for the unjuſt Detention. 10 Co. 116.

(*d*) That in a *Formedon*, no Damages were recovered, and conſequently no Coſts. Cro. Car. 425. Vent. 88. Lev. 146. Raym. 134.—On traverſing Inquiſitions, *vide* Carth. 242. and for Coſts on Penal Statutes, *vide infra*, Letter (E §17.) and Title *Damages*, in what Actions Damages were recovered.

" Alſo by 8 & 9 *W.* 3. *cap.* 11. in all Actions of Waſte and Debt upon " the Statute for not ſetting forth Tithes, wherein the ſingle Value or Da- " mages found by the Jury ſhall not exceed twenty Nobles; and in all " Writs of *Scire facias*, and Suits (*e*) upon Prohibitions, the Plaintiff ob- " taining Judgment, or any Award of Execution, after Plea pleaded or " Demurrer joined, ſhall recover Coſts."

(*e*) For recovering Coſts on a Declaration

* Attachment upon a Prohibition before this Statute, *vide* Rol. Abr. 516. 2 Inſt. 644. Cro. Car. 559. 2 Jones 128. Raym. 387. Vent. 348, 350. 3 Lev. 360. Jones 447.

(B) In

*Page 512 * **(B) In what Caſes the Plaintiff ſhall have no more Coſts than Damages:** And herein,

1. Of Actions of Treſpaſs where the Right of Freehold or Inheritance may come in Queſtion, or where the Treſpaſs is wilful and malicious.

2 Stra. 1232. BY the 43 *Eliz. cap.* 6. it is enacted, "That if upon Actions Perſonal "to be brought in any of her Majeſty's Courts at *Weſtminſter*, not "being for any Title nor Intereſt of Lands, nor concerning the Freehold "nor Inheritance of any Lands, nor for any Battery, it ſhall appear to the "Judges of the ſame Court, and ſo ſignified or ſet down by the Juſtices "before whom the ſame ſhall be tried, that the Debts or Damages to be "recovered there in the ſame Court, ſhall not amount to the Sum of 40*s*, "or above, that in every ſuch Caſe the Judge and Juſtices, before whom "any ſuch Action ſhall be purſued, ſhall not award for Coſts to the Party "Plaintiff any greater or more Coſts than the Sum of the Debt or Damages ſo recovered ſhall amount unto, but leſs at their Diſcretions."

Gilb. Hiſt. C. P. 265. The Intent of this Statute was to reduce all Actions where the Debt or Damages were under 40*s*. into the Court-Baron, or other County Courts, whereby it was thought the Profits of Landlords would be increaſed, and the Coſts of Defendants diminiſhed; but the Statute failed of effecting that Purpoſe; for it does not put it merely upon the Damages given by the Jury under forty Shillings, (for it would be hard when the Jury gave too little Damages, to have puniſhed the Plaintiff with the Loſs of his Coſts) but leaves it to the Judge to certify the Damages proved were not above 40*s*. in Approbation of the Verdict; but the Judges thought it extremely hard to certify, in order to make Plaintiffs loſe their Coſts where they had prevailed, unleſs the Action were exceedingly impertinent and vexatious; and therefore ſeldom made Uſe of this Power.

(*a*) The Statute 11 and 12 W. 3. c. 9. enacts, that this Statute ſhall extend to the Principalities of *Wales*, and Counties Palatine. * This Statute does not extend to the *Marſhalſea*, or other inferior Courts, that may hold Plea in ſuch Actions; nor does it extend to any Caſe where the Defendant juſtifies, or pleads ſpecially.

"By the 22 & 23 *Car.* 2. *cap.* 9. *ſ.* 136 (149). for preventing trivial "Suits, contrary to the Intention of 43 *Eliz.* commenced in the (*a*) Courts "at *Weſtminſter*, it is enacted, for the making the ſaid Law effectual, that "in all Actions of Treſpaſs, Aſſault and Battery, and other Perſonal "Actions, wherein the Judge at the Trial ſhall not find and certify under "his Hand, upon the Back of the Record, that an Aſſault and Battery "was ſufficiently proved, or that the Freehold or Title of the Land mentioned in the Plaintiff's Declaration, was chiefly in Queſtion, if the Jury "find Damages under 40*s*. the Plaintiff ſhall not recover more Coſts than "the Damage, and if more Coſts given, the Judgment ſhall be void, &c. "and the Defendant may have his Action for ſuch vexatious Suit*."

Gilb. Hiſt. C. P. 263. Gilb. Eq. Rep. 197, 198. 2 Vent. 36. S. C. 180, 195, 215. 3 Mod. 39, 40. 2 Mod. 141. This Statute ſeems to have purſued the ſame Purpoſe with that of the 43 *Eliz.* but neither of them repealed the Statute of *Glouceſter*, (for a Statute cannot be repealed by Implication) nor did the Statute of *Car.* 2. take away Coſts *de incremento*, except where the Judges Certificate was neceſſary, and that was only where the Treſpaſs was done to the Freehold, or to Things fixed to the Freehold, and the Damages under 40*s*. and in Battery, where the Damages were under ſuch Sum, for the Wording of the Statute is, that there ſhould be no Coſts in Battery, Treſpaſs, or other Perſonal Actions, unleſs the Judge certify the

Battery

Battery to be proved, or the Title of the Freehold to have come in Queſtion; hence theſe Words in the Act, *other Perſonal Actions*, were conſtrued to extend no farther than to Caſes where the Judge was permitted to certify, which was only in Battery, and Actions of Treſpaſs relating to the Freehold, and Things fixed to the Freehold. 8 Mod. 371. 11 Mod. 198. pl. 14. *Page 513 Ld. Raym. 566.

Stra. 534, 551, 633. 2 Stra. 1130, 1168. Stra. 192, 624, 645. 2 Com. Dig. 435. 2 Ld. Raym. 1444. 2 Stra. 936. 2 Ld. Raym. 1588, 1589. Hardw. 71. Fitzgib. 42. pl. 5. Barnes 91, &c. 105. 2 Barnes 104, 108, &c. 111, 124, 127. Freem. 214. pl. 222. Gilb. Eq. Rep. 198. Barnard. K. B. 79. 2 Stra. 726.

Therefore in Trover, or Actions of Treſpaſs *de bonis aſportatis* of Goods and Chattels not fixed to the Freehold, the Plaintiff ſhall have his full Coſts, though the Damages be found to be under 40*s.* and though the Judge does not certify purſuant to the Statute. Salk. 208. pl. 7.

So if an Action of Treſpaſs to the (*a*) Freehold, and an Action of Treſpaſs *de bonis aſportatis*, are joined, and the Plaintiff recovers in general upon both Counts, he hath no need of a Certificate to obtain his Coſts; and therefore Coſts *de incremento* ſhall go upon the Statute of *Glouceſter*. Com. Rep. 19. pl. 12.

(*a*) Though to the Freehold only, yet if for hunting by an inferior Tradeſman, the Plaintiff ſhall recover full Coſts. See Stat. 4 and 5 W. and M. c. 23. ſ. 10. Salk. 212. pl. 2. R. Raym. 149. Com. Rep. 26. pl. 18. 12 Mod. 121. Comb. 420. Carth. 382. 5 Mod. 307.

As in Treſpaſs for breaking his Cloſe, and impounding his Cattle, the Plaintiff ſhall have his full Coſts; (*b*) for the impounding his Cattle is an Injury to his Perſonal Property, in which no Right of Freehold can come in Queſtion. 3 Mod. 39. *Barnes* and *Edgard* adjudged.

(*b*) So in Treſpaſs for chaſing his Cow, and his Domeſtick Fowls, *viz.* Hares, Geeſe, &c. with Dogs which were uſed to bite Tame Fowl, by whoſe biting they were killed; on Not guilty, Verdict for the Plaintiff; and he had his full Coſts, becauſe this is not a Treſpaſs wherein the Right of Freehold may come in Queſtion. *Mich.* 9 *Geo.* 1. in *C. B. Keen* and *Whiſtler*, Stra. 534.—So in Treſpaſs for breaking his Cloſe, and chaſing his Bull, Verdict for the Plaintiff, and one Penny Damages; and held by the Court that he ſhould have his full Coſts, becauſe the 22 & 23 *Car.* 2. c. 9. extends only to ſuch Actions of Treſpaſs where the Freehold may come in Queſtion. *Paſch.* 9 *Geo.* 1. in *C. B. Thompſon* and *Barry*, Stra. 551. Gilb. Rep. 197.

So in Treſpaſs for chaſing his Sheep, and that he the Defendant *ad loca ignota eos abduxit & elongavit*, after Verdict for the Plaintiff, and 2*d.* Damages, he had his full Coſts principally upon the Word (*c*) *abduxit*, which is the ſame in Signification with *aſportavit*. Carth. 225. Salk. 208. pl. 7. like Caſe.

(*c*) And note that if any Thing be carried off from the Grounds, though of never ſo little Value, it will be an *Aſportavit*; for the Words *Abcarriavit* and *Aſportavit* in Declarations mean ſuch a Carrying as amounts to the Defendant's Uſe. Gilb. Rep. 198. And *vide* 2 Vent. 215. where digging Roots, and removing them about two Yards in the ſame Ground, amounted to an *Aſportavit*. See Stra. 634.

So in Treſpaſs *Quare vi & armis* the Defendant flung down certain Stalls of the Plaintiffs, in a Market-Place; on Not guilty, and Verdict for the Plaintiff, but Damages under 40*s.* the Court held that the Plaintiff, without the Judge's Certificate, ſhould have full Coſts; for this is a Treſpaſs done to a Chattel, in which no Title of Freehold can come in Queſtion; and though they had been fixed to the Freehold, yet if the Defendant had carried them away, it would be out of the Statute. Raym. 847. *Smith* and *Batterton* adjudged. 2 Jones 232. and 2 Show. 258. S. C. adjudged.

But where the Treſpaſs is merely to the Freehold; as where in Treſpaſs the Plaintiff declared that the Defendant *Herbam depaſcendo, & ſolum & fundum carucis ſubvertendo, & in ſolo fodiendo, & cum terra inde projecit' aquæ* Carth. 224.

aquæ curſum ſuum obſtupand', per quod clauſum ſuum inundat' fuit, &c. the Plaintiff ſhall have no more Coſts than Damages.

Ventr. 48. See Stra. 634.

So Treſpaſs *Quare clauſum fregit*, and putting Stakes in the Plaintiff's Ground, was held within the Statute.

Trin. 11 Geo. 1. in C. B. adjudged. Anon. Stra. 633. Gilb. Rep. 198.

So in Treſpaſs *Quare clauſum fregit, & quendam taurum Perſonæ ignotæ fugavit, per quod* the Plaintiff's Gooſeberry Buſhes, *necnon quinque perticas* (*Angl.* Poles) *in eodem clauſ. erect', affix' & exiſtent' fregit, laceravit & ſpoliavit*, after Verdict and one Penny Damages, the Court held that the taking and pulling up the Poles was not ſuch an Aſportation as amounted to Converſion; and that though the Treſpaſs begun by chaſing the Bull, yet the Damage is laid to be done to the Freehold; and ſo the Title thereof might well come in Queſtion.

*Page 514 Mic. 12 Geo. 1. in C. B. *Blunt* and *Miller* adjudged. Gilb. Rep. 197. Stra. 645.

* So in Treſpaſs for breaking and entering the Plaintiff's Houſe, and keeping him out of Poſſeſſion and Uſe of the ſaid Houſe, with a *Continuando* for a Month, *per quod* he was put to great Expence to gain the Poſſeſſion of his Houſe, and in the mean Time loſt the Profit and Uſe thereof; after Verdict for the Plaintiff, and 2*s*. 6*d*. Damages, the Court held that this was a plain Treſpaſs *Quare clauſum fregit* within the Statute, and that the *per quod* was only Matter of Aggravation.

2 Vent. 180, 195.

Alſo if there be a Treſpaſs upon the Freehold, and likewiſe a Count laid *de bonis aſportat'*, in order to put in for Coſts merely, if there be no Evidence of the carrying away of the Goods, by which the Defendant is acquitted as to that, though he is found Guilty as to the Treſpaſs to the Freehold, yet if the Damages be under 40*s*. the Plaintiff ſhall recover no more Coſts than Damages*.

* In trying ſuch Caſes, it is very neceſſary Attention, on the Part of the Defendant, ſhould be given to the Declaration, and to the Evidence, and if an *Aſportavit* is not found, to ſee that the Verdict be properly taken. Though if a Verdict was taken generally, and no Evidence given of an *Aſportavit*, and Damages under 40*s*. the Court, on Motion, will amend the Verdict, by the Judges Notes.

It is further to be obſerved in the Conſtruction of the Statute 22 & 23 *Car*. 2. that there is no need of a Judge's Certificate, where by the Pleading it appears that the Title or Intereſt of the Land is in Queſtion; (*a*) as in an Action for eating his Graſs, *per quod* his Common was impaired; ſo (*b*) if the Defendant juſtifies by any Thing that brings the Title of the Land in Queſtion, the Judge need not certify, to intitle the Plaintiff to his Coſts.

(*a*) 2 Mod. 141, 142. 2 Freem. 214. pl. 222.

(*b*) Where the Defendant juſtifies for a Way, and Iſſue is joined upon *extra viam*, and found for the Plaintiff, he ſhall have full Coſts. 2 Lev. 234. 2 Ld. Raym. 1444. 2 Stra. 726, 1168. Gilb. Rep. 198, 199.

Alſo by the 8 & 9 *W*. 3. *cap*. 11. for preventing wilful and malicious Treſpaſſes, it is enacted, "That in all Actions of Treſpaſs, to be commenced and proſecuted from and after the 25th of *March* 1697, in any of his Majeſty's Courts of Record at *Weſtminſter*, wherein at the Trial of the Cauſe at *Weſtminſter* it ſhall appear, and be certified by the Judge, under his Hand, on the Back of the Record, that the Treſpaſs upon which any Defendant ſhall be found Guilty was wilful and malicious, The Plaintiff ſhall recover not only his Damages, but his full Coſts of Suit; any former Law to the contrary notwithſtanding."

2 Stra. 1005. Raym. 395. 4 Mod. 378. 7 Mod. 129.

If an Action be commenced in an inferior Court, and removed by *Habeas Corpus* or *Certiorari* into the Courts at *Weſtminſter*, the Plaintiff ſhall have full Coſts, although the Damages are under 40*s*.

Gilb. Hiſt. C. P. 270. 2 Com. Dig. 435.

3. C

2 Of Costs in Actions of Slander.

By the 21 *Jac.* 1. *cap.* 16. it is enacted, "That in Case for slanderous Words to be sued or prosecuted in the Courts at *Westminster*, or other Courts that have Power to hold Plea thereof, after the End of that Session of Parliament, if the Damage is found to be under 40*s.* the Plaintiff shall recover (*a*) no more Costs than Damages. Gilb. Rep. 196. Ld. Raym. 181. Salk. 206. pl. 5. 7 Mod. 129.

(*a*) By this the Power of the Judges is taken away, as to giving Costs *de incremento*, where the Damages is under 40*s.* but it is said to have been the Resolution of the Judges, that though the Court cannot increase the Costs, yet the Jury are not bound by the Statute, and therefore they may give 10*l.* Costs where they give but 10*d.* Damages. Salk. 207.

In the Construction of this Statute, it has been held that it extends not to Actions for Slander of Title, for that is not properly Slander, but a Cause of Damage; and the Slander intended by the Statute is to the Person. Cro. Car. 141. *Low* and *Horwood* adjudged. Ley 82. Palm. 530. Jones 196. S. C. adjudged.

So if for calling Thief, and causing him to be arrested, *&c.* and the Defendant is found Guilty of both, it is not within the Act. Cro. Car. 163, 307. Bull. N. P. 10. Doug. 245, 667, 780. 1 Term Rep. 655. 3 Term Rep. 138, 391, 694.

* So where the Plaintiff brought an Action on the Case for slanderous Words spoken of his Wife, *viz. That she was a Whore*, per quod *she lost such and such Customers*; after Verdict for the Plaintiff, and Damages under 40*s.* the Court held that the Plaintiff should have full Costs, for it is not the Words, but the special Damage which is the Cause of Action in this Case; and it was incumbent on the Plaintiff to prove the special Damage, otherwise the Action would not have lain for the Words *. *Page 515 Salk. 206. pl. 5. *Browne* and *Gibbons* adjudged. 7 Mod. 129. 2 Ld. Raym. 831, 1588. Stra. 645. 2 Stra. 936. Gilb. Eq. Rep. 197. Andr. 375. 2 Barnard. K. B. 79, 84, 113. 2 Kel. 71. pl. 30. 8 Mod. 371.

* So in all Cases where the Words are not actionable, but the special Damages is the Gist of the Action, if Plaintiff recovers, it must be on Proof of the special Damage, and he shall have full Costs, though the Damages found, are under 40*s.*

3. Of Costs in Actions of Assault and Battery.

By the 22 & 23 *Car.* 2. *cap.* 9. it is enacted, "That in Actions of Assault and Battery, wherein the Judge at the Trial shall not find and certify, under his Hand, upon the Back of the Record, that an Assault and Battery was sufficiently proved, if the Jury find Damages under 40*s.* the Plaintiff shall not recover more Costs than Damage."

On this Part of the Statute it has been (*b*) held, that if an Assault be only proved, the Plaintiff shall have no more Costs than Damage. (*b*) 1 Vent. 256. 2 Lev. 102.

That if a Man brings Trespass for beating his Servant, *per quod servitium amisit*, it is not an Action of Assault and Battery within the Statute, but is an Action founded upon the special Damage, in which there shall be full Costs. Salk. 206. pl. 5. 5 Mod. 74. 7 Mod. 129. 2 R. Raym. 831.

In Trespass of Assault and Battery, Wounding and Imprisonment, as also for entering and breaking his House, and opening the Doors of the said House, and breaking three Locks and three Bars belonging to the said Doors, the Defendant pleaded Not guilty to all except the Imprisonment, and for that he justifies; and on the Trial the Justification was found for the Defendant, and the Not guilty for the Plaintiff, and the Damages 2*l.* 6*d.* Mich. 10. Geo. 1. in C. B. *Beeh* and *Nicholls*. Stra. 577. Gilb. Eq. Rep. 197.

2s. 6d. and held by the Court that the Damages being under 40s. he could not have full Costs for the Battery, becauſe the Judge had not certified the Battery to be well proved; neither could he have full Coſts for breaking the Houſe, becauſe this is a Treſpaſs relating to the Freehold†.

†But if Defendant had not juſtified the Impriſonment, and he had been found guilty of that, Plaintiff would have been intitled to full Coſts.

(C) Where the Coſts ſhall be doubled or trebled.

10 Co. 116. a. 2 Inſt. 289. Hard. 152. Carth. 297. S. P.

IT ſeems agreed that where Damages were before recoverable, and a Statute increaſes them to double or treble the Value, the Plaintiff ſhall recover his double or treble Damages; and Coſts alſo, as Parcel of the Damages, ſhall be trebled.

2 Inſt. 285. Salk. 205. pl. 2. Carth. 297, 321. S. P. Ld. Raym. 89. Skin. 555. pl. 4. Tithes, &c. W. 3. c. 11. *

But where a new Statute gives either ſingle, double or treble Damages, where there were no Damages recoverable before, (*b*) there no Coſts ſhall be allowed, becauſe the Party can have nothing more than ſuch new Statute has already given, and that is Damages only; for the Statute of *Glouceſter* cannot operate to add Coſts to what is given by a ſubſequent Statute, becauſe the new Statute muſt be conſtrued from itſelf, which gives Damages only.

Stra. 50. 2 Stra. 974. (*b*) As upon the Statute 2 E. 6. c. 13. for not ſetting out 2 Inſt. 651. Cro. Jac. 70. Cro. Car. 560. Hard. 152. but now *vide* the 8 and 9 1 Com. Dig. 558.

* *Ante* 511. but that Statute extends only to the Caſe where the ſingle Value of the Tithes found by the Jury does not exceed twenty Nobles, *i. e.* 6l. 13s. 4d.

(*c*) 2 Inſt. 289. 10 Co. 116. 1 Vent. 22. S. P. adjudged.

(*c*) In an (*d*) Action for a Forcible Entry upon 8 *H.* 6. *cap.* 9. which gives treble Damages, the Plaintiff ſhall recover not only treble Damages but (*e*) treble Coſts alſo.

(*d*) So in an Aſſiſe upon the Statute for a Diſſeiſin with Force. 10 Co. 116. b. (*e*) And the Coſts *de incremento*, as well as thoſe given by the Jury, ſhall be trebled. Cro. Eliz. 582. Leon. 282. 2 Leon. 52. Co. Lit. 257. 2 Stra. 1044.

*Page 516. 2 Inſt. 289. Kelw. 209. N. Bendl. 80. S. C. Rol. Abr. 516.

* But in an Action of Debt upon the Statute of 1 & 2 *Ph. & M. cap.* 12. of Diſtreſſes, upon the Branch of the Statute by which the 5*l.* and treble Damages are given to the Party grieved, for driving a Diſtreſs out of the Hundred, no Coſts are to be given, becauſe the Statute, by Intendment, gives triple Damages in Lieu of the Whole.

2 Inſt. 289. Kelw. 26. a. Godb. 210. S. P. adjudged.

So in an Action of Waſte againſt Tenant for Life or Years, by the Statute of *Glouceſter*, *cap.* 6. the Place waſted, and treble Damages ſhall be recovered, (*f*) but no Coſts, becauſe no Action lay againſt them at the Common Law; but the Action and Damages are merely given.

(*f*) But now *vide ſupra* 8 and 9 W. 3. c. 11. *

* *Ante* 511. if the ſingle Value of the Waſte found by the Jury does not exceed twenty Nobles Plaintiff ſhall have Coſts.

2 Inſt. 289. (*g*) A Prohibition of

But in Waſte againſt Tenant in Dower, &c. treble Damages and Coſts alſo ſhall be recovered, becauſe (*g*) an Action of Waſte lay againſt them

the Common Law; and for the Waſte, Damages ſhould have been recovered.

Waſte only, in which no Damages were recoverable, but only for Waſte, after the Prohibition delivered. 10 Co. 116. a.

In an Action upon the Statute of 2 *H.* 4. *cap.* 1. for ſuing before the Admiral for a Thing done upon the Land, in which Caſe the Statute gives to the Plaintiff double Damages, without ſpeaking of any Coſts, yet he ſhall recover as well double Coſts as double Damages. Rol. Abr. 517. Dyer 159. 10 Co. 116.

So on the Statute 2 *W.* & *M. cap.* 5. by which treble Damages and Coſts are given againſt the Reſcouſer of a Diſtreſs for Rent, in an Action upon the Caſe for a Reſcous upon the Statute, the Plaintiff ſhall recover treble Coſts as well as treble Damages; for the Damages are not given by the Statute, but increaſed, and an Action upon the Caſe lay for a Reſcous at Common Law. Salk. 205. pl. 2. Skin. 555. pl. 4. Stra. 50. 2 Stra. 974. *Lawſon* and *Storie*. Carth. 321. S. C. reſolved. Ld. Raym. 19.

(D) Of awarding the Defendant his Coſts.

BY the 23 *H.* 8. *cap.* 15. it is enacted, "That in any Suit in a "Court of Record, or elſewhere, in any Action, Bill or Plaint of "Treſpaſs, upon 5 *Rich.* 2. Debt or Covenant, upon any Specialty or "Contract, Detinue, Account, charging as Bailiff or Receiver, Caſe, "or (*c*) upon any Statute for any Offence or Wrong (*d*) Perſonal, im-"mediately done to the Plaintiff, if the (*e*) Plaintiff (*f*) after Appear-"ance of the Defendant be (*g*) nonſuited, or (*h*) any (*i*) Verdict "* (*k*) paſs by lawful Trial againſt the Plaintiff, the Defendant (*l*) ſhall "have Judgment to recover his Coſts, to be taxed by the Judge of the "Court, and the Defendant ſhall have ſuch Proceſs and Execution for the "ſame, as the Plaintiff ſhould have had, in Caſe the Judgment had been "for him." *Page 517

(*c*) Extends not to an Action for an Eſcape; for though within the Equity of *Weſtm.* 2. that gives it againſt the Warden of the *Fleet*, yet it is not properly an Action upon the Statute, becauſe no mention is made of the Statute in the Declaration; and this was an Perſonal Wrong. 2 Leon 9, 10. 4 Leon. 182. †——Nor to an Action upon 8 H. 6. c. 9. for a Forcible Entry, for that was no Perſonal Wrong; and the Writ ſays *Quod diſſeiſivit*. 2 Leon. 9, 10. 4 Leon. 182.——So it extends not to an Action upon 1 and 2 P. and M. c. 12. for unlawfully impounding a Diſtreſs. 2 Leon. 52. 3 Leon. 92. And the rather becauſe this Action is grounded upon a ſubſequent Statute.——Nor to an Action upon 5 Eliz. c. 9. for Perjury. Hut. 22. Brownl. 66. Cro. Eliz. 177.——So it extends not to an Action upon 2 E. 6. c. 13. for not ſetting forth Tithes, becauſe a mere Non-feaſance, and no Perſonal Wrong. 2 Inſt. 651. Noy 32. (*d*) It extends not to an Aſſiſe. Brownl. 28, 29. (*e*) Otherwiſe if he is an Infant, for commencing his Suit by Guardian, there can be no Malice ſuppoſed in him. Cro. Eliz. 33. & *vide* Bulſt. 189.——Nor to Perſons who ſue in *Auter Droit*; for which *vide infra*, concerning Executors and Adminiſtrators. (*f*) For this *vide* 2 Lev. 81, 82. (*g*) *Secus* if the Original be diſcontinued. Leon. 105. Hut. 36. Cro. Car. 575.—The Plaintiff the Day before the Trial came into Court, and entered a *Nolle Proſequi*, and whether the Defendant ſhould have Coſts, Hard. 152. *dubitatur*. (*h*) Though Special. Cro. Eliz. 465. Hard. 152. (*i*) In Covenant againſt two for not building, Judgment is given againſt one by Default, and the other pleads Performance, and it is found for him, the Plaintiff can have no Judgment, but the Defendant ſhall have his Coſts. Lev. 63. (*k*) Not upon Demurrer that goes to the Writ only; *ſecus* if to the Action. And. 117. *vide* Hard. 152. Cro. Car. 533. March 30. and 8 & 9 W. c. 10. by which it is now certainly given. (*l*) Though Judgment is not given upon the Nonſuit, but upon the Inſufficiency of the Pleading. Moor 625. pl. 857. Winch. 69. 3 Bulſt. 248. Godb. 220. & *vide* Dyer 32. Cro. Jac. 159.

† See *poſt* 517. and Q. If an Eſcape, the Defendant is not intitled; alſo *vide* the References in the Margin of the Statute, *Ruffhead's* Edition.

Also by the Statute of 4 *Jac.* 1 *cap.* 3. it is enacted, "That if any (*c*) Perſon, after the End of that Seſſion of Parliament, ſhould commence or ſue in any Court, any Action, Bill or Plaint of Treſpaſs, Ejectment, or other Action, (*d*) wherein the Plaintiff or Demandant (*e*) might have Coſts; and after Appearance of the Defendant becomes nonſuit, or any Verdict paſſes by lawful Trial againſt him, the Defendant ſhall have Judgment to recover his Coſts, to be aſſeſſed and levied as Coſts, by 23 *H.* 8."

(*c*) That it extends not to Executors, *vide infra.* (*d*) Not in an Attaint, where the firſt Verdict is affirmed, becauſe if the Jurors had been attainted, the Plaintiff ſhould have had ſuch Coſts only as in the firſt Action, if found for him, but not more in Reſpect of the Attaint. *Daly* and *Bellamy*, Cro. Car. 542. March 24. Jones 432. adjudged. (*e*) Though the Declaration is inſufficient, yet the Defendant ſhall have Coſts. 2 Rol. Rep. 213. Palm. 147. & *vide* Godb. 329, 345. Hob. 219. Hut. 16. Palm. 365. 3 Lev. 322. Style 153.——Though the *Niſi prius* Roll varied from the Plea-Roll, ſo as the Nonſuit was immaterial. Raym. 38.

By the 8 & 9 *W.* 3. *cap.* 11. "In Treſpaſs, Aſſault, falſe Impriſonment, or Ejectment againſt ſeveral, if any one or more is acquitted by Verdict, every Perſon ſo acquitted ſhall recover his Coſts, as if a Verdict had been given againſt the Plaintiff, unleſs the Judge ſhall immediately after Trial, in open Court, certify upon Record, that there was a reaſonable Cauſe for making ſuch Perſon Defendant."

11 Mod. 126. And by the ſame Act, "In all Actions of Waſte, Debt upon the Statute for not ſetting forth of Tithes, where the ſingle Value or Damages found by the Jury exceeds not twenty Nobles; and in a *Scire Facias*, and Suits upon Prohibitions, the Plaintiff ſhall recover his Coſts; and if the Plaintiff be nonſuit or diſcontinue, or a Verdict paſs againſt him, the *Defendant* ſhall recover his Coſts."

(E) What Perſons are intitled to, or exempted from paying Coſts: And herein,

1. Of Executors and Adminiſtrators.

Vide 2 Vol. Tit. *Executors*, 446. (*f*) 31 H. 6. 13.

(*f*) AN Executor Defendant pays Coſts in (*g*) all Caſes, and the Judgment is *de bonis Teſtatoris ſi, &c. & ſi non tunc de bonis propriis*, alſo (*b*) when he is Defendant, and there is Judgment for him, he ſhall have his Coſts.

Bro. Exec. 164. Plowd. 183. Bunb. 45, 160. (*g*) But a Defendant in Equity ſhall not pay Coſts, for he cannot plead it at Law in Excuſe of Aſſets. Hard. 165. and *nota*, That in Equity the Coſts are uſually awarded out of the Aſſets. Eq. Abr. 125. (*b*) That an Executor Defendant ſhall have his Coſts. Cro. Eliz. 503. Hut. 69, 79.

But an Executor or Adminiſtrator is not within the 23 *H.* 8. *cap.* 15. or 4 *Jac.* 1. *cap.* 3. which give Coſts to the Defendant after a Verdict or * Nonſuit; nor within the 8 & 9 *W.* & *M. cap.* 11. which gives Coſts upon a Demurrer, being made upon the ſame Platform; ſo that when they are Plaintiffs they pay no Coſts, for they ſue *in auter droit*, and are but Truſtees for the Creditors, and are not preſumed to be ſufficiently conuſant of the Perſonal Contracts of thoſe they repreſent; and this by an equitable Conſtruction of the Statutes, for there are no expreſs Words to exempt them.

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N. Bendl. 19. pl. 28. Cro. Eliz. 69. 503. Winch. 10, 70.

Savil 133. Cro. Jac. 361. Rol. Rep. 63. Cro. Car. 289. Kelw. 207. Hut. 69, 79. Cro. Jac. 229. Yelv. 168. Brownl. 107. 6 Mod. 93.

But (*a*) if Executors or Adminiſtrators bring an Action in their own Right, as for a (*b*) Converſion or Treſpaſs in their own Time, they ſhall pay Coſts. 11 Mod. 135. pl. 17. 174. pl. 18. See Salk. 314. pl. 21.

(*a*) 2 H. 7. 15. Sav. 134. Hut. 79. Although they name themſelves Executors, for it is but Surpluſage. Dalſ. 96. Latch. 220. 1 Vent. 92 ——But *vide Maſon* and *Jackſon*, 3 Lev. 60. adjudged *cont. per totam Curiam*; becauſe in the Right of the Teſtator, though a Thing done in their own Time.———So in a Raviſhment of Ward brought by Executors, for a Raviſhment in their Time. *Peacock* and *Steer*. Cro. Car. 29. By three Judges *cont'* Yelv. But Hut. 78. S. C. by two Judges againſt two; and in 6 Mod. 94. S. C. cited *per Holt*, and the Reaſon of the Reſolution was, becauſe the Ward never came to the Defendant's poſſeſſion. (*b*) Where the Trover is in the Life-time of the Teſtator, and the Converſion in the Time of the Executor, he ſhall not pay Coſts. 6 Mod. 92.

So in an *Indebitatus Aſſumpſit* by Huſband and Wife, who declared, That the Defendant was indebted to them in 20*l*. as Executors of the Laſt Will and Teſtament of *J. S.* for Money had and received to their Uſe as Executors, which he promiſed to pay, &c. on the Trial the Plaintiffs were nonſuited; and it was held, that the Plaintiffs ſhould pay Coſts, for the Cauſe of Action aroſe in their Time; for the Receipt being ſince the Death of the Teſtator, if it was by the Conſent of the Executor it is the Receipt of the Executor; or if without his Conſent, yet the bringing the Action is a Conſent, and the naming themſelves Executors is only to deduce their Right, and ſet it forth *ab origine*. Salk. 207. pl. 6. *Jenkins & Ux'* v. *Plume*. 6 Mod. 92, 181. S. C. adjudged.

But if an Executor brings an *Indebitatus* upon an Account made in his Time, it is in the Right of his Executorſhip, and he (*c*) ſhall pay no Coſts. 2 Lev. 165. 2 Jones 47. adjudged.

(*c*) If he brings an *Inſimul computaſſet*, and is nonſuited, he ſhall pay no Coſts; becauſe there was no new Cauſe of Action, but a new Action upon aſcertaining an antient Right, notwithſtanding which, it ſtill remains the Teſtator's Debt. 6 Mod. 93. 12 Mod. 440. Bunb. 44. Said to have been adjudged, 2 Ann. Salk. 207. pl. 6. S. P. †

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† Executors, &c. pay Coſts for not proceeding to Trial, according to Notice.

So if the Goods of the Teſtator be taken and converted before they come to the Hands of the Executor, he ſhall not pay Coſts upon a Nonſuit in an Action brought for theſe, for they were never Aſſets, Salk. 208. *per Holt*, C. J.

So where an Action was brought by an Adminiſtratrix for Money lent by the Inteſtate, the Defendant pleaded Payment to the Plaintiff after the Death of the Inteſtate, and Iſſue joined upon it, and Verdict for the Defendant; it was inſiſted upon, that the Defendant ſhould have Coſts upon 4 *Jac.* 1. *c.* 3. this being a Falſity in her own Conuſance; but it was denied, the Action being as Adminiſtratrix; ſo that upon the bringing the Action, that which is pleaded to be in her own Conuſance does not appear. Paſch. 27. Car. 2. in *B. R.* Anne *Taylor* v. *Barbone*.

If an Adminiſtrator brings an Action on the Caſe in *C. B.* and there is a Verdict and Judgment againſt him, and thereupon he brings a Writ of Error in *B. R.* where the Judgment is affirmed; yet he ſhall not pay Coſts, for he is not a Perſon within the Intent of the Statute which gives Coſts in this Caſe, although it was objected, that it was his own Act, and lay in his own Knowledge, and was brought *in dilatione executionis*. Carth. 281. *Gale* and *Till*. 4 Mod. 244. and 3 Lev. 375. S. C. If it be brought after a *Devaſtavit*, he ſhall pay Coſts. 2 Stra. 977. 2 Barnard. *K. B.* 450. An Adminiſtrator diſcontinues without Coſts. 2 Stra. 871. See Hardr. 70. 2 Barnard. *K. B.* 154.

* 2. Of Officers and Miniſters of Juſtice. *Page 519

By the Statute 7 *Jac.* 1. *cap.* 5. it is enacted, "That if any Action "upon the Caſe, Treſpaſs, Battery, or falſe Impriſonment, ſhall be brought "in the Courſe of *Weſtminſter*, or elſewhere, againſt any Juſtice of Peace, "Mayor, See 2 Barnard. *K. B.* 171.

"Mayor, Bailiff of City or Town Corporate, Headborough, Portreeve
"Mayor, Bailiff, (a) Conſtable, Tithing men, Collectors of Fifteenths
"and Subſidies, concerning any Thing by them done by Virtue of their
"Office, they, and all others, doing any Thing in their Aſſiſtance, or by
"their Command concerning their Office, may plead the general Iſſue, &c.
"and (b) if the Verdict ſhall paſs with the Defendant in any (c) ſuch Ac-
"tion, or the Plaintiff become nonſuit, or ſuffer a Diſcontinuance, the
"Juſtices, or (d) ſuch Judge before whom the Matter ſhall be tried,
"ſhall allow the (e) Defendant his double Coſts."

(a) Extends to a Deputy Conſtable. 3 Bulſt. 77. Rol. Rep. 274. Moor 845.

(b) Though Judgment is after given upon the Inſufficiency of the Declaration. Cro. Car. 175. (b) But this extends not to an Action upon the Caſe againſt a Conſtable, for preſenting that the Plaintiff was an Inhabitant of *A.* by Reaſon of which he was compelled to pay, &c. unjuſtly, becauſe no Treſpaſs or falſe Impriſonment, wherein Liberty is given to plead Not guilty. Cro. Car. 467.——Nor to an Action by a Freeman againſt a Mayor, for refuſing his Vote in the Election of a Mayor, becauſe a Non-feaſance. 2 Lev. 251. And ſaid *per Curiam*, that the Intent of the Statute was to give double Coſts in falſe Impriſonment, &c. where it enabled to plead the general Iſſue. (d) It cannot be allowed, unleſs the Judge of Aſſiſe marks the *Poſtea*. 2 Vent. 45. 2 Lev. 251. Winch. 16. (e) All the Defendants. Vaugh. 117.

By the Statute 21 *Jac.* 1. *cap.* 12. *ſ.* 3. the above Statute is made perpetual, and it is thereby further enacted, "That Churchwardens, and
"all Perſons called ſworn Men, executing the Office of Churchwardens,
"(f) Overſeers of the Poor, and others, which ſhall do (g) any Thing by
"their Aſſiſtance or Command, concerning their Office, ſhall have Bene-
"fit of 7 *Jac.*"

(f) *Vide* 43. Eliz. c. 2. and Title *Poor.* (g) Not where an Action is brought againſt Churchwardens, for falſly and maliciouſly preſenting the Plaintiff for Incontinency; becauſe merely Eccleſiaſtical, and the Statute is intended only where troubled concerning Temporal Matters. Cro. Car. 286. Jones 305.

Carth. 188. *Willet* and *Tydy.* If *A.* brings an Action on the Caſe againſt *B.* (who is Collector of the Taxes) and declares, that for 19*s.* due to the King, he diſtrained 20 of his Lambs, which he might have ſold to *J. S.* for 40*s.* but that he *deceptivè* ſold them for 35*s.* and kept the Overplus of the Money; and farther declares upon a general *Indebitatus Aſſumpſit* for 16*s.* as ſo much Money received by him to the Plaintiff's Uſe; and the Defendant, as to the firſt Part, pleads Not guilty, and *quoad* the Promiſe *Non aſſumpſit*, and there is a Verdict for the Plaintiff; if the Judge of Aſſiſe certifies on the *Poſtea*, that the Defendant's Juſtification, as to all, was as Collector of the Royal Aid, by Virtue of the Statute 1 *W. & M. St.* 2. *c.* 32. *ſ.* 10. the Defendant, purſuant to that Statute, ſhall have treble Coſts.

3. Of Coſts for and againſt Informers, and where the Proſecution may be ſaid to be carried on at the Suit of the King.

2 Keb. 781. Rol. Abr. 544. Lutw. 200. Vent. 133. Salk. 206. pl. 4. Moor 65. 3 Lev. 374. It ſeems agreed, that a common Informer, upon a popular Statute, can in no Caſe recover Coſts, unleſs they be expreſly given by ſuch Statute; for it is certain, that he cannot recover them at Common Law, for that doth not give Coſts in any Caſe; neither can he recover them by Force of the Statute of *Glouceſter*, which gives the Plaintiff his Coſts only in Caſes in which he ſhall recover his Damages. 2 Inſt. 288.

•Page 520 Jones 447. Cro. Car. 559. • But in an Action on a Statute by the Party grieved, for a certain Penalty given by ſuch Statute, the Plaintiff within the Statute of *Glouceſter* ſhall recover Coſts, becauſe ſuch Penalty is intended him by Way of Recompence for

for his particular Damage by the Offence prohibited; and if he could recover that only, and no more, it would be in moſt Caſes in vain for him to ſue for it, ſince the Coſts of Suit would exceed it. 2 Inſt. 289. Rol. Abr. 516, 517, 574.

So in Debt for a Penalty of 20*l.* brought by a Corporation *qui tam*, &c. upon a private Act of Parliament concerning the *New River Water* brought to *Plymouth*, where the Action was brought for diverting the Water-courſe, contrary to the Statute; after Verdict for the Plaintiffs it was held, That though this was on a new and penal Law, yet being brought by the Parties injured, and for a certain Penalty, they ſhould have their Coſts; otherwiſe where the Action is brought by a common Informer. March. 56. 3 Lev. 374. 3 Keb. 781. Lutw. 200. Carth. 230, 231. The Corporation of *Plymouth* v. *Collings*, adjudged. And the like Point ſaid to have been adjudged Mich. 5 W. 3. between the Corporation of *Cutlers* and *Buſtin*. 12 Mod. 46. Comb. 224. Skin. 363. pl. 6. 367. pl. 14. Holt. 172.

But no Coſts ſhall be recovered in an Action on a Statute, which gives no certain Penalty to the Party grieved, but only his Damages in general, &c. if ſuch a Statute be introductive of a new Law, and give a Remedy in a Point not remediable at the Common Law; but there is not that Inconvenience in this Caſe as in the former, becauſe no certain Sum being ſpecified, the Jury may give the Plaintiff full Satisfaction by Way of Damages. Rol. Abr. 574. Lutw. 200. 10 Co. 116. Cro. Car. 560. Salk. 206. pl. 4.

As to Coſts againſt *Informers*, by the 24 *H.* 8. *cap.* 8. it is enacted, "That the Defendant ſhall recover no Coſts on Nonſuit or Verdict, when "the Plaintiff ſues to the King's Uſe.

But by the 18 *Eliz. cap.* 5. which is made perpetual by 27 *Eliz. cap.* 10. it is enacted, "That if any Informer or Plaintiff, on a Penal Statute, ſhall "willingly delay his Suit, or ſhall diſcontinue, or be nonſuit in the ſame, "or ſhall have the Trial or Matter paſſed againſt him therein by Verdict "or Judgment of Law; that then in every ſuch Caſe, the ſame Informer "or Plaintiff ſhall yield, ſatisfy and pay unto the Party Defendant, his "Coſts, Charges and Damages, to be aſſigned by the Court, in which the "ſame Suit ſhall be attempted, &c."

In the Conſtruction of this Statute it hath been holden, that it extends only to common Informers, who are to have the whole Benefit of the Penalty, and not where the Penalty is given to the Party grieved, or where Part is given to the King, and Part to him who will ſue for it*. And. 116. Sav. 50, 51. Cro. Eliz. 177. 2 Hawk. P.C 390. 3 Burr. 1724. 2 Leon. 116. Salk. 30. 2 Salk. 543. pl. 1. Ld. Raym. 27.

* *Sed qu.*

Alſo it hath been holden, That where Judgment is given againſt an Informer, becauſe the Court in which he ſues has no Juriſdiction of the Cauſe, or becauſe the Statute on which he grounds his Information is diſcontinued, yet he ſhall pay Coſts within the Intent of the Statute, which ſhall have a liberal Conſtruction, and was intended to prevent all vexatious Informations. Sid. 311. 2 Keb. 106. 581. *Vide* Hut. 35, 36.

By the 18 *Eliz.* there is a *Proviſo*, That it ſhall not extend to any Officers that have uſed to exhibit Informations, &c.

But now by the 4 & 5 *W.* & *M. cap.* 18. it is recited, "That divers "malicious and contentious Perſons had more of late, than in Times "paſt, procured to be exhibited and proſecuted, Informations in their "Majeſties Court of *King's Bench* at *Weſtminſter*, againſt Perſons in all "the Counties of *England*, for Treſpaſſes, Batteries, and other Miſde-"meanors; and after the Parties ſo informed againſt had appeared to "ſuch Informations, and pleaded to Iſſue, the Informers had very ſel-"dom proceeded any further; whereby the Perſons ſo informed againſt "had been put to great Charges in their Defence; and although at the "Trials of ſuch Informations, Verdicts had been given for them, or a "*Nolle Proſequi* entered againſt them, they had no Remedy for obtaining "Coſts

Vide 9 Ann. c. 20. By which Coſts are given in Informations in Nature of a *Quo warranto*.

" Costs againſt ſuch Informers;" *and thereupon it is enacted,* " That
*Page 521 " * the Clerk of the Crown in the Court of *King's Bench* ſhall not, with-
" out expreſs Order be given by the ſaid Court in open Court, exhibit,
" receive or file, any Information for any of the Cauſes aforeſaid, or iſſue
" out any Proceſs thereupon, before he ſhall have taken, or ſhall have de-
" livered to him a Recognizance from the Perſon procuring ſuch Informa-
" tion to be exhibited, with the Place of his Abode, Title or Profeſſion, to
" be entered, to the Perſon againſt whom ſuch Information is to be exhibit-
" ed, in the Penalty of 20*l.* that he will effectually proſecute ſuch Infor-
" mation, and abide by and obſerve ſuch Orders as the ſaid Court ſhall
" direct; which Recognizance the Clerk of the Crown, and alſo every
" Juſtice of Peace of any County, *&c.* (where the Cauſe of any ſuch In-
" formation ſhall ariſe) are by the ſaid Statute impowered to take; after
" the Taking whereof the Crown ſhall make an Entry thereof upon Re-
" cord, and ſhall file a *Memorandum* thereof in ſome public Place in his
" Office, that all Perſons may reſort thereunto without Fee; and in caſe
" any Perſon againſt whom any Information for the Cauſes aforeſaid, or
" any of them, ſhall be exhibited, ſhall appear thereunto, and plead to
" Iſſue, and that the Proſecutor of ſuch Information ſhall not, at his own
" proper Coſts and Charges, within one whole Year next after Iſſue joined
" therein, procure the ſame to be tried; or if upon ſuch Trial a Verdict
" paſs for the Defendant; or in caſe the ſame Informer procure a *Nolle Pro-*
" *ſequi* to be entered; then in any of the ſaid Caſes, the Court of *King's*
" *Bench* is authorized to award to the Defendant his Coſts, unleſs the
" Judge before whom ſuch Information ſhall be tried, ſhall at the Trial,
" in open Court, certify upon Record, that there was reaſonable Cauſe for
" exhibiting ſuch Information; and in caſe the ſaid Informer ſhall not,
" within three Months after the Coſts taxed, and Demand made thereof,
" pay to the ſaid Defendant the ſaid Coſts, then the Defendant ſhall have
" the Benefit of the ſaid Recognizance to compel them thereunto.

" Provided, That nothing hereof ſhall extend, or be conſtrued to ex-
" tend, to any other Information, than (*a*) ſuch as ſhall be exhibited in
(*a*) From whence it follows, that Informations exhibited by the Attorney General, remain as they were at the Common Law. 2 Hawk. P. C. 262.
" the Name of their Majeſty's Coroner or Attorney in the Court of *King's*
" *Bench* for the Time being (commonly called the Maſter of the Crown-
" Office.)"

2 Hawk. P. C. 263. In the Conſtruction of this Statute it has been holden, that no Coſts can be had on this Statute, on an Acquittal at a Trial at Bar, not only becauſe the Clauſe which gives Coſts, *unleſs the Judge at the Trial certify a reaſonable Cauſe*, ſeems only to have a reaſonable View to Trials at *Niſi prius*, but alſo becauſe a Cauſe, which is of ſuch Conſequence as to be thought proper for a Trial at Bar, cannot well be thought within the Purview of the Statute, which was chiefly deſigned againſt trifling and vexatious Proſecutions.

Salk. 194. pl. 5. Alſo if there be ſeveral Defendants, and ſome of them acquitted, and others convicted, none of them can have Coſts.

2 Hawk. P. C. 263. But whenever a Defendant's Caſe is ſuch as authorizes the Court to award him his Coſts, he ſeems to have a right to them *ex debito Juſtitiæ*; for it ſeems a general Rule, that where Judges are impowered by Statute to do a Matter of Juſtice, they ought to do it of Courſe.

4. Of

* 4. Of Paupers. *Page 522

In the Statute 23 *H.* 8. *cap.* 15. there is a Proviſion, "That whoever "ſues *in Forma Pauperis* ſhall not pay Coſts, but ſhall ſuffer ſuch other "Puniſhment as the Judge of the Court ſhall think fit."

But notwithſtanding this Statute, if he be (*a*) diſpaupered, or (*b*) non-ſuited, the uſual Practice is to tax the Coſts, and for Non-payment to order him to be (*c*) whipped.

(*a*) Rol. Rep. 88.

(*b*) 2 Salk. 506. pl. 1.

(*c*) But though the uſual Courſe in ſuch Caſe is to tax the Coſts, and if not paid, to whip the Plaintiff; yet upon Conſideration of the Circumſtances of the Caſe, it is in the Diſcretion of the Court to ſpare both. Sid. 261.——And *per Holt* Ch. Juſt. on Motion to whip a Pauper who had been non-ſuited, there is no Officer for that Purpoſe, nor did I ever know it done. 2 Salk. 506. pl. 1.

A. brought a Bill *in Forma Pauperis*, to which the Defendant put in a Plea, and Demurrer, which were both over-ruled; and it was inſiſted upon, That he ſhould have no Coſts, being at none; but my Lord *Sommers*, after long Debate, and Inquiry of all the antient Counſel and Clerks, who agreed that he ſhould have Coſts, ordered him his Coſts (*d*) like other Suitors; for though he is at no Coſts, or but ſmall Coſts, yet the Counſel and Clerks do not give their Labour to the Defendant, but to the *Pauper*.

Eq. Abr. 125.

(*d*) But *vide* Preced. Chan. 219. Where a *Pauper* having a Decree to recover with Coſts, it was held, on Motion, *per Curiam*, to be unreaſonable that any one ſhould have more Coſts than he was out of Pocket; and thereupon ordered the Plaintiff and his Solicitor to make Oath before the Maſter, and what they ſwore they had paid, or were to pay, was to be allowed, but no further.

(F) Of Coſts in Replevin.

IN Replevin the Plaintiff had Damages at Common Law, and Coſts by the Statute of *Glouceſter*, as a Conſequence of ſuch Damage, but the Avowant or Defendant in Replevin had no Coſts, although in many Caſes where an Avowry or Conuſance was made, and a Return prayed, the Defendant was an Actor.

Jones 434.

But now by 7 *H.* 8. *cap.* 4. "Every Avowant and Perſon that makes "Conuzance, or juſtifies as Bailiff in Replevin, or ſecond Deliverance, "for any Rent, Cuſtom or Service, if (*e*) their Avowry, Conuzance "or Juſtification be found for them, or the (*f*) Plaintiffs otherwiſe "barred, ſhall recover their Damages and Coſts, as the Plaintiff ſhould "have done if he had recovered."

Comyns 122. pl. 85. 2 Ld. Raym. 788.

(*e*) If Defendant avows for 36*l.* for a Year and a Half's Rent, and the Plaintiff pleads Payment of 12*l.* and there is another Iſſue for the 24*l.* and the firſt Iſſue is found for the Plaintiff, and the ſecond for the Defendant, the Plaintiff ſhall have no Coſts or Damages; but the Avowant ſhall have a Return, Damages and Coſts. Cro. Jac. 473.

(*f*) Extends not to a Nonſuit, Jones 423.

Alſo by the 21 *H.* 8. *cap.* 19. By which the Lord may avow, as in Lands within his Fee, without naming any Tenant in certain, it is further enacted, "That (*g*) every Avowant or other Perſon (*b*) making Juſtification "or Conuzance, as Bailiff or Servant in Replevin, or ſecond Deliverance, (*i*) "for

Comyns 122. pl. 85. 2 Ld. Raym. 788. Salk. 95. pl. 6. 1 Burr. 406.

Dyer 709. 2 Term Rep. 235. 12 Mod. 547. (*g*) Extends to Executors that avow; by 32 H. 8. c. 2. a ſubſequent Statute. 2 Rol. Rep. 457. (*b*) Extends not to a Defendant that claims Property. Hard. 153. (*i*) The Defendant avowed the Taking as a Stray within his Manor; and whether he ſhould have Coſts, *Haſlop* and *Chaplain*, *dubitatur*; but Judgment reverſed for another Cauſe. Cro. Eliz. 257, 329. Owen 13. but Jones 435. cited and ſaid, the Judgment was reverſed becauſe

Page 523 * " for Rents, Cuſtoms, (*k*) Services, (*l*) Damage-feaſant, or for other (*m*) " Rent or Rents, if the Avowry, Conuzance, or Juſtification, be found " for them, or the (*n*) Plaintiff be nonſuit, or otherwiſe barred, they ſhall " recover Damages and Coſts, as the Plaintiff ſhould have done."

becauſe Damages and Coſts were given; and that this Reaſon is entered upon the Roll.——Not if an Avowry for an Amercement in a Leet, &c. *Porter* v. *Grey*. Cro. Eliz. 300. Moor 893. Cro. Jac. 520. 2 Rol. Rep. 75. But releaſing his Damages, he had Coſts by 4 Jac. 1 & *vide* Jones 424, 435. But Cro. Eliz. 257, 329. It has been the conſtant Practice ſince this Act to give Coſts and Damages.—— Where the Avowry was for a Penalty upon Breach of a By-Law. Cro. Jac. 497, 532. Jones 421, 435. March 29. (*k*) Where the Avowry for Relief *dubitatur*, becauſe no Service, but a Flower thereof only, and goes to Executors. Cro. Jac. 28. Cro. Car. 422, 533, 534. Jones 422. 2 Rol. Rep. 75.——But upon a Diſtreſs for a Heriot, no Queſtion but Coſts ſhall be paid. Cro. Jac. 28. Yet *vide* Cro. Eliz. 257, 329. (*l*) But he ſhall recover Damages for the Treſpaſs at the Time of the Taking only, and not for the mean Time. Dalſ. 52. (*m*) Extends not to an Avowry for a *Nomine Pœnæ*. (*n*) Therefore 2 Sid. 155. Where the Defendant avowed for a Rent-charge, and the Plaintiff, after Evidence, was nonſuited, the Court took the Verdict of the Jurors, who found for the Defendant, and aſſeſſed Damages and Coſts. No Coſts in Replevin for the Defendant, if the *Plaintiff confeſſes a Plea in Abatement to be true*. 2 Ld. Raym. 788.

(G) Of Coſts in a Writ of Error.

Cro. Eliz. 588.

AS there were no Damages given in a Writ of Error, but only a Reverſal or Affirmance of the former Judgment, there could be no Coſts, either at Common Law or by the Statute of *Glouceſter*: Hence it was thought neceſſary to make a Statute to redreſs the Miſchiefs that aroſe from Writs of Error, in order to delay Execution. Therefore,

(*o*) By the Statute of 19 H. 7. c. 20. this Act is confirmed; and it is enacted, That the ſame ſhould from thenceforth be put in Execution. See 8 Mod. 73, 314, 316. Sid. 357.

By the (*o*) 3 *H.* 7. *cap.* 10. " Whereas Plaintiffs or Demandants had " been delayed of Execution, for that Defendants, &c. againſt whom the " Judgment was given, or others bound thereby, brought Error to reverſe " the Judgment, to the Intent only to delay Execution, it is enacted, " That if any Defendant, &c. or others bound thereby, before Execution " had, bring any Writ of Error in Delay of Execution, then, if Judgment " be affirmed, or the Writ of Error diſcontinued through the Default of " the Party, or the Plaintiff therein be nonſuited in the ſame, the Party " againſt whom the Writ of Error is ſued, ſhall recover his Coſts and Damage, for the Delay, and wrongful Vexation, by the Diſcretion of the " Juſtices before whom the Writ of Error is ſued."

In the Conſtruction of this Statute, it has been holden, That it extends not to *Ireland*, becauſe not particularly named; therefore a Judgment upon a Writ of Error in the King's Bench there, wherein Coſts were given, was for that Reaſon (*p*) reverſed here, as to the Coſts.

(*p*) Where a Judgment in *C. B.* in *Ireland*, was affirmed in *B. R.* there, as alſo on a Writ of Error in *B. R.* here, and likewiſe on a Writ of Error in the Houſe of Lords here, and a *Capias ad Satisfaciend'* in *B. R.* here, as well for the Coſts given by the Courts in *Ireland*, as for thoſe given by the Court here, was ſuperſeded as irregular. Carth. 460. Ld. Raym. 427. 5 Mod. 421. Salk. 321. pl. 6.

(*q*) Vent. 166. Mod. 77. (*r*) 3 Lev. 375. Carth. 281.

It extends not to Executors or Adminiſtrators, where they bring Error upon a Judgment againſt their (*q*) Teſtator, or upon a Judgment againſt (*r*) themſelves; for being *in auter droit*, they are not preſumed to bring the Writ of Error for Delay.

4 Mod. 244. Ld. Raym. 437. 2 Ld. Raym. 865, 1215, 1413. Stra. 682. 8 Mod. 108. 10 Mod. 276, 277. 11 Mod. 135. pl. 17, 174. pl. 18, 196. pl. 11, 256. pl. 10. 12 Mod. 440. Comyn. 162. pl. 110. Barnes 90, 103, 110. 2 Barnes 99, 102, 106, 122. 2 Stra. 871. See Annaly 367. 2 Barnard. *K. B.* 154. And *Note*, held contrary in *C. P.* Barnes 110. 2 Stra. 977. 2 Barnard. *K. B.* 450. 2 Stra. 1106. Andr. 356. Stra. 682.

There are no Coſts by this Act where Execution is executed, for then there can be no Delay of Execution. Cro. Jac. 636.

* Hence there can be no Coſts in a Writ of Error upon a Judgment in Ejectment, where Execution was executed as to the Coſts and Damages, though not as to the Term†. Cro. Car. 401. *Page 524 Vent. 88.

† It is uſual now to enter up the Judgment, to recover the Term, with nominal Damages, &c. to execute a Writ of Poſſeſſion, and then bring an Action for the meſne Profits, and for the Coſts.

Nor in Error upon a Judgment in *Formedon*, becauſe the Plaintiff had no Coſts in the (*a*) firſt Judgment; and the Intent of the Statute is to prevent the Delay of Execution for the firſt Damages and Coſts. Cro. Car. 425. Vent. 88. See 2 Stra. 1084.

And. 113. Lev 146. Raym. 134. But *vide* Cro. Eliz. 617, 659. *cont'*. (*a*) But in a *Quare Impedit*, though therein no Coſts are recoverable, but Damages only, the Party ſhall have Coſts. Dyer 77. Cro. Car. 145, 175. Sayer's Law of Coſts 200.

This Statute extends to a Writ of Error in the Exchequer-Chamber, though given by a ſubſequent Statute. 2 And. 123. Cro. Eliz. 588.

Alſo the more effectually to prevent Defendants from bringing frivolous Writs of Error, by the 13 *Car. 2. ſtat. 2. cap.* 2. it is enacted, "That if "any proſecute a Writ of Error for Reverſal of any Judgment *after Ver-* "*dict* in the Courts of *Weſtminſter*, Counties Palatine of *Cheſter*, *Lancaſter* "or *Durham*, or of the great Seſſions in *Wales*, and the Judgment is af- "firmed, they ſhall pay double Coſts; popular Actions upon Penal Laws "(except Debt for Tithes) Indictments, Informations, *&c.* excepted."

But as theſe Statutes do not extend to Caſes where Judgment is given for the (*b*) Defendant, and the Plaintiff brings a Writ of Error, it was thought neceſſary to remedy this Inconvenience: And therefore, 2 And. 123. Cro. Car. 401.

(*b*) A Defendant in Replevin, tho' he is conſidered in ſome Caſes as a Plaintiff, ſhall not have Coſts within thoſe Statutes which are to be conſtrued ſtrictly, becauſe Coſts are in Nature of a Penalty. Carth. 179. 4 Mod. 7. Show. 13, 165. 12 Mod. 1, 2. 2 Ld. Raym. 788. Salk. 205. pl. 1. S. C.

By the 8 & 9 *W.* 3. *cap.* 10. "If in any Action, *&c.* upon Demurrer "by Plaintiff or Defendant, Judgment ſhall be given for the Defendant; "or if after Judgment for the Defendant in ſuch Action, *&c.* the Plaintiff "ſhall bring Error, and the Judgment ſhall be affirmed, the Writ of "Error diſcontinued, or the Plaintiff nonſuited, the Defendant ſhall have "Judgment for his (*c*) Coſts, and Execution for the ſame by *Capias ad* "*ſatisfaciend'*." 8 Mod. 314. 316. 12 Mod. 523. 2 Ld. Raym. 992. Salk. 194. pl. 3. Comb. 482.

4 Mod. 88. (*c*) But not for double Coſts, for this ſhall not be preſumed merely for Delay, ſince the Plaintiff keeps Poſſeſſion of nothing by his Writ of Error.

(H) Of Coſts in the ſeveral Steps and Proceedings of a Cauſe.

AS the Courts exerciſe a Diſcretionary Power in awarding Coſts, before there is a final Judgment in the Cauſe, it ſeems difficult to aſcertain the ſeveral Caſes in which the Courts will make uſe of this Power; however, it may be obſerved in general, that the Delays or Contempts, which either Party is guilty of, can only be remitted or purged on payment of Coſts.

As

12 Mod. 560. *Vide* Title *Amendment*, Letter (G).

As for not going on to Trial, &c. so if the Plaintiff moves to amend his Declaration, (which is seldom refused whilst the Proceedings are in Paper) it must be on Payment of Costs.

20 Mod. 88. Salk. 208, 209. pl. 8.

There are no Costs in Abatement upon Demurrer, because there are no Damages given, but only a *Respondeas ouster* awarded.

2 Salk. 520. pl. 22. 6 Mod. 157. 2 Ld. Raym. 1138.

Leon. 105. Hutt. 36. Cro. Car. 575. Hard. 152. *Page 525 2 Com. Dig. 549.

But the Statutes gives Cost on a *Non Pros'*; and this even before declaring, and then he is demandable, for he is not in Court by Attorney until he has declared; but since he has put in his Appearance by Attorney, the Court will vacate his Appearance, if he does not do as he ought to do in declaring; and this Sort of Nonsuit is as well within the Statutes, as when he is demandable at the *Nisi prius*: But because the *King's Bench* suffered them to lie three Terms, without awarding a *Non prosi*, therefore

Enlarged to the End of the 2d Term, by an Order of *K. B.* made Mich. Term. 10 Geo. 2. Reg. 2. *Note* (*b*).

By the 8 *Eliz. cap.* 2. if upon a *Latitat*, *Alias* or *Pluries Capias* issuing out of the *King's Bench*, the Plaintiff does not declare within three Days after Bail put in, or after Declaration shall delay or suffer his Suit to be discontinued, or be nonsuit, the Court shall award the Defendant his Costs and Damage.

After a Declaration put in by the Plaintiff, and the Defendant puts in a Bar or Demurrer' and the Plaintiff does not reply, &c. there is a Judgment against him on the Bar, &c. and Costs awarded, because he does not prosecute his Writ with Effect.

After Issue joined or a Verdict given, the Plaintiff cannot discontinue without Leave of the Court, which is never granted but upon Payment of Costs†.

† *Qu.* if he can discontinue at any Time, after Suit commenced, without paying Costs?

4 Mod. 374. That if a new Trial, or second Issue be directed out of Chancery, it must be on Payment of Costs. 2 Vern. 75. 8 Mod. 225.

The Plaintiff cannot bring a new Ejectment without paying the Costs of the first‡.

‡ If he does, the Court will, on Motion, stay Proceedings, 'till Costs paid.

Vide Title *Outlawry*.

The Defendant shall not pay the Costs of reversing an Outlawry until the Plaintiff declares against him; and if the Plaintiff be nonsuit, the Defendant shall have them again in his Costs; and if there be more Defendants than one, and they be all outlawed, they shall all be contributory for the Costs, and not every one pay the whole Costs.

(I) Costs, how assessed or taxed.

Rol. Abr. 517.

AFTER the making the Statutes that introduced Costs, it was agreed on as a Rule, That the Jury should tax the Damages a-part, and the Costs a-part, that so it might appear to the Court that the Costs were not considered in the Damages; and when it was evident that the Costs taxed by the Jury were too little to answer the Costs of Suit, the Plaintiff prayed that the Officer might tax the Costs, and that was inserted in the Judgments

ments; and therefore ſaid to be done *ex aſſenſu* of the Plaintiff*, becauſe at his Prayer.

* It is ſaid the Judgment would be erroneous, if that was omitted.

If there are ſeveral Iſſues found for the Plaintiff, or againſt ſeveral Defendants, intire Coſts are given upon the whole Pleadings, for that is the whole Charge the Plaintiff is at. 10 Co. 117. b.

So if in Debt the Defendant pleads ſeveral Pleas, upon which they are at Iſſue, and the Jury find one Iſſue for the Plaintiff, and Damages 12*d.* another Iſſue for the Plaintiff, and Damages 10*d.* and another Iſſue for the Plaintiff, and Damages 6*d.* and one Iſſue againſt the Plaintiff, they muſt aſſeſs the Coſts intirely, and not according to the Damage ſeverally, for every Iſſue found for the Plaintiff. Keilw. 48. 2 Leon. 177. Brownl. 3.

Upon a *Scire Facias* on a Recognizance in *C. B.* againſt Bail, the Plantiff had Judgment for Execution upon the Recognizance, & *quod recuperet Damna ſua occaſione dilationis executionis*; upon a Writ of Error in *B. R.* this was reverſed, for the Bail are only liable to Coſts of Suit by the Statute, and Damages, by Reaſon of the Delay of Execution, are not Coſts, nor Coſts of Suit, but Damage ſuſtained by being ſo long out of his Money, which uſed to be aſſeſſed by allowing the Party what lawful Intereſt would have come to him in the mean Time; ſo that Coſts and Damages are different in this Caſe, given for different Ends, and aſſeſſed by different Meaſures. Salk. 208. pl. 8. 2 Salk. 520. pl. 22. *Fanſhaw* and *Morriſon.* 6 Mod. 157. S. C. 2 Ld. Raym. 1138. 10 Mod. 306. *Page 526

If Baron and Feme join in an Action, and a Verdict is given for the Plaintiffs, and the Jury aſſeſs Damages *ultra miſas & cuſtagia per ipſum* (the Baron) *circa ſectam ſuam expoſita*, to ſo much, & *pro miſis & cuſtagiis illis*, to ſo much; and thereupon Judgment is given, that the Baron and Feme ſhall recover the Coſts and Damages, though it is found that the Baron only expended and diſburſed the Money for the Coſts of the Suit, in as much as the Feme had nothing, yet the Judgment is good, that the Baron and Feme ſhall recover the Coſts; for there cannot be one Judgment for the Coſts, and another for the Damages†. Rol. Abr. 516. *Cruſoe* and *Berry* adjudged upon a Writ of Error.

† *N. B.* Mr. Serjeant *Sayer* has made a very uſeful Collection of Caſes relative to *Coſts*, in a ſmall Volume, and another, as to *Damages*.

COVENANT.

COVENANTS, Contracts and Agreements, are often uſed as ſynonymous Words, ſignifying an Engagement entered into, by which one Perſon lays himſelf under an Obligation to do ſomething beneficial to, or to abſtain from an Act, which if done, might be prejudicial to another.

As the Good of Society requires a punctual Performance of, and that no Perſon ſhould be allowed to reſcind and break through his Contracts, ſo the Law has provided a Remedy by Action of Covenant*, in which the injured

* Where the Contract is by Deed.

injured Party is to recover Damages for the Violation of the Contract, in Proportion to the Loſs he has ſuſtained.

But here it may be neceſſary to obſerve, That where the Covenant or Agreement is for doing ſomething in *Specie*, as conveying Lands, executing Deeds, &c. the moſt uſual, and indeed the moſt proper Remedy is by Bill in Chancery; which, in Caſes reaſonable, will decree an Execution in *Specie*, whereas at Common Law, the Party can only be repaired in Damages.

But if the Matter of the Bill is merely in Damages, the Remedy is only at Law, becauſe the Damages cannot be aſcertained by the Conſcience of the Chancellor, and therefore muſt be ſettled by a Jury at Law.

But if there be Matter of Fraud mixed with the Damages, as if *A.* ſues *B.* on a Covenant at Law for Damages, and *B.* files a Bill for an Injunction, upon this equitable Suggeſtion, that the Covenant was obtained by Fraud; if *A.* files his Croſs-Bill for Relief upon that Covenant, the Court will retain it, becauſe the Validity of the Covenant is diſputed in that Court, and on a Head properly conuzable there; and therefore, if the Validity of the Deed be eſtabliſhed, the Court will direct an Iſſue for the *Quantum* of the Damages.

But for the better underſtanding of this Action of Covenant, I ſhall conſider,

(A) Of the Manner, and by what Words an expreſs Covenant is created. 527.

*Page 527 * (B) Of Covenants created by Implication of Law. 530.

(C) Where an Action of Covenant is the proper Remedy. 532.

(D) Where there are ſeveral Parties; and herein of joint Covenants. 532.

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(F) How Covenants are to be construed. 539.
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(A) Of the Manner, and by what Words an express Covenant is created.

(a) THE Law does not seem to have appropriated any set Form of Words, which are absolutely necessary to be made use of in creating a Covenant; and therefore it seems that any Words will be effectual for that Purpose, which shew the Parties Concurrence to the Performance of a future Act; as (b) if Lessee for Years covenants to Repairs, &c. *Provided always, and it is agreed, that the Lessor shall find great Timber*, &c. this makes a Covenant on the Part of the Lessor to find great Timber, by the Word (c) *agreed*, and it shall not be a Qualification of the Covenant of the Lessee.

(a) 1 Chan. Ca. 294. Leon. 324.
(b) Rol. Abr. 518. Brownl. 23. S. C.
(c) But it is said, that without this Word it would have been only a Qualification of the Covenant of the Lessee. Rol. Abr. 518. Sid. 423. 2 Co. 72. b. Lev. 155.

So if *A.* leases to *B.* for Years, upon Condition that he shall acquit the Lessor of ordinary and extraordinary Charges, and shall keep and leave the Houses at the End of the Term in as good Plight as he found them; if he does not leave them well repaired at the End of the Term, an Action of Covenant lies. 40 E. 3. 5. b. Rol. Abr. 518. S. C.

* So these Words in a Lease of a Mill, *and the Lessee shall repair the Mills as often as Need shall require, and shall leave them sufficiently repaired at the End of the Term*, make a Covenant, (d) becaufe it is the clear Agreement of the Parties; for otherwise the Words, *shall leave*, &c. would have no Effect. *Page 528 Rol. Abr. 518. *Bret* and *Cumber-land* adjudged. Cro. Jac. 399, 521. 3 Bulst. 163. Rol. Rep. 359. 2 Rol. Rep. 63. S. C. adjudged.

(d) As if *A.* by Indenture agrees to give *B.* 70*l.* for an House, if *B.* executes one Part of the Indenture to *A. A.* may bring Covenant for the House. *Pordage* and *Cole.* Lev. 274. *per Cur'*. Raym. 183. *per Cur'* Sand. 319. That on the Part of *B.* it amounted to a Covenant to convey. Sid. 423. *per Cur'*.

If *A.* leases to *B.* for Life, with a *Proviso*, That if the Lessee dies within the Term of forty Years, that then the Executors of the Lessee shall have it for so many of the Years as amount to the Number of forty Years, to be accounted from the Date of the Indenture of Lease; this *Proviso* shall not be a Lease, but only a Covenant. Co. 155. Rol. Abr. 518. Moor 478.

If there are Articles of Agreement between *A.* and *B.* by which it is agreed, upon a Marriage intended between *A.* and *C.* that all the Stock of *C.* shall remain in the Hands of *B.* till *A.* shall make a certain Jointure to *C.* Rol. Abr. 518, 519.

ipso

ipſo B. annuatim ſolvendo to *A. intereſſe proinde ſecundum Ratam* 8*l. per Centum, &c.* If *B.* does not pay the ſaid Intereſt, an Action of Covenant lies againſt him upon theſe Words, becauſe (*b*) every (*c*) Agreement by Deed is a Covenant, otherwiſe *A.* could not have any Remedy for the Money.

(*b*) So where a Man acknowledges himſelf to be accountable to another for all Money by him charged upon *A.* to be paid to *B.* Lev. 47. ——Where the Words were only by way of Recital, that it was intended that a Fine ſhould be levied, *&c.* 2 Mod. 89, 91. Gilb. Eq. Rep, 6, 7, 108, 109, 166, 167. *& vide* Leon. 122. (*c*) Where a Man aſſigns and transfers a Choſe in Action, though nothing paſſes, yet it amounts to a Covenant, that the other ſhall have the Thing. Mod. 113. 3 Keb. 304. Freem. 268. Ld. Raym. 683. 2 Ld. Raym. 1242, 1419.

Rol. Abr. 519. If *A.* makes a Deed to *B.* in theſe Words, *I have in my Cuſtody one Writing obligatory, in which Writing obligatory, one* William *now ſtandeth bound to the ſaid* B. *for the Payment of* 400l. *upon ſuch a Day, being the proper Money of* B. *and* (*d*) *I will be ready at all Times, when I ſhall be required, to redeliver the ſame Writing obligatory to the ſame* B. If *B.* after demands the ſaid Obligation of *A.* and he refuſes to deliver it, *B.* may have an Action of Covenant upon this Deed by Force of the Words, *and I will be ready at all Times, when I ſhall be required, to redeliver the ſame,* &c.

(*d*) So where the Words of a Deed are, I oblige myſelf to pay ſo much Money at ſuch a Day, and ſo much at another. Hard. 178. adjudged; but the Chief Baron doubted, if the Words had been *teneri & firmiter obligari*; for that theſe Words ſound in Debt, and not in Covenant.

Raym. 25. *Robinſon* and *Ampton* adjudged. Keb. 103, 118. S. C. Sid. 48. S.C. If *A.* enters into a Statute to *B.* and afterwards *B.* by his Deed covenants, that upon Payment of ſuch a Sum at a Day to come, the Statute ſhall be void, and that he will deliver it in, and cauſe it to be vacated; if *B.* before the Day ſues Execution upon the Statute, *A.* may bring an Action of Covenant; for though it be true, that a Covenant that is to take Effect preſently is to ſtand or fall by the Operation of Law, and no Action of Covenant will lie; as if a Man Covenants that a Bond ſhall be void upon doing ſuch an Act, or to ſtand ſeized, no Action of Covenant will lie upon theſe; but here the laſt Words bind the Party to the Performance of a future Act, *viz. to deliver in the ſaid Statute, and cauſe it to be vacated,* which without all Queſtion ſound in Covenant.

Carth. 64. Comb. 123, 124. If *A.* enters into an Obligation to *B.* and afterwards *B.* covenants not to ſue *A.* without any Limitation of Time, this amounts to a Releaſe, and may be pleaded as ſuch.

Carth. 64. But if the Covenant be temporary, and limited to a certain Time; as if it be, that *B.* will not ſue for ninety-nine Years, *&c.* this ſtill remains a Covenant; and for the Violation thereof an Action of Covenant is the proper Remedy, but it cannot be pleaded in Bar; ſo if there
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* be two Obligors, and the Obligee covenants that he will not ſue one of them, this is no Releaſe, but only a Covenant.

Carth. 64. A Letter of Licence containing the Words following, *viz. That if the Creditor ſue within ſuch a Time, his Debt ſhall be forfeited,* works a Forfeiture by the Commencement of the Suit, and therefore may be pleaded in Bar to the Action.

Rol. Abr. 518. *Geary* and *Read.* Cro. Car. 128, 129. S.C. adjudged. *& vide* Cro. Eliz. 242, 385. 2 Co. 71. If there are Articles of Agreement made by Indenture between *A.* and *B.* in which *A.* agrees that *B.* ſhall have a Houſe in a Street in *London*, for certain Years; provided, and upon Condition, that *B.* ſhall receive and pay the Rents of the other Houſes of *A.* in the ſame ſtreet mentioned in a Schedule annexed to the Indenture; and it is further agreed, that *B.* for his Labour in collecting of the ſaid Rents, ſhall have the Overplus of the Rents, over and above ſuch a certain ſum; this is not any Covenant on the Part of *B.* to bind him to receive and pay the Rents mentioned in the Schedule; but the *Proviſo* and Condition will only make the Eſtate of *B.* void in the Houſe.

If *A.* by Deed enfeoffs *B.* provided, that, if *A.* pays Money to *B.* by a Day the Feoffment ſhall be void, and covenants to ſave harmleſs from Incumbrances and Arrears of Rent, and to make further Aſſurance; and after *A.* enters into an Obligation conditioned for the Performance of all (*a*) Covenants, Payments, Articles and Agreements compriſed in the Deed, if *A.* pays not the Money, yet the Bond is not forfeited; for there being no Covenant to pay the Money, it is a *Proviſo* in Advantage of the Feoffor, that, if he paid the Money, he ſhould have the Land again; ſo that it is in his Election to pay the Money or loſe the Land, which is a ſufficient Loſs to him, and the Word *Payment*, in the Bond, hath Reference to the Covenant to ſave harmleſs from Arrears of Rent.

Cro. Jac. 281. *Briſco* and *King*, adjudged; Yelv. 206. S. C. adjudged; the *Proviſo* being, That if *A.* paid for *B.* 40l. to *C.* *&c.* for the Word *Payment*, in the Obligation, ſhall have Reference to ſuch Payments, only, as by the Deed are compulſory, not ſuch as are voluntary; for otherwiſe the Obligation and Condition would be repugnant, and contrary to the Deed. 1 Brownl. 113. S. C. and *Bulſt.* 156. S. C. adjudged. 2 Mod. 37. S. P. 10 Mod. 227. Gilb. Eq. Rep. 43. (*a*) Otherwiſe if the Condition of the Bond had been for the Performance of all Covenants and Conditions in the Deed. *Tooms* v. *Chandler*, 2 Lev. 116. 3 Keb. 454. adjudged, and in 3 *Keb.* 460. Judgment is given for the Defendant unleſs the Plaintiff diſcontinue.

An Action of Covenant may be brought as (*b*) well on a Deed Poll, as on a Deed indented.

Rol. Abr. 517. (*b*) So a Writ of Covenant lies upon the King's Patent, though there is no Counterpart ſealed by the Leſſee, who is to be charged. Cro. Jac. 240. Bulſt. 21. Cro. Jac. 399, 521. 3 Bulſt. 163. Rol. Rep. 359. 2 Rol. Rep. 63. Poph. 136.

But though Covenant lies as well on a Deed Poll as upon a Deed indented, yet the Parties muſt be named therein; and therefore, where in Covenant the Plaintiff declared, that *J. S.* being arreſted at his Suit, and in the Cuſtody of the Bailiff, he, the Defendant, promiſed and engaged to bring in the Body of *J. S.* into the Cuſtody of the Bailiff ſuch a Day; and on Demurrer it was held, that the Action would not lie, the Plaintiff not being named in the Agreement, and no Averment *dehors* could avail him.

Salk. 197. pl. 3. *Green* and *Horn*, adjudged.

(B) Of Covenants created by Implication of Law.

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THERE are ſome Words, which of themſelves import no expreſs Covenant, yet being made Uſe of in certain Contracts, they amount to ſuch, and are therefore called Covenants in Law, and will as effectually bind the Parties, as if expreſſed in the moſt explicit Terms.

48 E. 3. 2. b. 7. Rol. Abr. 519.

As if a Man (*c*) makes a Leaſe for Years of Land, by the Words (*d*) *dimiſit* or *demiſi*, theſe import a Covenant, and if the Leſſee or his Aſſignee are (*e*) evicted, they may bring an Action thereupon.

5 Co. 17. a. reſolved. (*c*) So if an Aſſignment thereof be made by the Word *Grant*. 2 Rol. Rep. 399. Palm. 388. (*d*) Carth. 98. S. P. admitted.—Where a Man *aſſignavit & tranſpoſuit* all the Money that ſhould be allowed by any Order of a Foreign State, to come to him in Lieu of his Share in a Ship. Mod. 113. 8 Mod. 40, 42, 173, 332. 10 Mod. 223. Said by *Hale*, though it cannot be aſſigned, yet this amounts to a Covenant that he ſhall have all the Money; *& vide* 4 Co. 81. Cro. Eliz. 214. 2 Leon. 104. (*e*) Whether the Leſſor himſelf, or a Stranger, ouſts him. *Vide* Rol. Abr. 519. 2 Leon. 104. Cro. Eliz. 214*. So if the Cattle of the Leſſee are diſtrained by the Lord Paramount, he may have Covenant againſt the Leſſor. Raym. 257.

* *Sed qu.* If it muſt not mean a Stranger having Title, Paramount to the Leaſe?

Rol. Abr. 519. Style 387. Carth. 135.

So if a Man leaſes for Years, reſerving Rent, an Action of Covenant lies for Non-payment of the Rent, for the (*d*) *Reddendo* of the Rent is an Agreement for Payment of the Rent, which will make a Covenant.

(*d*) So the Words Yielding and Paying make a Covenant. Style 406, 407, 431. 2 Brownl. 215. Sid. 266, 401. 2 Mod. 92. Vent. 10. 2 Jones 102. 3 Lev. 155.

4 Co. 80. b. *Nokes* and *James*, adjudged.

Alſo if a Man leaſes for Years by the Words *Demiſe*, *Grant*, &c. and in the Deed there are ſeveral Covenants on the Part of the Leſſor, and he enters into a Bond conditioned for the Performance of all the Covenants, &c. in the ſaid Deed; this extends as well to the Covenants in Law, as expreſs Covenants.

4 Co. 80. Cro. Eliz. 674. Yelv. 175.

But if a Man leaſes for Years by the Words *Demiſi*, &c. and the Leſſor covenants that the Leſſee ſhall enjoy during the Term, without Eviction by the Leſſor, or any claiming under him; this expreſs Covenant qualifies the Generality of the Covenant in Law, and reſtrains it by the mutual Conſent of both Parties, that it ſhall not extend farther than the expreſs Covenant.

Rol. Abr. 520. Cro. Jac. 73. S. C. adjudged.

If a Man leaſes to me by Indenture the Land of (*e*) *J. S.* of which *J. S.* is ſeiſed at the Time, upon which I enter, and he re-enters, I ſhall have a Writ of Covenant upon this Indenture, though I was not in the Land by the Leaſe, but by Eſtoppel, for the Leſſor is eſtopped to ſay that I was not in of his Leaſe.

(*e*) So if by Indenture he Leaſes to me my own Land, and I am ouſted by a Stranger. Cro. Jac. 73. Rol. Abr. 520, 871. Shep. Touch. 162.

Rol. Abr. 520. *Holder* and *Taylor*. 2 Brown. 22. 6. P. Hob. 12. S. C. But *vide* in Rol. the Caſe immediately following; which ſeems *cont'*, and that if a Man leaſes Land for Years, and a Stranger enters before the Leſſee enters, he ſhall not have an Action of Covenant upon this Ouſter, becauſe he was never a Leſſee in Privity to have the Action. Rol. Abr. 520. Owen 105. S. P. *per Fenner*

So if a Man leaſes to me Land of *J. S.* of which *J. S.* is ſeiſed at the Time, I ſhall have a Writ of Covenant before Entry upon *J. S.* and Reentry by him; for I need not alledge an Eviction, for this is a Covenant in Law, which is broke when he is not ſeiſed of the Land at the Time of the Demiſe, for the Word *Demiſe* imports a Power of Letting; and it is not reaſonable to enforce the Leſſee to enter into the Land, and ſo to commit a Treſpaſs.

† *Sed qu.* If this is Law? and if he may not maintain an Action on the Covenant, expreſs, implied, that he ſhall hold and enjoy for the Term?

Owen 104. Rol. Abr. 519. *Page 531

But if a Man leaſes certain Goods for Years by Indenture, which are evicted within the Term, yet he ſhall not have a Writ of Covenant for the Law does (*f*) not create any Covenant upon ſuch Perſonal Thing ‡.

(*f*) And therefore in caſe of a Leaſe of a Houſe, together with the Goods, it is uſual to make a Schedule thereof, and affix it to the Leaſe, and to have a Covenant from the Leſſee to re-deliver them at the End of the Term; for without ſuch Covenant the Leſſor can have no Remedy but Trover or Detinue for them after the Leaſe ended.

‡ This means if there is not any expreſs Covenant.

(*g*) If for Life. 2 Jones 102. *dubitatur*.

So in the Caſe of a Grant of an (*g*) Inheritance, by the Words *enfeoffe*, *grant*, &c. the Law does not create a Covenant.

Carth. 97, 98. *Coleman* and *Sherwin*, adjudged. Salk. 137. pl. 1.

Alſo if two or more join in making a Leaſe by the Words *conceſſi*, &c. this creates a Covenant in Law, for the Breach of which, all of them ſhall be jointly ſued; but if the Breach be the Perſonal Tort of one of them, if one of them enters and ouſts the Leſſee, the Action may be brought

againſt him alone; for it is unreaſonable, that the others ſhould ſuffer for the Perſonal Wrong of their Companion. Show. 79. S. C.

A. by Indenture granted and demiſed to *B.* certain Lands, except a little Piece upon which a Pump was ſtanding, together with the Uſe and Occupation of the Pump, in common with other the Tenants of *A.* for thirty-one Years; and after the Pump became uſeleſs for Want of Repairs, and *B.* brought Covenant againſt *A.* and aſſigned the Breach in *A.*'s permitting the Pump to run to decay; and it was held by *Kelynge*, Chief Juſtice, *Rainsford* and *Moreton*, Juſtices, that the Action lay; for that when the Uſe of a Thing is (*c*) demiſed, and it runs to decay, ſo that the Leſſee cannot have the Uſe and Benefit thereof, he may have Covenant upon the Word *demiſi*; and here the Leſſee himſelf could not repair, having no Intereſt in the Pump, or Land where it ſtood; but *Twiſden totis viribus cont'*. 1. Becauſe a Covenant created by Law, as this is, never lies but on an (*d*) actual Ouſter. 2. This Covenant created by Law, is not (*e*) properly to recover Damages, but the Term itſelf, and the Damages that are recovered are for the whole Term, whereas the Pump may be repaired the next Day. 3. The Leſſee may repair the Pump himſelf, and may come on the Ground without being a Treſpaſſer; as where I grant that you may fiſh in my Pond, you have Liberty to come upon my Ground; ſo if you have a Grant to lay Pipes in my Ground, you may dig up the Ground for that Purpoſe; and for theſe Reaſons of *Twiſden*'s, the Judgment was *una voce* reverſed *in Cam' Scac'*. Comb. 163. Vent. 26, 44. *Pomfret* and *Ricroft*, adjudged, *cont' Twiſden* in B. R. Sid. 429. S. C. adjudged, *cont' Twiſden* in B. R. But Sand. 321, 322. S. C. reverſed for *Twiſden*'s Reaſons *in Cam' Scacc'*, and *Hale* ſaid, That if I lend one a Piece of Plate, and covenant he ſhall have the Uſe thereof, yet if the Plate be worn out by ordinary Uſe, without any Default, no Action of Covenant lies againſt me.—But if one by Deed grants a Water-courſe, and after ſtops it, an Action of Covenant lies againſt him. Sand. 322. For by *Twiſden*, This is a voluntary Misfeaſance.—So if I leaſe a Houſe, and therewith grant Eſtovers out of ſuch a Wood, if I cut down the Wood, ſo that no Eſtovers can be had, the Leſſee may bring Covenant againſt me. (*c*) But if *A.* in Conſideration that *B.* will build a Mill upon the Land, and a Water-courſe through the Land, demiſes to *B.* by the Words *dedi & conceſſi*; and after *A.* ſtops the Water-courſe, yet no Action of Covenant lies; for the Covenant extends not to a Thing which was not *in Eſſe* at the making of the Leaſe. Leon. 278. (*d*) *Vide* 275. and Rol. Abr. 519. & 2. (*e*) *Vide* F. N. B. 145.

If *A.* leaſes a Houſe to *B.* excepting two Rooms, and free Paſſage to them, and the Leſſee aſſigns to *J. S.* who diſturbs the Leſſor in the Paſſage; this, though a Covenant in Law, ſhall bind the Leſſee; for where the Leſſee agrees to let the Leſſor have a Thing out of the demiſed Premiſſes, as a Way, Common, *&c.* Covenant lies for a Diſturbance; but if the Diſturbance had been in the Rooms excepted, Covenant would not have lain†. Carth. 232. *Buſh* and *Cole* adjudged. Salk. 196. Show. 388. S. C. & *vide* Moor 553.

Cro. Eliz. 657. See 11 Mod. 170. pl. 8. 12 Mod. 24, 25. † But Treſpaſs would.

(C) Where an Action of Covenant is the proper Remedy. *Page 532

IF *A.* for valuable Conſideration, promiſe by his *Deed* not to do a certain Thing, no Action upon the Caſe lies upon this Promiſe, but a Writ of Covenant. Rol. Abr. 11. Cro. Jac. 505.

Cowp. 128. Doug. 18. 1 Term Rep. 441. 2 Term Rep. 479, 483.

So if *A.* recovers a Debt againſt *B.* and *B.* pays him the Condemnation, upon which *A.* releaſes all Actions, Executions, *&c.* to *B.* by Deed, and by the ſame Deed promiſes that he will withdraw and diſcharge all Writs of Execution againſt *B.* upon the ſaid Judgment, yet no Action upon the Caſe Rol. Abr. 517. *Bemiſh* and *Hilderſly*, adjudged. Cro. Jac. 505. S. C.

Caſe lies upon this Promiſe; becauſe it is made by Deed, and ſo he ought to have a Writ of Covenant.

2 Stra. 1089. 12 Mod. 371. *Vide* Title *Debt*, and *Actions in general.*

If a Man leaſes for Years, reſerving Rent, he may have an Action of Covenant, as well as Debt, for the Rent Arrear; ſo if *A.* grants a Rent to *B.* payable at a certain Feaſt yearly, and covenants to pay the Rent at the Feaſt; an Action of Covenant lies for Non-payment, though he might have an Action of Debt for it.

Rol. Abr. 517, 518. Brownl. 19. Keb. 821. *Vide* Hob. 4. Yelv. 139. Noy 131.

It ſeems by the better Opinion, that upon the Eviction of a Freehold, no Action of Covenant will lie upon a Warranty, either in Deed or in Law, for the Party might have had his *Warrantia Chartæ*, or Voucher; but in Caſe of a Leaſe for Years upon an Eviction, there can be no other Remedy *.

* The Courſe now is, to introduce an expreſs Covenant for quiet Enjoyment, againſt all Perſons claiming, and that the Eſtate is free from Incumbrances.

(D) Where there are ſeveral Parties; and herein of joint Covenants.

5 Co. 18. b. *Slingſby's* Caſe. Hob. 172. 2 Leon. 27.

IF *A.* covenants to do an Act for the Benefit of two or more, and *A* breaks his Covenant, one of them alone (*b*) cannot maintain Covenant againſt him, for then might he be doubly or trebly charged for the ſame Breach.

But where a Covenant may be joint or ſeveral, *vide* 2 Rol. Abr. 149. Skin. 401. pl. 35. (*b*) In an Indenture between *A.* and *B.* of the one Part, and *C.* of the other Part; among other Covenants there is one thus, *viz.* It is agreed between the Parties, that *C.* ſhall enter into a Bond to *B.* to pay him 100*l.* at a Day; in an Action for Non-performance, *A.* and *B.* muſt join. Yelv. 177.

5 Co. 19. a. Show. 8. Comb. 155.

So if *A.* covenants to do an Act for the Benefit of *B.* and *C.* and enters into a Bond to them & *cuilibet eorum* for Performance; yet this being a joint Intereſt, each cannot bring a ſeparate Action, but two may bind themſelves ſeverally to pay Money, or if jointly and ſeverally bound, the Obligee may ſue which he pleaſes.

2 Keb. 44.

A Leaſe was made to three, who covenanted jointly and ſeverally for the Rent; Covenant being brought againſt two, it was laid, that the (without ſaying, or the Third) had not paid ſuch Rent, *ſed Reddit' prædict' aretro exiſtent' ſolvere o'io recuſ.* and it was held, that this was a ſufficient Averment that the Rent was behind, and that it was not paid by the Third †.

† *Sed qu.* If the Action was well brought againſt two, if the third was living? And whether if the Plaintiff choſe to ſue two and not all three, if he ſhould not have brought a ſeparate Action againſt each of the two?

Sid. 107.

If *A.* covenants with *B.* that *A.* or his Son, or either of them, ſhall work with *B.* at, &c. *B.* paying to each of them ſo much, &c. and requeſts *C.* to work with him, &c. if he doth not, the Covenant is broken, for *B.* had the Election to require both, or any one of them, to work with him.

*Page 533 Comb. 115. *Spencer* and *Durant.*

* If an Agreement be entered into between ſeveral Fidlers, that they would not play, &c. aſunder, unleſs on my *Lord Mayor's Day*, &c. and they bind themſelves in 20*l.* each to the other jointly and ſeverally, and one only brings Covenant, and aſſigns the Breach, That the Defendant played *ad Quandam Tabernam*, &c. this is naught, for they ought all to

have joined, the Intereſt being joint; and it is (*a*) repugnant and contradictory, for four Perſons to bind themſelves the one to the other jointly and ſeverally *.

(*a*) But *vide* Skin. 401. pl. 35. and Carth. 98.

Comb. 163. * In this Caſe it is to be preſumed the others who did not join in the Action, were equally intereſted with him who ſued, and therefore they ought to have joined in the Action.

(E) Of Covenants Real and Perſonal; and herein of the Perſons to whom they ſhall extend: And therein,

1. Of Covenants which ſhall extend to the Heir or Executor, ſo as to be bound by them, though not expreſsly named.

IN every Caſe where the Teſtator is bound by a Covenant, the Executor ſhall be bound by it, (*b*) if it be not determined by his Death. 48 E. 3. 2. Bro. Covenant 12. S.C.

Cro. Eliz. 553. Same Rule *per Curiam*, and ſo Dyer 14. pl. 69. (*b*) *Viz.* Where it was to be performed by the Perſon of the Teſtator, the Executor cannot perform it. Cro. Eliz. 553. & *vide* 2 Mod. 269. 3 Wilſ. 29, 387. 3 Burr. 1272. Doug. 187, 461. 1 Term Rep. 86, 91.

If *A.* be (*c*) Tenant for Life, the Remainder to *B.* in Fee, and *A.* by Indenture demiſes, &c. to *C.* for fifteen Years, and after *A.* dies, and *B.* enters upon *C.* yet *C.* ſhall have no Action of Covenant againſt the Executors of *A.* for the Covenant was but (*d*) during the Term, which determined by the Death of the Tenant for Life. And. 12. adjudged. Moor 74. pl. 204. Bendl. 150. S. C. Dyer 257.

S. P. by three Judges againſt one, who differed from the others, becauſe the Leaſe was by Indenture, which is a Matter of Concluſion; but if it had been by Deed Poll, he agreed with the reſt. Brownl. 12. S. P adjudged. (*c*) So if Tenant in Tail demiſes, and dies without Iſſue. And. 12. 1 Leon. 179. Cro. Eliz. 157. & *vide* Lit. Rep. 334. (*d*) So if the Leſſee had granted, bargained and ſold all his Eſtate to another (admitting there was, by theſe Words, a Warranty implied) yet it determines with the Eſtate. Cro. Eliz. 157. Leon. 179.

If a Man covenants that *A.* ſhall ſerve *B.* as an Apprentice for ſeven Years, and dies, if *A.* departs within the Term, a Writ of Covenant lies againſt the Executor of the Covenantor, without naming. 48 E. 3. 2. Bro. Covenant 12. S.C.

If a Man be bound to inſtruct an Apprentice in a Trade for ſeven Years, and the Maſter dies, the Condition is diſpenſed with, for it is Perſonal; but if he were likewiſe bound to find him with Meat, Drink, Cloaths and Lodging, this the Executors are obliged to perform. Sid. 216. Keb. 761, 820. Lev. 177.

2. Of Covenants which the Heir or Executor may take Advantage of.

Covenants Real, or ſuch as are (*e*) annexed to Eſtates, ſhall deſcend to the Heirs of the Covenantee, and he alone ſhall take Advantage of them. 42 E. 3. 4. And. 55. (*e*) *Secus* of Covenants in Groſs. Palm. 558.—Alſo for a Breach in the Time of the Covenantee, the Action ſhall be brought by his Executor, though the Covenant was with him, his Heirs and Aſſigns only. Vent. 175. 2 Lev. 26. adjudged*.

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* In ſuch Actions, *Damages* are to be recovered, which go to the Executors.

As

*Page 534

2 H. 4. 6. b. 5 Co. 18. * As if an Abbot and Convent covenant to ſing for the Covenantee and his Heirs in ſuch a Chapel, his Heirs at all Times ſhall have a Writ of Covenant for the not doing thereof.

2 Lev. 92. *Lougher* and *Williams*. Skin. 305. pl. 1. S. C. cited. If a Man leaſes for Years, and the Leſſee covenants with the Leſſor his Executors and Adminiſtrators, to repair, and leave it in good Repair at the End of the Term, and the Leſſor dies, &c. his Heir may have an Action upon this Covenant; for this is a Covenant that runs with the Land and ſhall go to the Heir though he is not named; and it appears that it was intended to continue after the Death of the Leſſor, in as much as his Executors, &c. are named.

3. Where the Aſſignee ſhall be bound by the Covenant of the Aſſignor.

Rol. Abr. 521. Cro. Eliz. 457. Moor 399. 5 Co. 24. S. C. The Aſſignee of a Term is bound to perform all the Covenants annexed to the Eſtate; as if *A.* leaſes Lands to *B.* and *B.* covenants to (*a*) pay the Rent, repair Houſes, &c. during the ſaid Term, and *B.* aſſigns to *J.* S. the Aſſignee is (*b*) bound to (*c*) perform the Covenants (*d*) during the Life of the firſt Leſſee, though the Aſſignee be not named, becauſe the Covenant runs with the Land being made for the Maintenance of a Thing *in* (*e*) *eſſe* at the Time of the Leaſe made.

(*a*) Where the Aſſignee ſhall be chargeable with a *Nomine Pœnæ* incurred after Aſſignment, *vide* Cro. Eliz. 383. Moor 35 pl. 486. Goldſb. 129. (*b*) By the Common Law, but without Queſtion by the Statute of 32 H. 8. c. 37. Cro. Eliz. 457. (*c*) Lev. 109. Sid. 157. Raym. 80. S. P. (*d*) During the Term. Moor 399. and *vide* Cro. Eliz. 457. S. P. by two Judges againſt two. (*e*) When the Covenant extends to a Thing *in eſſe*, Parcel of the Demiſe, it is *quaſi* annexed to the Thing demiſed, and runs with the Land, and ſhall bind the Aſſignee, though not expreſsly named. 5 Co. 16. b. Godb. 270. * It must be during the Term. Doug. 461. 3 Term Rep. 394.

5 Co. 15. *Spencer's* Caſe. But if *A.* leaſes for Years to *B.* and *B.* for himſelf, his Executors and Adminiſtrators, covenants with *A.* to build a Wall upon Part of the Land demiſed, and after *B.* aſſigns, the Aſſignee is not bound by this Covenant for the Law will not annex the Covenant to a Thing not *in eſſe* †.

† If Leſſee covenants to pull down old Houſes, and build new on the Ground within ſeven Years, and does not, but *after* ſeven Years aſſigns; Aſſignee is not liable, for the Covenant does not run with the Land. *St. Saviour v. Smith*, H. 2 Geo. 3. 3 Bur. 1271. *Note*, The Covenant was broken before the Aſſignment.

5 Co. 15. *per Cur'*. But if *B.* had covenanted for him and his Aſſigns to build the Wall, &c. this would have bound the Aſſignee, becauſe it is to be done upon the Land and the Aſſignee is to have the Benefit thereof.

Salk. 199. pl. 5. Ld. Raym. 388. *per Holt* Ch. Juſt. If Leſſee for Years covenants for him and his Aſſigns to rebuild and finiſh a Houſe within ſuch a Time, and after the Time expired, the Leſſee aſſigns over the Premiſſes, the Houſe not being built and finiſhed according to the Covenant; this Covenant ſhall not bind the Aſſignee, becauſe it was broken before the Aſſignment; *aliter* if broken after; as if the Leſſee had aſſigned before the Time expired.

5 Co. 15. *per Cur'*. (*f*) Cro. Jac. 438. S. P. adjudged. Alſo though the Covenant be for him and his Aſſigns, yet if the Thing to be done be *merely collateral*, and no way concerning the Thing demiſed, the Covenant ſhall not bind the Aſſignee; as if it be to build an Houſe upon other Land of the Leſſor, or (*f*) to pay a collateral Sum.

5 Co. 16. b. 17. a. So if a Man demiſes Sheep or other Perſonal Things for a certain Time and the Leſſee covenants, for him and his Aſſigns at the End of the Term to deliver ſuch Sheep, &c. or the Price of them, and the Leſſee aſſigns them over, the Aſſignee ſhall not be bound by the Covenant; for it is but

(*g*) P

(g) Perſonal Contract, and there is not (b) ſuch Privity as between Leſſor and Leſſee of Land and his Aſſigns*.

(g) So if a Leaſe of a Fair, Wine-Licence, &c.

Hard. 88.——But where ſuch an Aſſignee may be made liable in Equity, *vide* 2 Vern. 423. (b) If *A.* having Land charged with the Payment of a Fee-farm Rent, grants Part of the Land to *B.* and covenants that the ſame ſhall be diſcharged of the ſaid Rent, and after grants the Reſidue of the Land to *C.* this ſhall not be taken as a Covenant-Real, which ſhall in Equity charge the other Land granted to *C.* with the whole Rent. Hard. 87.

* And therefore the Leſſor muſt purſue his Remedy againſt the Leſſee, on his Covenant.

* So (i) if a Man leaſes Lands for Years (k) with a Stock of Cattle, and the Leſſee for him and his Aſſigns covenants to deliver the Stock at the End of the Term. *Page 535

5 Co. 17. a. (i) A Man poſſeſſed of a Tavern for ſix Years, leaſes to another for three Years; and it was covenanted, that during the three Years *quolibet menſe* the Leſſee ſhould give an Account to the Leſſor of the Wine which he ſold, and ſhould pay unto him, for every Tun ſold, ſo much; and after the Leſſor grants the remaining three Years to another, the Covenant being collateral, it paſſes not by the Aſſignment of the three Years. Godb. 120. Moor 243. Though the Covenant was to account to the Leſſor or his Aſſigns. † (k) As in Owen 139. Leon. 42. Godb. 113.

† *Sed. qu.* For the Payment of ſo much *per* Tun, is in the Nature of a Rent, and the Accounting is abſolutely neceſſary to aſcertain the Money to be paid.

If Leſſee for Years for himſelf, his Executors and Adminiſtrators, covenants with his Leſſor to leave fifteen Acres every Year for Paſture, *abſque Cultura*, and after the Leſſee aſſigns, the Aſſignee, though not named, muſt perform the Covenant, becauſe it is for the Benefit of the Eſtate, according to the Nature of the Soil; but a collateral Covenant, as to build *de novo*, &c. ſhall not bind him, unleſs named.

Cro. Jac. 125. adjudged. 1 Bl. Rep. 351. Cowp. 125. Doug. 174, 441, 636, 764.

If *A.* demiſes to *B.* ſeveral Parcels of Land, and the Leſſee covenants for him and his Aſſigns to repair, &c. and after the Leſſee aſſigns to *D.* all his Eſtate in Parcel of the Land demiſed, and *D.* does not repair that to him aſſigned, the Leſſor may have an Action of Covenant againſt *D.* the Aſſignee.

Rol. Abr. 522. Cro. Car. 221. S. C. adjudged,

becauſe this Covenant is deviſable, and follows the Land, with which the Defendant is chargeable by the Common or by Statute Law. Jones 245. S. C. adjudged.——So if the Leſſor had granted the Reverſion of Part to one, and of other Part to another, they might have brought an Action of Covenant. Lev. 109. Sid. 157. Raym. 80. *Kitchen* and *Buckly*. Doug. 187, 461.

If a Man leaſes for Years, and the Leſſee covenants for him and his Aſſigns, to pay the Rent ſo long as he and they ſhall have the Poſſeſſion of the Thing lett; and the Leſſee aſſigns, the Term expires, and the Aſſignee continues the Poſſeſſion afterwards; an Action of Covenant will lie againſt him for Rent behind after the Expiration of the Term, though he is not an Aſſignee (l) ſtrictly according to the Rules of Law; yet he ſhall be accounted ſuch an Aſſignee as is to perform the Covenants.

Stile 407. *Bromefield* and Sir *John Williamſon*.

(l) If a Leſſee for Years, with Covenants to repair, aſſigns to *J. S.* by way of Mortgage, and *J. S.* never enters, Equity will not compel him to repair, though he had the whole Intereſt in him; and though it was his own Folly to take an Aſſignment of the whole Term, when he ſhould have taken a derivative Leaſe, by which Means he would not be liable at Law. 2 Vern. 275.—But where ſuch an Aſſignee, though he never entered, and had loſt his Mortgage Money, was by Law compelled to pay the Rent; and having ſued in Equity could have no Relief. 2 Vern. 374.

If *A.* leaſes to *B.* and *B.* covenants to repair, &c. and he aſſigns to *J. S.* who dies Inteſtate; the Premiſſes being out of Repair, the Leſſor may bring Covenant againſt his Adminiſtrator as Aſſignee, and declare that he made a Leaſe to *B.* &c. *cujus ſtatus & reſiduum termini Annorum*, &c. *devenit*, &c. *per aſſignationem* to the Adminiſtrator.

Carth. 519. *Tilney* and *Norris* adjudged. Ld. Raym. 553. Salk. 309. pl. 13.

4. Where

4. Where the Aſſignor continues ſtill liable.

Bro. Covenant 32. Rol. Abr. 522. S. C. Jones 223. S.P. *per Cur'*.

If a Leſſee covenants that he and his Aſſigns will repair the Houſe demiſed, and the Leſſee grants over the Term, and the Aſſignee does not repair it, an Action of Covenant lies either againſt the Aſſignee at Common Law, becauſe this Covenant runs with the Land; or it lies againſt the Leſſee (*d*) at the Election of the Leſſor.

(*d*) He may charge both, but Execution ſhall only be againſt one of them; for if he takes both in Execution, he that is laſt taken ſhall have an *Audita Querela*. Cro. Jac. 523.

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Rol. Abr. 522. Cro. Jac. 399, 521. S.C. adjudged, that it

* So if a Man leaſes for Years, rendering Rent, and the Leſſee covenants for him and his Aſſigns to repair the Houſe during the Term, and after the Leſſee aſſigns over the Term, and the Leſſor accepts the Rent from the Aſſignee, and after the Covenant is broken, notwithſtanding the Acceptance of the Rent from the Aſſignee, yet an Action of Covenant lies againſt the firſt Leſſee, for the Leſſee hath covenanted expreſsly for him and his Aſſigns, and this Perſonal covenant cannot be transferred by the Acceptance of the Rent.

lay againſt the Executor of the Leſſee. Rol. Rep. 359. 2 Rol. Rep. 63. Poph. 136. Godb. 276. Cro. Car. 188, 580. Jones 223. Sand. 240. Brownl. 20. Style 300. 2 Mod. 139. Sid. 402, 447. 2 Keb. 640. * Doug. 461, 463, 764. 1 Term Rep. 310, 441. 3 Term Rep. 393, 627.

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* Though all the Eſtate of the Leſſee is aſſigned by Act of Parliament, if there are no Words of Diſcharge, the Leſſee's Executor is ſtill liable to Covenant for the Rent. *Homby* v. *Houlditch*, M. 11 *Geo.* 2. Andr. 40.

3 Lev. 233. *Edwards* and *Morgan* adjudged. Carth. 178. S. C. cited.

So if *A.* leaſes to *B.* rendering Rent, and *B.* covenants to pay it, and after *B.* aſſigns to *C.* and *A.* grants the Reverſion to *D.* and *D.* after accepts Rent from *C.* yet for Non-payment at another Day, *D.* may have an Action againſt *B.* it being upon an (*e*) expreſs Covenant †.

(*e*) Brownl. 20. Sid. 447. S. P.

† If a Leſſee covenants for him and his Aſſigns to pay Rent, and he aſſigns to *B.* and the Leſſor accepts the Rent of *B.* who afterwards aſſigns to *C.* Covenant does not lie againſt *B.* for Rent incurred after the Aſſignment to *C.* though the Leſſor had no Notice of the Aſſignment. R. *cont. by* 2 J. *in* C. B. *but the Judgment was reverſed in* B. R. *inter* Pitcher *and* Tovy. 4 Mod. 71. 3 Lev. 295. Carth. 177.

Lev. 215. Raym. 303. Salk. 81. pl. 2. Ld. Raym. 368.

Alſo an Aſſignee, who aſſigns over, is liable, and ſhall pay the Rent which incurred due before, and (*f*) during his Enjoyment.

(*f*) Where ſuch an Aſſignee was made liable in Equity, though the Privity of Eſtate was deſtroyed at Common Law. Vern. 165.

Carth. 177. *Tovey* and *Pitcher* adjudged. Salk. 80. pl. 1. 2 Vent. 228. S. C. 232.

But in Covenant againſt *A.* as Aſſignee for Non-payment of Rent, he may plead, That before any Rent was due and payable, *viz.* on ſuch Day, he granted and aſſigned all his Term and Eſtate to *J. S.* who by Virtue thereof entered, and was poſſeſſed for the Reſidue of the Term; and this ſhall be a good Diſcharge, without alledging any Notice of the Aſſignment, or that the Leſſor accepted *J. S.* as his Tenant.†

2 Danv. Abr. 485. pl. 9. 4 Mod. 71. 3 Lev. 295. Show. 340. 12 Mod. 23. Holt 73. pl. 1. Ld. Raym. 320, 322 354, 368. 2 Ld. Raym. 1551. Stra. 405. 2 Stra. 1221. Swinb. 390. Vern. 241. Prec. Chan. 156. † See the Note above.

5. Whe

5. Where an Aſſignee ſhall take Advantage of a Covenant.

As an Aſſignee ſhall be bound by a Covenant Real annexed to the Eſtate, and which runs along with it, ſo ſhall he take Advantage of ſuch; and therefore if the Leſſor covenants to repair, or if he grants to the Leſſee ſo many Eſtovers as will repair, or that he ſhall burn within his Houſe during the Term; theſe, as Things appurtenant, ſhall go with it into whoſe Hand ſoever it comes. Rol. Abr. 521. 5 Co. 17. b. Godb. 270. Moor 242. pl. 380. Preced. Chan. 39, 40.

So if a Man leaſes Land to another by Indenture, this Covenant in Law, created by the Word *Demiſe*, ſhall (*c*) go to the (*d*) Aſſignee of the (*e*) Term, and he ſhall have Advantage of it. Rol. Abr. 521. Dyer 257. 4 Co. 80.

5 Co. 17. b. S. P. reſolved. (*c*) So of Tenant by Statute Merchant, &c. of a Term, &c. though they came to the Land by Act in Law. 5 Co. 17. a.——But not to an Aſſignee of a Leaſe by Eſtoppel only. Moor 419. Cro. Eliz. 373. (*d*) The Aſſignee of the Aſſignee, the Executors of the Aſſignee, the Executors or Adminiſtrators of every Aſſignee, are all compriſed within this Word *Aſſigns*. 5 Co. 77. b. Carth. 519. Ld. Raym. 553. Salk. 309. pl. 13. (*e*) When the Eſtate paſſes, tho' by Parol, the Warranty and Covenants follow it, and the Aſſignee of the Eſtate ſhall have the Benefit thereof. Cro. Eliz. 373, 436.

But if one by Indenture leaſes an Houſe for forty Years, and the Leſſee covenants with the Leſſor, that he will ſufficiently repair the Houſe during the Term, and that the Leſſor may enter every Year, to ſee if the Repairs are done; and if upon View of the Leſſor it was repaired according to the Agreement, that then the Leſſee ſhould hold the Houſe for forty Years after the firſt Term ended; and the Leſſee grants to another *totum intereſſe, terminum & terminos quæ tunc habuit in tenementis*, and after the firſt Term ends, the Aſſignee ſhall not take Benefit of this Agreement. Moor 27. pl. 88. *Skern's* Caſe adjudged by three Judges againſt one, who held, That the Poſſibility was inherent to the Land and Term.

* Upon Equality of Partition, if one Coparcener covenants to acquit the other and her Heir of Suit, the Aſſignee of the Land ſhall have Benefit of this Covenant. * Page 537 5 Co. 18. Co. Lit. 384. b. S. P.

If *A.* ſeiſed of Lands in Fee, conveys it by Deed indented to *B.* and covenants with *B.* his Heirs and Aſſigns, to make any other Aſſurance upon Requeſt, for the better Settlement of the Land, &c. and after *B.* conveys it to *C.* who conveys it to *D.* and after *D.* requires *A.* to make another Aſſurance according to the Covenant, and he refuſes, *D.* ſhall have an Action of Covenant in this Caſe againſt *A.* by the Common Law, as Aſſignee to *B.* Rol. Abr. 521. *Middlemore* and *Goodal*. Cro. Jac. 503, 505. Jones 406. S. C.

If *A.* by Deed infeoffs *B.* of certain Lands, reſerving Rent, Fealty, and Suit of Court, and by the ſame Deed grants, that if the Feoffee ſhall be diſtrained, vexed, or charged for other Rents or Services, then he may enter and diſtrain for his Amends in other Lands; this is annexed to the Eſtate of the Land, and ſhall go with it to every Aſſignee. Moor 185. *per Cur'*.

If *A.* leaſes an Houſe to *B.* for Years, who covenants to repair, and that *A.* his Heirs, his Executors, and Adminiſtrators, may at all Times enter, and ſee in what Plight the ſame is; and if upon ſuch View any Default ſhall be found in the not repairing, and thereof Warning ſhall be given to *B.* his Executors, &c. then within four Months after ſuch Warning ſuch Default ſhall be amended; and after, the Houſe in Default of *B.* becomes ruinous, and *A.* grants the Reverſion to *C.* who upon View of the Houſe gives Warning to *B.* of the Default, &c. if it is not repaired, *C.* may have an Action as Aſſignee of *A.* againſt *B.* though the Houſe became ruinous before Leon. 61. *Maſcball's* Caſe, adjudged. Moor 242. pl. 380. S. C. adjudged.

before *C.* was intitled to the Reverſion; (*a*) for the Action is not founded upon the ruinous Eſtate of the Houſe, and the Time when it firſt happened, but for not repairing within the Time appointed by the Covenant after the Warning.

(*a*) But an Aſſignee ſhall not have an Action upon a Breach of Covenant before his Time. Cro. Eliz. 863. 3 Leon. 51. 2 Vent. 278.—But upon a Breach after his Time, though his Eſtate is determined, he may. Rol. Rep. 80. Owen 152. 2 Bulſt. 281.

Cro. Eliz. 599, 617. Gouldſ. 175. S. C.

If Leſſee for Years covenants to leave the Houſes in good Repair at the End of the Term, and the Leſſor grants his Reverſion to another, (*b*) tho' this Covenant is not to be performed during the Term, yet for a Breach thereof the Grantee of the Reverſion may bring an Action, and there cannot be a more apt Covenant to run with the Land.

(*b*) So where the Leſſor covenants to make a new Leaſe at the End of the Term, and the Leſſor grants over his Reverſion. Moor 150. And. 82. Doug. 187. 3 Term Rep. 394.

Cro. Car. 137. Jones 242. S. C. Doug. 764. 3 TermRep. 393, 678.

If *A.* leaſes Lands to *B.* for 200 Years, and by the ſame Deed covenants for himſelf, his Heirs and Aſſigns, with *B.* his Executors and Aſſigns, that if *B.* is diſturbed for Reſpite of Homage, or inforced to pay any Charge, or Iſſues loſt, that he ſhall with-hold ſo much of his Rent as he ſhall be inforced to pay, and *A.* grants his Reverſion to *C.* and *B.* aſſigns the Term to *D. D.* may take the Benefit of this Covenant againſt *C.* for it runs with the Land.

6. Of Covenants which bind by Force of the Statute 32 *H.* 8. *c.* 34.

(*c*) Extends not to Gifts in Tail. Co.Lit.215. Cro. Eliz. 863. 2 Wood's Conv. 380. 3 Term.Rep 396.

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By the 32 *H.* 8. *c.* 34. reciting, "Whereas divers had leaſed Manors, &c. or other Hereditaments (*c*) for Life or Lives, or Years, by Writing, containing certain Conditions, Covenants and Agreements, as well on the Part of the Leſſees and Grantees, their Executors and Aſſigns, as on the Part of the Leſſors and Grantors, their Heirs and Succeſſors; and whereas by the Common Law, no Stranger to any Condition or Covenant could take Advantage thereof, by Reaſon whereof all Grantees of Reverſions, and all Grantees and Patentees of the * King, of Abbey Lands, could have no Entry or Action for any Breach, &c. it is enacted, That all Perſons, Bodies Politick, their Heirs, Succeſſors and Aſſigns, which have, or ſhall have any Grant of our (*d*) ſaid Lord the King, of any Lordſhip, &c. Rents, Tithes, Portions, or other Hereditaments, or any Reverſion thereof which belonged to the Monaſteries, &c. or which belonged to any other Perſon, &c. and alſo all other Perſons, (*e*) (*f*) being (*g*) Grantees or Aſſignees, (*h*) to, or (*i*) by our ſaid Lord the King, or to, or by any other Perſon or Perſons, and the Heirs, (*k*) Executors, Succeſſors and Aſſigns of every them, (*l*) ſhall

(*d*) It extends to his Succeſſors, though not named. Co.Lit.215. a.

(*e*) It extends not to Grantees by Fine till Attornment; for it muſt be intended of ſuch only as have had all Ceremonies requiſite by Law. Co Lit. 215. 5 Co. 112, 113. (*f*) Though after Breach, and before the Action brought, their Eſtate determines. Rol. Rep. 80. Owen 151. 2 Bulſt. 281. (*g*) It extends to Grantees of Part of the Eſtate of the Reverſion, &c. Co. Lit. 215. a. Godb. 162. Rol. Rep. 80. Owen 151. 2 Bulſt. 181. & *vide* Leon. 252. Moor 93. pl. 230.—But not to Grantees, &c. of the Reverſion in Part of the Land. Co. Lit. 215. Cro. Eliz. 833. Moor 98. (*h*) It extends to him that comes in by Limitation of an Uſe, though in the Poſt; for coming in by the Act and Limitation of the Party, he is a ſufficient Grantee, &c. within the Statute. Co. Lit. 215. Moor 98. 4 Leon. 27, 29.—But it does not extend to ſuch as come in merely by Act in Law, as the Lord upon an Eſcheat, Alienation, upon a Mortmain, &c. Co. Lit. 215. b.—Nor to him who is in of another Eſtate. Moor 876. (*i*) But if a Copyholder by Licence of the Lord leaſes for Years, &c. and after ſurrenders the Reverſion to the Uſe of another in Fee, who is admitted, yet he is not a Grantee, &c. within the Act, for he is not privy to the Leaſe made by the Copyholder, nor in by him, but may plead a Grant of his Eſtate immediately from the Lord. *Braſier* and *Beal*, Yelv. 222. *per Curiam*, upon the firſt opening. Cro. Jac. 205. Adjudged by two Judges, & *vide* Cro. Car. 25, 44. Hob. 178. But in the Caſe of *Glover* and *Cope*, 3 Lev. 326. it is adjudged, that ſuch Surrendree may have an Action of Covenant by this Act. (*k*) Leſſee for twenty Years leaſes for ten Years, and his Leſſee

" (*l*) shall and may have (*m*) like Advantage by Entry for Non-payment " of Rent, or for doing Waste or (*n*) other Forfeiture; and the (*o*) same " Remedy by Action only for not performing other Conditions, Covenants " and Agreements contained in the said Leases against the Lessees and " Grantees, their Executors, Administrators and Assigns, as (*p*) the (*q*) " Lessors and Grantors, their Heirs or Successors, ought, should, or might " have had at any Time or Times."

Lessee covenants, &c. and the first Lessee grants his Reversion, this Grantee is a sufficient Assignee within the Statute. Moor 525, 527. Cro. Eliz. 599, 617, 649. Gouldf. 175. Godb. 161. (*l*) Whether this doth not imply that the Grantor shall not, 3 Lev. 155. *dubitatur*, & *vide* Sid. 402. (*m*) But he shall not take Advantage of a Condition before he has given Notice to the Lessee. Co. Lit. 215. 5 Co. 113. b.——*Secus* of a Covenant. Godb. 262. Cro. Jac. 476. Bridg. 130. (*n*) *Viz.* by Force of a Condition incident to the Reversion, as Rent, or for the Benefit of the Estate, as for doing Waste, not keeping Houses in Repair, &c. and not for the Payment of any Sum in Gross, Delivery of Corn, &c. So as other Forfeiture shall be taken for other Forfeitures, like to these Examples put, *viz.* Payment of Rent, and not doing Waste, which are for the Benefit of the Reversion. Co. Lit. 215. b. & *vide* 5 Co. 18. Moor 159, 243, 876. Owen 41. And. 82. Raym. 250. Sand. 159. So if the *Proviso* be to enter for Non-payment of a Rent, or gross Sum by Way of Fine, the Grantee of the Reversion shall not take Advantage of it; for the Condition cannot be apportioned. Style 316. *Sed qu?* (*o*) The Privity of Action is transferred, and it may be brought in the County where the Covenant was made, though the Lands lie in another. Sand. 237. adjudged; but a Writ of Error was brought *in Cam' Scacc'*, and it was after compounded. Sid. 401. Lev. 259. Vent 10 & 3 *Mod.* 338. and Tit. *Actions Local and Transitory*. (*p*) Therefore if the Conuzee of the Reversion before Attornment bargains and sells to another, to whom the Lessee attorns, the Bargainee may, &c. though his Bargainor could not. 5 Co. 113. a. (*q*) *A.* devises to *B.* for Years, rendering Rent, upon Condition to re-enter for Non-payment; and after devises the Reversion in Fee to another, and dies; the Devisee may take Advantage of the Condition, though there never was any Reversion, &c. in the Devisor. 2 Leon. 33.

And by the same Act it is enacted, " That all Farmers, Lessees and " Grantees of Lordships, &c. Rents, Tithes, Portions, or other Heredi- " taments for Years, Life or Lives, their Executors, Administrators and " (*r*) Assigns, shall and may have like Action and Remedy against all Per- " sons, Bodies Politic, their Heirs, Successors and Assigns, which by Grant " of the King, or other Persons, shall have the Reversion of the same " Lordships, &c. so letten, or any Part thereof, for any Condition, Co- " venant or Agreement contained in their Leases, as the Lessees, or any of " them might or should have had against the Lessors and Grantors, their " Heirs and Successors; Recovery in Value, by Reason of any Warranty " in Deed or Law, only excepted."

(*r*) But if Lessee for 30 Years leases to another for ten, he is no Assignee within the Statute; for he is not Tenant to the first Lessor. Moor 93. pl. 230.

* *A.* demised a House for a Term of Years to *B.* who assigned to *J. S.* the Lessor devised one Moiety of the Reversion to *C.* and the other to *D.* who granted the Reversion to *J. D.* after which Grant *C.* and *D.* brought Covenant against *J. S.* for Rent due before the Assignment by them; and it was held, 1. That *C.* and *D.* being Tenants in Common, may at their Election join or sever, as well in Debt as in Covenant, for the Rent; but if they sever, they must not each of them make his Demand of such a certain Sum, which amounts to a Moiety; but the Demand must be *de una medietate* of the whole Rent; and if they can count in Debt, they may in Covenant, and if Debt will lie, *a fortiori* Covenant. 2. That this Action was maintainable for the Arrears of the Rent, notwithstanding the Reversion was out of the Plaintiffs; for though the Defendant was but an Assignee of a Term, yet the very Privity of Contract was transferred by the Statute of 32 *H.* 8. *c.* 34. which gives the Action for and against Assignees; and the Contract still remains, though the Privity of Estate is gone; the Assignee shall leave it as a Fruit fallen from the Reversion; at Common Law after Assignment the Assignor might bring Debt for Rent before in Arrear, but the Power over the Land being gone, he could not distrain or bring Waste.

*Page 539 Carth. 289, 290. *Midgly* and *Gilbert* v. *Lovelace*, adjudged.

(F) How Covenants are to be construed.

Moor 458. 8 Co. 83. Sir *Richard Pexhall's* Case.

ALL Contracts are to be taken according to the Intent of the Parties, expreſſed by their own Words, and if there be any Doubt in the Senſe of the Words, ſuch Conſtruction ſhall be made as is moſt ſtrong againſt the Covenantor, leſt, by the obſcure Wording of his Contract, he ſhould find Means to evade and elude it; hence, (*a*) if *A.* covenants with *B.* That, if *B.* marries his Daughter, he will pay him 20*l. per Ann.* without ſaying for how long, yet it ſhall be for the Life of *B.* and not for one Year only; for by the Words *per Annum*, the (*b*) Meaning of the Parties appears to be, that it ſhould continue longer than one Year; and this is the Conſtruction that is moſt ſtrong againſt the Grantor.

(*a*) Lev. 102. *Hookes* and *Swain.* Sid. 151. Keb. 511. S. C.

(*b*) If I covenant to deliver ſo many Yards of Cloth, and I cut it in Pieces, and then deliver it, this is a Breach; for the Law regards the real and faithful Performance of Contracts, and diſcountenances all ſuch Acts as are done *in fraudem Legis*. Raym. 464.——So if the Condition of a Bond be to pay 50*l.* though it is not ſaid of Money, yet it muſt be ſo intended. Sid. 151.——But if a Man covenants that his Son, then *infra annos nubiles*, ſhall marry the Daughter of *B.* before ſuch a Day, and he marries her accordingly, but at the Age of Conſent diſagrees to the Marriage, yet is the Covenant performed; for it was a Marriage, though ſubject to be defeated by Diſagreement, and no other could be had within the Time. Owen 25. adjudged.

Noy 86. *Meriton's* Caſe. Latch. 161. and Poph. 200. S. C.

If two Men leaſe for Years, and covenant that the Leſſee ſhall enjoy free from all Incumbrances made by them, and after the Leſſee is diſturbed by *J. S.* to whom one of the Leſſors had made a precedent Leaſe; this is a Breach, for they ſhall be taken ſeverally, and not jointly only.

Godb. 335. & *vide* 2 Rol. Rep. 332, 347. S. C.

If a Man leaſes for ſix Years and covenants, that if he ſhall be diſpoſed to leaſe the Land after the Expiration of the Term of ſix Years, that the Leſſee ſhall have the Refuſal; and within the ſix Years he leaſes to another; this is no Breach, becauſe (*c*) out of the Words of the Covenant.

(*c*) If *A.* leaſes Land to *B.* for ſix Years, and covenants, that he ſhall enjoy it during the Term without Interruption, diſcharged from Tithes, and after the ſix Years he is ſued for Tithes, this is a Breach; for the Meaning was, that he ſhould be freed from Suits, and the Payment of Tithes; and a Suit after the Expiration of the Term, is as prejudicial as if before. Cro. Eliz. 916. 2 Brownl. 22.

Sid. 374. *Lewis* and *Hilliard.*

If a Man leaſed for nine Years by Indenture, dated 1 *Jan.* 16 *Car.* 2. and covenanted to ſave the Leſſee harmleſs from all Evictions during the Term, but this Deed was not delivered till 1 *Jan.* 17 *Car.* 2. if he was in Poſſeſſion and evicted before the Delivery, this was a Breach; for during

*Page 540 * the Term ſhall be conſtrued during the Term in Computation, and not only from the Time of the Delivery of the Deed, when it firſt commenced, in Point of Intereſt.

3 Lev. 264. *Douſe* and *Earl.* 2 Vent. 126, 127. S. C. adjudged; becauſe taken as ſeveral Covenants; but *Rokeby* doubted, it ſeeming to him to be all one Covenant, and that the ſubſequent Matter, concerning leaving the Houſes in good Repair, muſt be reſtrained to, and underſtood of, thoſe agreed to be built.

If *A.* leaſes three Meſſuages to *B.* for forty-one Years, and *B.* covenants to pull them down, and erect three other in their Place, *ac etiam de tempore in tempus* to maintain the Meſſuages agreed to be erected in ſufficient Repair, *ac etiam* to repair the Pavements, &c. *ac etiam dicta præmiſſa, & Domos ſuperinde fore erect'*, at the End of the Term to leave in good Repair; and after *B.* pulls down the three Houſes, and builds five, he muſt leave them all in good Repair at the End of the Term; for though by the firſt Covenant he is bound only to repair, &c. the Meſſuages *agreat' fore erect'*, yet by the laſt Covenant he is obliged to leave in good Repair *Domos ſuperinde erect'* indefinitely, which extends to all Houſes which ſhall be built upon the Premiſſes during the Term.

* But it ſhould ſeem his Doubt was not well founded.

So

So if a Man takes a Leaſe of a Houſe and Land, and covenants to leave the demiſed Premiſſes in good Repair at the End of the Term, and he erects a Meſſuage upon Part of the Land, beſides what was before, he (*a*) muſt keep or leave this in good Repair alſo. 3 Lev. 265. *per Curiam.*

(*a*) S. P. adjudged. between *Brown* and *Blunden*, Skin. 121. For it is a continuing Covenant; and though the Houſe had no actual, yet it had a potential Being, at the Time of the Leaſe.

If a Leaſe be made for Years, rendering 80*l. per Annum* Rent, free and clear from all Manner of Taxes, Charges and Impoſitions whatſoever, the Leſſee is bound to pay the whole Rent without any Manner of Deduction, for any old or new Tax, Charge or Impoſition whatſoever. Carth. 135. *Giles* and *Hooper.*

So where *A.* by Deed, dated 1649, granted a Rent-charge of 40*l. per Ann.* to *B.* and his Heirs, and on the ſame Deed there was an (*b*) Indorſement, that the Rent was to be paid clear of all Taxes; by the 3 *W.* & *M.* 4*s. per* Pound is laid upon Land, and Power given to the Tenant to deduct 4*s.* in the Pound, with a *Proviſo*, not to alter the Covenants or Agreements of Parties; and it was held, That ſuch a Covenant, if made in the Year 1640, would not have freed the Rent-charge from the Taxes impoſed by thoſe Acts, becauſe there was no ſuch Parliamentary Tax in Being, or known at that Time; but becauſe there were ſuch Taxes in the Year 1645, which was before the Grant, therefore this Covenant muſt be conſtrued to extend to them. Salk. 198. pl. 4. Ld. Raym. 317. 12 Mod. 169. 171. Comb. 424, 467. *Brewſter* and *Kitchel*, adjudged. Carth. 438. S. C. 5 Mod. 368. S. C.

(*b*) Which muſt be preſumed to have been made before the Deed was executed, and ſo Parcel thereof. Carth. 439. *per Cur'*.

(G) Where the Principal, and all Auxiliary Covenants ſhall be ſaid to be void and extinguiſhed.

IF a Man covenants with Tenant for Life of an Houſe, to find a Chaplain to ſing, &c. every *Saturday* during the Life of the Covenantee, if the Covenantee ſurrenders the Houſe, and (*c*) retakes an Eſtate for Years, yet the Covenant remains. 6 H. 4. 1. Rol. Abr. 522.

(*c*) But if he had not retaken ſuch Eſtate, Q. Rol. Abr. 55.

* If *A.* grants a Rent-charge to *B.* for the Life of *C. Habend'* to *B.* his Heirs and Aſſigns, to the Uſe of *C.* and *A.* covenants to pay it *ad uſum C.* if the Rent is behind, *B.* may have an Action of Covenant againſt *A.* for though the Rent-charge is executed by the Statute, and the Power of diſtraining, as incident thereto, transferred to *C.* yet the Covenant being collateral, is not transferred nor diſcharged, but remains with *B.* *Page 541 Mod. 223. *Boſcawen* and *Herle*, adjudged. 2 Mod. 138. S. C.

If a Man hath good Title to Lands by Virtue of a Fine, and ſells the ſame, and covenants with the Vendee, his Heirs and Aſſigns, that he ſhall enjoy againſt him and *B.* and all claiming under them; and after by an Act of Parliament, reciting, that *B.* had ſettled his Eſtate upon *C.* and that certain Perſons had unduly procured the ſaid Fine from her, it is enacted, The Fine ſhall be void, and that every Perſon may enter as if no ſuch Fine had been; and after one enters, claiming Title under *C.* this is a Breach of the Covenant; for the Act makes no new Title, but removes the Obſtruction of the Old; and it was ſaid, that doubtleſs *B.* was named in the Covenant for this Purpoſe, in caſe this Fine unduly obtained ſhould be avoided. 2 Lev. 26. *Lucy* and *Levingſton.* Vent. 175. 2 Keb. 831. S. C.

As

Salk. 198. pl. 4. As to Covenants which are repealed or extinguiſhed by Act of Parliament, the following Diverſities are laid down, *viz.* Where *A.* covenants not to do any Act or Thing which was lawful to do, and an Act of Parliament comes after, and compels him to do it, the Statute repeals the Covenant; ſo if *A.* covenants to do a Thing which is lawful, and an Act of Parliament comes and hinders him from doing it, the Covenant is repealed; but if a Man covenants to do a Thing which then was unlawful, and an Act comes and makes it lawful to do it, ſuch an Act of Parliament does not repeal the Covenant.

Cro. Eliz. 529. *Lee* and *Colſtill.* 2 And. 55. S. C. By the Report of which it appears, that If *A.* being a Cuſtom-houſe Officer by Patent, makes *B.* his Deputy, and covenants, *inter alia*, to ſurrender the old Patent, and procure a new one to *B.* and himſelf before a Day, and that if *B.* dies before *A.* that *A.* ſhall pay 300*l.* to the Executors of *B.* and gives Bond for the Performance thereof; admitting theſe Covenants void, (*a*) by the 5 *Ed.* 6. *cap.* 16. the whole Bond is void, though ſome of the Covenants are not void or illegal.

by the Agreement *B.* was to pay 600*l.* and to allow *A.* 100*l.* yearly for this Deputation, and adjudged, becauſe the Obligation is one intire Act and Deed of the Party; & *vide* 2 *And.* 207, 208. 3 Co. 82. S. C. cited. (*a*) So where a Sheriff takes a Bond for a Point againſt 23 *H.* 6. c. 9. and alſo for a juſt Debt, the whole Bond is void according to the Letter of the Statute; for a Statute is a ſtrict Law, but the Common Law divides according to common Reaſon; and having made that void which is againſt Law, lets the Reſt ſtand. Hob. 14. *per Cur'.* Moor 856. Godb. 213. 10 Co. 100. Latch 143. Mod. 35. Brownl. 282. Vent. 237. Carter 230. Shep. Touch. 367.

Sid. 309. Yelv. 19. Style 357. If the principal Thing to be performed, as the conveying an Eſtate, &c. be void, further Covenants which are relative and dependant thereon are ſo likewiſe.

Lev. 45. *Caponhurſt* and *Caponhurſt.* Raym. 27. S. C. So if Leſſee for Years grants ſo much of the Term as ſhall be to come at the Time of his Death, and covenants that the Leſſee ſhall enjoy it, although he gives Bond for Performance of Covenants, yet the principal Thing, *viz.* the Grant, being void for Uncertainty, (*b*) both Bond and Covenants are void likewiſe.

(*b*) For tho' they are ſeveral Deeds, yet they make but one Aſſurance, and are but one Contract. 4 H. 7. 6. 20 H. 6. 293. Bro. Obligation 6. Dyer 4, 28. Hob. 168.

Owen 136. *Waller* and *the Dean and Chapter of Norwich.* Brownl. 21. Moor 877. S. C. & *vide* 2 Brownl. 134, 136, 158, &c. But where the Dean and Chapter of *Norwich*, 8 *Eliz.* leaſed to *B.* for ninety nine Years, and after in 42 *Eliz.* they leaſed to *C.* for three Lives, and covenanted to ſave him harmleſs againſt *B.* if he is diſturbed by *B.* he may have an Action of Covenant againſt the Dean and Chaper, though the Leaſe is void, becauſe the Covenant is for a Thing collateral, as that the Leſſor is Owner, &c. and the Covenant was broken immediately upon ſealing the Leaſe to *C.*

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Salk. 159. pl. 5. Ld. Raym. 388. *Northcote* and *Underbil* adjudged. * So where in Covenant the Plaintiff declared, that the Defendant by his Deed did Grant, bargain and ſell to the Plaintiff and his Heirs, &c. Provided, That if the Grantor paid ſo much Money, it ſhould be lawful for him to re-enter; and that he covenanted to pay the ſaid Money; and the Breach aſſigned was the Non-payment of the Money; although it was admitted that nothing paſſed by the Deed for Want of Inrolment, yet the Covenant in this Caſe being to pay Money, it is a diſtinct, ſeparate and independent Covenant; and therefore not material whether any Eſtate paſſed or not*.

* The beſt Method to make a Mortgage in Fee is, we conceive, by Leaſe and Releaſe; in ſuch Caſe, neither Inrolment, Livery, nor Attornment of the Tenant is neceſſary.

(H) What ſhall be deemed a Breach, or conſtrued a good Performance.

IF *A.* enters into a Statute to *B.* and afterwards *B.* by his Deed covenants, That upon Payment of ſuch a Sum at a Day to come, that the Statute ſhould be void, and that he would deliver it in, and cauſe it to be vacated; if before the Day *B.* ſues Execution, *A.* may bring Covenant; and it is no Objection, that nevertheleſs *B.* at the Day may deliver it in, and cauſe it to be vacated; for it is an * apparent preſent Breach, for after the Statute was ſet a-foot, and had its Courſe, it did *tranſire in rem Judicatam*, and could not be vacated. It is the ſame Law, in caſe of a Promiſe, Rol. Abr. 448.

Sid. 48. *Robinſon* and *Ampton* adjudged. Raym. 25. Keb. 103, 118. S. C. * See *ante* 429. Sec. 5.

If *A.* leaſes to *B.* for twenty-one Years, and covenants at any Time during the Life of *B.* (*b*) upon Surrender of the old Leaſe, to make a new Leaſe, and after *A.* leaſes to a Stranger, he hath diſabled himſelf, and broke his Covenant.

5 Co. 20, 21. Sir *Anthony Scot* and *Main*. 2 And. 18. Moor 452.

Cro. Eliz. 450. Poph. 109. S. C. adjudged. (*b*) So if the Leſſee aſſign his old Leaſe, he diſables himſelf to take Benefit of the Covenant. Bulſt. 22.

If *A.* being a common Brewer, covenants that *B.* ſhall have ſeven Parts of his Grains made in his Brewhouſe for ſeven Years; and after *A.* renders them unfit for the Uſe of *B.* this is a Breach. See *Ante* 429. *ſ.* 5.

Raym. 464. *Griffith* and *Geoland*. 2 Jones 191. S. C. adjudged. Skin. 39. pl. 8. If one covenants to leave all the Timber upon the Ground at the Expiration of a Term, and after cuts it down, it is a Breach of Covenant, though he carry it not away; but if a Stranger cuts it down, it is no Breach of Covenant. Skin. 40. *per Cur'*.—So if a Man covenants to deliver a Horſe, and he poiſons him, and then delivers him, this is a Breach. Skin. 40. *per Cur'*.

If two Men, upon Sale of their Wives Lands, covenant that they and their Wives have good Right to convey Lands, and to make further Aſſurance; if one of the Women is under Age, this is a Breach, for ſhe hath not Power to convey the Eſtate according to the Covenant.

2 Jones 195. *Naſh* and *Aſhton* adjudged.

* If the Leſſor covenants with his Leſſee for Years, that he quietly and peaceably ſhall enjoy the Land without the Impediment or Diſturbance of the Leſſor, if the Leſſor exhibits a Bill in Chancery againſt the Leſſee, to reſtrain his committing Waſte, this is no Breach, though the Bill be diſmiſſed with Coſts, becauſe the Suit does not relate to his Title or Poſſeſſion.

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2 Vent. 213. adjudged.

If a Parſon leaſes his Rectory for Years, and covenants that the Leſſee ſhall have and enjoy it during the Term, without Expulſion, or any Thing to be done by the Leſſor, and after, for not reading the Articles, he is *ipſo facto* deprived by the Statute 13 *Eliz. c.* 12. and the Patron preſents another, who ouſts the Leſſee; this is no Breach, for he was not ouſted by Reaſon of any Act done by the Leſſor, but for a (*c*) Non-feaſance; and ſo it is out of the Compaſs of the Covenant.

4 Leon. 35. adjudged.

(*c*) But if Leſſee for Years, rendering Rent, with a Condition of Re-entry for Non-payment, leaſes Part for a leſs Term, and covenants that his Leſſee ſhall enjoy, without Impeachment of him, or any other, occaſioned by his Impediment Means, Procurement or Conſent, and after he neglects to pay his Rent, upon which the firſt Leſſor enters, &c. This is a Breach. Bulſt. 182, 183. adjudged.

Tenant in Tail of a Rent purchaſes the Land out of which it iſſues, and makes a Feoffment thereof, and covenants that it is free from all former Incumbrances; this is a Charge, though not *in eſſe*, but in Suſpence; for if

Owen 7. *per Cur'*, but *vide* Co. Lit. 389. a.

if Tenant in Tail dies, his Iſſue may diſtrain, and then the Covenant is broken.

Cro. Eliz. 517. *Woodruff* and *Greenwood* adjudged.

If *A.* be Tenant in Tail, the Reverſion in the King, and *A.* leaſes for Years, and covenants that the Leſſee ſhall enjoy it againſt all Perſons, and without the Interruption of any, except the King, his Heirs and Succeſſors, *exiſtentibus Regibus vel Reginis Angliæ*, and the King grants his Reverſion to *B.* and *A.* dies without Iſſue, and *B.* enters, the Covenant is broken, for that extends only to the King and his Succeſſors, in which Words his Patentee is not included.

Cro. Jac. 657. *Butler* and *Swinnerton*, adjudged *per totam Curiam.* Palm. 339. S. C. adjudged, *abſente Chamberlain*, though objected, *by his Means and Procurement*, muſt refer to ſubſequent Acts. 2 Rol. Rep. 286. S. C. *adjornatur.*

If *A.* by the Means and Procurement of *B.* by Fine conveys Lands to *B.* and his Wife, and the Heirs of *B.* and after *B.* leaſes the ſame for Years, and covenants that the Leſſee ſhall quietly enjoy during the Term, without the Diſturbance of him, his Heirs or Aſſigns, or of any other Perſon, by or through his Means, Title or Procurement, and *B.* dies, and his Wife enters, this is a Breach, for ſhe claims by the Means of the Baron; and therefore it is within the Covenant.

(I) Where the Breach ſhall be ſaid to be well aſſigned.

Lev. 78. *Coniers* and *Smith.*

IF in an Action of Covenant the Plaintiff declares upon a Leaſe for twenty-one Years to the Defendant, and that he covenanted to pay 20*l. per Ann.* by equal Portions, at *Michaelmas* and *Lady-day*, and aſſigns for Breach, that he did not pay the Rent, *dedit' ad præd' ſeparalia feſta durante termino*; this Breach is (*b*) ſufficiently aſſigned, and it ſhall be intended that the Rent was not paid at either of thoſe Days.

(*b*) In Covenant for not repairing, the Breach was generally alledged, without ſhewing in what; 1 Brownl. 23. adjudged, it was helped after Verdict; ſo 2 Mod. 176. Ld. Raym. 168, 170, 284, 594. 2 Ld. Raym. 1416. Sra. 681. 2 Barnes 284. 10 Mod. 228, 303, 329. 12 Mod. 406, 413, 414. 2 Jones 125. where the Covenant was to repair all the Pales, except thoſe on the Weſt Side; and the Breach aſſigned was, in not repairing the Pales, *contra formam conventionis.*—But where the Breach aſſigned, or Performance pleaded, muſt purſue the Words and Subſtance of the Covenant or Condition. Leon. 245. Cro. Eliz. 202, 203, 780. March 17. All. 60. 2 Mod. 229.†——

† The Breach aſſigned by the Plaintiff ſhould ſpecify the Particulars, and he may aſſign every poſſible Breach, within the Meaning of the Covenant, and though he proves only *Part*, he will be intitled to recover. As to the Defendant, if he means to plead, that he did repair, and if the Term is ended, that he yielded up the Premiſſes in Repair, he ſhould purſue the Words of the Covenant, fully, without regarding the *Particulars* aſſigned by the Plaintiff.

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Cro. Eliz. 830. *Cutler* and *Brewſter*, adjudged.

* If in Debt upon an Obligation, the Condition whereof is of three Parts, 1. That he ſhall ſerve the Plaintiff well. 2. That he ſhall duly account, 3. That within three Months after Notice he ſhall make Satisfaction for all Loſſes ſuſtained by his Apprenticeſhip; the Defendant pleads Performance ſpecially, and the Plaintiff aſſigns for Breach, that upon Account he was found in Arrear 60*l.* which he received and converted to his own Uſe, and ſo had not ſerved the Plaintiff well; this is a good Replication, without alledging Notice; for though it might be alledged as a Breach of the third Part of the Condition, yet the Converſion of the Money to his own Uſe, may be alledged as an ill Service.

In an Action of Covenant ſeveral Breaches may be aſſigned; otherwiſe in Debt upon an Obligation, conditioned to perform Covenants. Cro. Car. 176. 2 Burr. 773.

But now by the 8 & 9 *W.* 3. *cap.* 11. it is enacted, "That in all Actions upon any Bond or on any penal Sum, for Non-performance of any Covenants or Agreements in any Indenture, Deed or Writing contained, the Plaintiff may aſſign as many Breaches as he ſhall think fit; and the Jury, upon Trial of ſuch Action, may aſſeſs not only ſuch Damages and Coſts of Suit as have heretofore been uſually done in ſuch Caſes, but alſo Damages for ſuch of the ſaid Breaches ſo to be aſſigned, as the Plaintiff, upon the Trial of the Iſſues, ſhall prove to have been broken, and that the like Judgment ſhall be entered on ſuch Verdict as heretofore hath been uſually done in ſuch like Actions; and if Judgment ſhall be given for the Plaintiff, on a Demurrer, or by Confeſſion, or *Nihil dicit*, the Plaintiff upon the Roll may ſuggeſt as many Breaches of the Covenants and Agreements as he ſhall think fit; upon which ſhall iſſue a Writ to the Sheriff of that County where the Action ſhall be brought to ſummon a Jury to appear before the Juſtices or Juſtice of Aſſiſe, or *Niſi prius* of that County, to inquire of the Truth of every one of thoſe Breaches, and to aſſeſs the Damages which the Plaintiff ſhall have ſuſtained thereby, in which Writ it ſhall be commanded to the ſaid Juſtices, *&c.* that he or they ſhall make a Return thereof to the Court from whence the ſame ſhall iſſue at the Time in ſuch Writ mentioned; and in Caſe the Defendant, after ſuch Judgment entered, and before any Execution executed, ſhall pay into the Court where the Action ſhall be brought, to the Uſe of the Plaintiff, or his Executors or Adminiſtrators, ſuch Damages ſo to be aſſeſſed, by Reaſon of all or any of the Breaches of ſuch Covenants, together with the Coſts of Suit, a Stay of Execution on the ſaid Judgment ſhall be entered upon Record; or if, by Reaſon of any Execution executed, the Plaintiff, or his Executors or Adminiſtrators, ſhall be fully paid or ſatisfied all ſuch Damages ſo to be aſſeſſed, together with his Coſts of Suit, and all reaſonable Charges and Expences for executing the ſaid Execution, the Body, Lands or Goods of the Defendant, ſhall be thereupon forthwith diſcharged from the ſaid Execution, which ſhall likewiſe be entered upon Record; but notwithſtanding in each Caſe ſuch Judgment ſhall remain as a further Security to anſwer to the Plaintiff, and his Executors or Adminiſtrators, ſuch Damages as ſhall or may be ſuſtained for *further* Breach of any Covenant in the ſame Indenture, Deed or Writing contained, upon which the Plaintiff may have a *Scire facias* upon the ſaid Judgment againſt the Defendant, or againſt his Heir, Terre-tenants, or his Executors or Adminiſtrators, ſuggeſting *other* Breaches of the ſaid Covenants or Agreements, and to ſummon him or them reſpectively to ſhew Cauſe why Execution ſhall not be had or awarded upon the ſaid Judgment, upon which there ſhall be like Proceeding, as was in the Action of * Debt upon the Bond or Obligation, for aſſeſſing of Damages upon Trial of Iſſues joined upon ſuch Breaches, or Inquiry thereof, upon a Writ to be awarded in Manner as aforeſaid, of ſuch future Damages, Coſts and Charges as aforeſaid, all further Proceedings on the ſaid Judgment are again to be ſtayed, and ſo *toties quoties*; and the Defendant his Body, Lands or Goods, ſhall be diſcharged out of Execution, as aforeſaid."

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If *A* leaſes to *B.* for Years, and covenants that he hath full Power and lawful Authority to leaſe, *&c.* and in an Action upon this Covenant, *B.* muſt be had (*a*) not full Power and lawful Authority to leaſe, *&c.* the Breach 9 Co. 60, 61. *Bradſhaw* and *Salmon.* Cro. Jac. 304. S. C.

alged, and that the Defendant muſt ſhew he was ſeiſed in Fee, and then the Plaintiff muſt ſhew ecial Title in ſome Body elſe; but the Covenant being general, the general Aſſignment of reach *prima facie* is good. (*a*) That he was not lawfully ſeiſed in Fee of an indefeaſible Eſ- Cro. Jac. 369. & *vide* Raym. 14, 15. Shep. Touch. 167. Cowp. 578.

is well assigned, for he hath well pursued the Words of the Covenant *negative*; and what Estate he had lies more in the Knowledge of the Lessor than Lessee; and therefore he ought to shew what Estate he had at the Time of making the Lease, that it may appear that he had full Power, &c.

Cro. Jac. 171. *Hancock* and *Field*.

If *A.* leases to *B.* for Years, and *B.* covenants to repair during the Term, and at the End of the Term to leave the Premisses well repaired, in an Action upon this Covenant, it may be assigned for a Breach, that he did not leave them well repaired at the End of the Term; and if the Defendant pleads, that at the End of the Term he delivered them up well repaired, then if the Plaintiff will assign a Breach, he ought to shew particularly in what Part it was not repaired, so that the Defendant may give a particular Answer thereto; but it was said that in a Declaration in Covenant, it sufficeth to assign the Breach as (*b*) general as the Covenant is *.

(*b*) Cro Jac. 661. S. P.

* *Sed vide* the last Note on the first Clause under this Head, *ante* 543.

Cro. Jac. 240. Lord *Ewre* and *Strickland*, adjudged.

In an Action of Covenant, the Plaintiff declared that Queen *Elizabeth* leased a Messuage, &c. to the Defendant for twenty-one Years, and that the Defendant, his Executors and Assigns, were thereby bound to repair and leave the Premisses at the End of the Term in good Repair, and that the Queen granted the Reversion to *B.* and that *B.* granted the same to the Plaintiff; and for not repairing, &c. this is a good Declaration, though the Plaintiff is not named Assignee.

Cro. Car. 188. *Batchelor* and *Gaye*, adjudged. Cro. Eliz. 195. Cro. Jac. 383. S. P.

If in an Action of Covenant the Plaintiff declares, whereas by Indenture, bearing Date, &c. *Testatum existit*, that the Plaintiff had demised to the Defendant a Messuage and Garden for two Years, and the Defendant, by the said Indenture, covenanted not to erect any Building in the Garden, &c. and avers *in facto*, that he did erect, &c. this is a good Declaration, though he does not expressly say *Quod demisit & convenit*; and it is the (*c*) usual Course in *B. R.* to declare in this Manner.

adjudged, & *vide* Sid. 375. where the Plaintiff declares *per quoddam scriptum per quod Testatum existit*, &c. (*c*) And so are the precedents in *B.* Cro. Eliz. 195. 2 Rol. Rep. 210, 211. Cowp. 665. Doug. 667, 767.

† But the usual Method now is to declare, that whereas by such an Indenture made between &c. at, &c. (with a Profert) such a one demised, &c.

Cro. Car. 285. Major and *Talbot*, adjudged. Jones 305. S. C. adjudged; but by the Report thereof, the Baron was dead, and the Feme and the Heir of the Baron conveyed, and

If Baron and Feme being seised of an House, to them and the Heirs the Baron, lease to *A.* and he covenants with them and the Heirs and Assigns of the Baron, to repair, &c. and the Baron and Feme convey the Inheritance to *B.* in an Action upon this Covenant, *B.* may shew the whole Matter, and conclude *Quod Actio ei accrevit* ‡, as Assignee of the Baron without shewing the Death of the Feme; for the Estate for Life being transferred with the Fee, it is drowned therein.

Action was brought as Assignee of the Heir, and said that it was no Benefit to the Lessee to have the Estate for Life continue, and therefore, &c.

‡ This Conclusion is not now used, unless in Cases of Debt on penal Statutes, &c. But in Actions of Covenant, the usual Conclusion, after assigning the Breach, is, And so the Plaintiff saith that the Defendant (altho' requested, &c.) hath not kept with the Plaintiff, the Covenant made between such an one and such an one, but hath therein failed and made Default, to the Plaintiff's Damage of so much in *B. R.* or in *C. P.* wherefore the Plaintiff saith he is injured, and hath sustained Damage, &c.

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2 Mod. 311. *Asser* and *Mazeen*, adjudged.

* If in an Action of Covenant the Plaintiff declares upon an Indenture in which the Defendant had covenanted that he was seised in Fee, &c. that he would free the Premisses from all Incumbrances, and that the Plaintiff should quietly enjoy, and for Breach assigns an Entry and Eviction by

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Stranger, *& ſic conventionem ſuam* (in the ſingular Number) *fregit*, this is well enough; (*a*) for *conventio eſt nomen collectivum*, and if twenty Breaches are aſſigned, the Count is *de placito quod teneat ei conventionem. ac fracta*, all one. Hard. 178.——If a Breach of Covenant is ſufficiently alleged, the Plaintiff need not conclude *& ſic non tenuit conventionem in hoc, &c.* for that is but Repetition. Cro. Jac. 298. adjudged. 2 Mod. 229. S. P. adjudged ‖.

(*a*) *Quod teneat, &c. & de conventic*

‖ But it is the uſual Way.

If in Action of Covenant the Plaintiff declares upon a Leaſe in *London*, of a Meſſuage in *D. in Com' S.* and that the Leſſee covenanted to repair, *&c.* and aſſigns for a Breach, that *apud London* he permitted the Houſes to decay, *&c.* this is naught, becauſe the Breach is in a Matter local, and not tranſitory *.

Cro. Jac. 446. *Sheers* and *Briton*, adjudged.

* But it may be alledged at the Place where the Premiſſes are ſituate, *ſc. at London, &c.*

If in an Action of Covenant the Plaintiff declares upon a Covenant, to find the Plaintiff with Meat, Drink, Apparel, and other Neceſſaries, and aſſigns the Breach as general as the Covenant, *viz.* that he did not find him with Meat, Drink, Apparel, and other Neceſſaries; this is good, without ſhewing in particular what other Things are neceſſary, and the *alia neceſſaria* ſhall be intended ſmall Things, as Trimming, Waſhing, *&c.* which would be too long to inſert, and the Bench being aſſigned in the Words of the Covenant, it is ſufficient.

3 Lev. 170. *Procter* and *Burdet*, adjudged. 3 Mod. 69. 70. adjudged. Ld. Raym. 106, 276, 594, 620. 2 Ld. Raym. 824, 968, 991, 1140, 1181, 1219, 1410. Fitzgib. 161. Comyns 89. pl. 59. 146. pl. 98. 180. pl. 113, 376. pl. 188. Stra. 231. 10 Mod. 227, 443. 11 Mod. 66. pl. 6. 78. pl. 11. 135. pl. 13. 12 Mod. 3, 327, 406, 413. Cro. Jac. 486. Salk. 140. pl. 6.

So in Debt upon an Obligation conditioned to ſatisfy for all Goods that an Apprentice ſhall waſte, in his Replication, the Plaintiff aſſigned for Breach, that he had waſted *diverſa bona ad valentiam* 100*l.* and adjudged that it was good, without ſhewing in particular, what the Goods were; for (*b*) the Penalty of the Obligation is to be recovered upon any Breach, but ſaid that it would be otherwiſe in Covenant, where there is to be a Recompence for the Damages †.

Lev. 94. *French* and *Pierce*, adjudged.

(*b*) *Vide ſupra* 8 & 9 W. 3. and Salk. 137. pl. 1.

† In aſſigning that he had received of divers Perſons divers Sums of Money, in the whole amounting to a large Sum, to wit, the Sum of 100*l.* and converted the ſame to his own Uſe, contrary to the Condition, would be good.

If in Debt upon an Obligation conditioned to ſave the Plaintiff harmleſs from all Charges and Troubles, by Reaſon of the laſt Will of *A.* or any Thing therein mentioned, touching one *B.* or any Legacy to her given, *&c.* the Defendant pleads *Non damnificatus*, and the Plaintiff replies that he paid 60*l.* to *B.* for a Legacy, *&c.* this is no good Replication; for he ought to have ſhewed that a Legacy of 60*l.* was given her by the Will; for though the Will is recited in the Date, againſt which Recital the Defendant cannot ſay he made no ſuch Will, yet the Legacy given to *B.* is not recited, but in general, againſt which the Defendant may take a Traverſe †.

Yelv. 226. Brownl. 117. 2 Bulſt. 19. S. C. *& vide* Cro. Jac. 250.

† *Qu.* alſo. if he ſhould not have alledged he was obliged to pay the Legacy, or paid it to avoid a Suit?

If *A.* covenants to permit *B.* his Heirs and Aſſigns, to take and enjoy the Rents, Iſſues and Profits of certain Lands, and in an Action of Covenant the Plaintiff aſſigns for Breach, that *A.* took the Profits, & (*b*) *non permiſit B.* to enjoy, *&c.* this Breach is well aſſigned, for the taking the Profits by *A.* is a ſpecial Diſturbance.

Jones 218. *Simmons* and *Smith*. Cro. Car. 176. S. C. *et vide* Hard. 132. 2 Vent. 178.

(*b*) But *non permiſit* alone is too general. 8 Co. 89. b. 91. b. *et vide* And 137.

Mod. 2[illegible] *Boſcawin & al'* and *Cook*. 2 Mod. 138. S. C. adjudged, and ſaid that if

If *A.* grants a Rent to *B.* and his Heirs, for the Life of *C.* to the Uſe of *C.* and covenants with *B.* to pay the Rent *ad opus & uſuam* of *C.* and in an Action upon this Covenant, *B.* aſſigns the Breach, in not paying the Rent to him *ad opus & uſum* of *C.* this Breach is well aſſigned in the Words of the Covenant, though a (*z*) negative Pregnant.

it was paid to *C.* which is a Performance in Subſtance, the Defendant ought to have pleaded it.

(*z*) For this *vide* 2 Leon. 197.

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2 Jones 186. *Bellamy* and *Ruſſel*, adjudged.

* If in an Action of Covenant the Plaintiff declares upon a Charter-Party, by which the Plaintiff, being Maſter of a Ship, was to pay two Parts of the Port-Charges, and the Factor of the Defendant the other Part, and the Plaintiff ſhews that he ſailed from *L.* to *C.* and there paid all the Port Charges, *viz.* two Parts for himſelf, and the other Part for the Defendant, and that the Defendant had not repaid him: this Breach is well aſſigned; for when the Plaintiff ſays he paid the third Part, it ſhall not be intended the Defendant did, but that the Plaintiff was neceſſitated to pay it, or otherwiſe his Ship would have been ſtayed in the Port.

Carth 124. *Rawline* and *Vincent*, adjudged. (*a*) *Vide* Cro. Eliz. 348. 5 Mod. 133. Salk. 139. pl. 4. (*b*) *Vide* 5 Mod. 67, 223.

In covenant, which was that the Defendant ſhould make out a good Title in Law and Equity, before ſuch a Time, to the Satisfaction of the Plaintiff, his Heirs or Aſſigns, or to his or their Counſel learned in the Law; the Breach was aſſigned in the very Words of the Covenant; and it was objected, that the Covenant, being in the (*a*) Disjunctive, *viz. to ſatisfy the Plaintiff or his Counſel*, he had his Election, and therefore the Plaintiff ought to have given Notice who his Counſel was, before which Time the Defendant could not ſatisfy him; but it was reſolved that the Breach, being in the very Words of the Covenant, was ſufficient; and (*b*) if the Truth was, that the Defendant did not know who the Plaintiff's Counſel was, he ſhould have ſet is forth in pleading.

Salk. 169. pl. 2. *Griffith* and *Harriſon*, adjudged.

If an Aſſignee of a Term has a Covenant from the Aſſignor, that he ſhall quietly enjoy, free and clear from all Taxes, and all Arrears of Rent, &c. though there be Rent Arrear, yet he cannot aſſign this as a Breach of the Covenant; for the Rent being Arrear, is no Damage to him, unleſs he ſued or charged therewith; and if paid at any Time, before he is damnified, it is ſufficient for him.

Salk. 196. pl. 2. *Per Cur'*.

So if a Counter-Bond or Covenant be given to ſave harmleſs from a penal Bond, after the Condition of the Obligation be broken, or to ſave harmleſs from a ſingle Bill, without a Penalty, the Counter-Bond cannot be ſued without a ſpecial Damnification.

Salk. 197. pl. 3. *Per Cur'*.

But where the Counter-Bond or Covenant is given to ſave harmleſs from a penal Bond, before the Condition broken, there if the penal Sum be paid at the Day, and ſo the Condition not preſerved, the Party to be ſaved harmleſs does by this become liable to the Penalty, and ſo is damnified, and the Counter-Bond forfeited.

5 Mod. 352. *Toddard* and *Middleton*.

The Defendant covenanted to pay ſo much *per* Chaldron for all Coals laden either at *Newcaſtle*, or upon the River *Tyne* and brought to *London*, and the Breach aſſigned was, that the Coals were laden on ſuch a Ship *infra portum de Tinmouth*, *viz.* at *North Shields*, and brought from thence to *London*; and on Demurrer, the Court inclined that the Breach was well aſſigned, for that they could not take Notice Judicially, that *Tinmouth* is upon the River *Tyne*, but gave the Plaintiff Leave to diſcontinue upon Payment of Coſts.

(K) Why

(K) Where the Performance shall be said to be well set forth and pleaded. *Pge 548.

IF a Man is bound to perform all the (a) Covenants in an Indenture, if they are all in the Affirmative, he may plead Performance thereof generally. Co. Lit. 303. b. Kelw. 95. Leon 136. Palm. 70.

Lev. 303. S. P. (a) But in Debt upon an Obligation, conditioned to do several Things in the Condition mentioned, the Defendant cannot plead Performance generally, but ought to plead to every Thing particularly by itself. Lev. 303. & *vide* Sid. 215. Kelw. 95. b.——*Quod conditio semper infracta fuit*, is naught. 2 Vent. 156.

But to (b) such as are in the (c) Negative, he (d) must plead Specially, (for a Negative cannot be performed) and to the Rest Generally. Co. Lit. 303. b. Moore 856.

Cro. Eliz. 691. Palm. 70 (b) But if the negative Covenants are all void and against Law, and the Affirmative good and lawful; he may plead Performance generally, and the Court shall take Notice that the Negative Covenants are void and against Law. Moor 850. Godb. 212. Hob. 12, 13. (c) Unless the Negative Covenant is only in Affirmance of the affirmative Covenant precedent. Sid. 87. (d) But it is only Matter of Form, and helped upon a general Demurrer. Cro. Eliz. 232. Leon. 311. & *vide* All. 72. Style 63.

If any of them are in the Disjunctive, (e) he must shew which Part he hath performed. Co. Lit. 363. b. Sav. 120. S. P. *arguendo*. Cro. Eliz. 560. Palm. 70. S P. and if Performance generally is pleaded, it is naught upon a general Demurrer; for that the Court cannot tell which Part he hath performed. Cro. Eliz. 231. Leon 311. (e) But if the Condition of an Obligation be to perform the Award of *J. S.* and he awards the Obligor to pay 100*l.* or to procure a Stranger to be bound in 200*l.* &c. the Defendant may plead Performance Generally, because one Part is void; and it will be intended that he pleads Performance of that Part which he was bound to perform, and not the other Part, Sav. 120.

If any of them are to be done (f) of Record, the Performance thereof must be shewn specially, and it cannot be involved in the general Pleading. Co. Lit. 303. b. (f) As to levy a Fine. Cro. Jac. 560. 2 Rol. Rep. 159. Palm. 70. S. P. adjudged, and the Reason given, because the Record shall be tried by itself and its Credit shall not be examined by a Jury; and perhaps the Plaintiff will reply, that all the Lands are not comprised in the Fine, or other Matter upon which the Fine shall be examined.

If in Debt upon an Obligation conditioned that the Plaintiff shall enjoy certain Lands (g) discharged, or otherwise saved harmless (h) from all Incumbrances, the Defendant pleads that the Plaintiff hath enjoyed the Lands discharged, and kept indemnified from all Incumbrances; this Plea 2 Co. 4. a. *Manser's* Case, adjudged. Cro. Jac. 363. Winch. 9. Mutuq

Like Point adjudged. (g) If the Condition be to acquit, discharge and save harmless from such a Bond *Non Damnificatus*, Leon. 71.——But in an Action upon a Bond, conditioned to acquit, discharge and save harmless, a Parish from a Bastard Child, the Defendant pleaded *Non Damnificat*, and the Plaintiff demurred; and because it did not appear upon the whole Record, that the Parish was damnified, it was adjudged for the Defendant. Ld. Raym. 106, 124, 597, 664, 968. 8 Mod. 316, 318, 349. Gib. Eq. Rep. 253. 10 Mod. 227, 228, 303, 384, 443. 11 Mod. 78. pl. 11. 12 Mod. 406, 413. Stra. 231, 681 2 Ld. Raym. 1416, 1449. Forteſc. 333. Barnard. 4. *vide* March 121.——But if in Debt upon a Bond, conditioned to save harmless *J. S.* and the mortgaged Premisses, and to pay the Interest for the principal Sum, the Defendant pleads *J. S. Non fuit damnificatus*; for that the Defendant paid the principal Money, and all Interest due at such a Day; this is no good Plea, because *Non damnificatus* goes to the Person, and not to the Premisses. 2 Mod. 305. adjudged.——If the Condition be to save harmless the Obligee against another, *Non damnificatus* is a good Plea. Kelw. 80.——But if to discharge the Obligee, it ought to be shewn in the Affirmative how. Kelw. 80. *per Frowick.* (h) So if the Condition be to save harmless from all Bonds entered into for the Obligor, *exoneravit & indempnem conservavit* is no good Plea, without shewing how. Cro. Eliz. 216. But that he need now shew from what

Plea is naught; for being in the Affirmative (i) it ought to have bee
*Page 549 * ſhewn (k) how; but if he had pleaded in the Negative *Non fuit damni*
what Bond *ficatus*, is had been otherwiſe.
he ſaved
him Harmleſs and *per* Cro. Eliz. 433. *per Gaudy*, there is a Diverſity when the Condition is to di
charge from a particular Thing; and when from a Multiplicity of Things; for in the laſt Ca
it is ſufficient to plead generally. (i) Cro. Jac. 165 S. P. adjudged. All. 72. S. P. adjudge
& *vide* Cro. Eliz. 477. Cro. Jac. 503. 5 Com Dig. 49. (k) But a Man may plead *Quod exon*
eravit, &c. from an Arreſt, without ſhewing how, for that it may be done by Compoſition, &
without Deed. Cro Eliz. 914. adjudged——So in Debt upon a Bond, conditioned to perfor
the Award of J. S. if it is awarded that a Suit in Chancery, by the Defendant againſt the Plai
tiff, ſhall ceaſe, and the Plaintiff, ſhall ſtand acquitted *de qualibet materia in eadem contenta*; th
Defendant may plead *quod ſtetit inde quietus*, without ſhewing how, or that he *in facto* diſcharge
him; for it was not intended that an actual Diſcharge ſhould be given, but that by the Arbitr
ment he ſhould be acquitted. Cro. Jac. 339. Rol. Rep. 8. 2 Bulſt. 93, 94 ——Otherwiſe if th
Award had been, that he ſhould diſcharge and ſave him harmleſs from a certain Obligatio
Leon. 71.

Kelw. 95. b. In Debt upon an Obligation, conditioned that the Defendant ſhall r
pair and do other Things, and alſo pay his Rent every Day of Paymen
he cannot plead Performance Generally, but muſt plead Specially.

Kelw. 95. b. But where the Condition refers to ſuch a Generalty, that by Intendme
it is paſt the Remembrance of Man; as if the Under-Sheriff is bou
to diſcharge his Maſter from all Accounts and Returns of Writs with
the County, he may plead Performance of the Condition Generally.

Kelw. 95. b. S. P. *per Cur' cont.* Sid. 215. Latch 16. In Debt upon a Bond, conditioned that the Defendant ſhall enfeoff t
Plaintiff of all his Lands, the Defendant muſt plead Performance Sp
cially.

* And *qu.* If ſuch *contra* Determination is not Law?

Kelw. 95. (c) But by the Caſe of *Lee* and *Luttrell*, Cro. Jac. 559. 2 Rol. Rep. 159. Palm. 70. it is otherwiſe. † But if the Condition be that (c) a Stranger ſhall enfeoff the Obligee a General Performance may be pleaded.

† *Sed qu.* If the Text is not Law?

Kelw. 95. b. (d) If the Condition be to convey an Eſtate, in pleading, it If the Condition of an Obligation be to make to the Obligee a lawf Eſtate in certain Lands, it is ſafe to plead that he hath (d) enfeoffed ‡ hi thereof, which is a lawful Eſtate, though in Strictneſs it is not neceſſar becauſe it appears to be a lawful Eſtate.

muſt be ſhewn by what Manner of Conveyance it was done. Leon 72. 2 Leon 39. Go 360. 2 Mod. 240. 11 Mod. 78. pl. 11. Ld. Raym. 106, 968, 1140.——So if the Condition to ſhew a ſufficient Diſcharge of an Annuity, in pleading Performance it muſt appear wh Manner of Diſcharge it was, that the Court may judge whether ſufficient or not. 9 Co. 2 Hob. 107. 2 Mod. 240. 11 Mod. 78. pl. 11. Ld. Raym. 106, 968, 1140.

‡ But the Conveyance ſhould have the Word *Enfeoff*, or otherwiſe the Conveyance, ſhould properly pleaded, according to its Operation in Law.

Kelw. 55. b. But if the Condition be to build a ſufficient Houſe, the Defend muſt ſay that he hath built ſuch an Houſe, which is ſufficient.

Kelw. 95. b. (e) But *per* Cro. Eliz. 869. *per Cur'*, he may plead that he hath delivered all, &c. and the contrary, in ſome Particular, o to be ſhewn on the other Side.* In Debt upon an Obligation conditioned to deliver all Evidences co cerning ſuch Lands, the Defendant (e) muſt plead that he hath deliver ſuch and ſuch Charters, which are all the Charters concerning the La

* And this ſeems moſt eligible.

In Debt upon an Obligation, conditioned that the Defendant at all Times upon Requeſt, ſhould deliver to the Plaintiff all the Fat and Tallow of all Beaſts which ſhould be killed or dreſſed by the Defendant, his Servants or Aſſigns, before ſuch a Day; the Defendant may plead, that upon every Requeſt to him made, he did deliver to the Plaintiff all the Fat and Tallow of all Beaſts, &c. without ſhewing how many Beaſts were killed or dreſſed, or what Quantity of Fat he delivered; for when Matters tend to Infinity and Multiplicity, whereby the Rolls would be incumbered with Length, the Law allows of ſuch general Pleading. Cro. Eliz. 749. *et vide* Sid. 215, 334. Cro. Eliz. 916. Like Point.

In Debt upon an Obligation, conditioned, for the Payment of 60 *l.* *viz.* 30 *l.* at one Day, and 30 *l.* at another Day, the Defendant may plead Payment of the 60 *l.* *ſecundum formam & effectum conditionis præd'*; for *reddendo ſingula ſingulis*, it is as if he had pleaded the ſeveral Payments at the ſeveral (*a*) Days. Cro. Eliz. 281. *Fox* and *Lee*, adjudged. *Page 550.

(*a*) But ſuch general Pleading is not good, where a certain Day of payment is not mentioned in the Condition. 2 Bulſt. 267.——In Debt upon an Obligation conditioned to deliver ſuch Briefs ſuch a Day, the Defendant pleads that he delivered them *ſecundum formam Conditionis præd'*. Lev. 145.

If in Debt upon an Obligation, conditioned that if the Obligee ſhall enjoy ſuch Lands till the Age of *J. S.* and if *J. S.* within one Month after his full Age, makes an Aſſurance thereof to the Obligee, then, &c. the Defendant pleads that *J. S.* is not yet of full Age; this Plea is not good, without ſhewing the Obligee hath enjoyed the Lands in the mean Time; for the Condition is in the Copulative. Cro. Eliz. 870. *Waller* and *Croot*, adjudged. Cowp. 578.

If in Debt upon an Obligation, conditioned to pay 30 *l.* to *A. B.* and *C.* *tam cito* as they ſhall come to the Age of Twenty-one Years, the Defendant pleads that he paid thoſe Sums *tam cito* as they came of Age, this is no good Plea; for the (*b*) Time, Place, and Manner of Performance, ought to be ſhewn in certain; ſo that a certain Iſſue might be taken upon it. Cro. Jac. 359. 2 Bulſt. 267, S. C. *Halſey* and *Carpenter*. Bulſt. 43, S. P.

(*b*) If the Condition be to ſurrender a Copyhold, the Defendant muſt not plead Generally, that he hath ſurrendered it, but muſt ſhew when the Court was held, &c. Winch. 11. adjudged.—— If the Condition be that the Obligee ſhall enjoy an Office according to Letters Patent, the Defendant muſt not plead *in hæc verba*, but ſhew the Effect of the Letters Patent, and the Enjoyment accordingly. Hob. 295.

If in Debt upon an Obligation, conditioned to perform Covenants, one of which was for the Payment of Money upon the making an Aſſurance, the Defendant pleads that he paid the Money ſuch a Day, but ſaith not when the Aſſurance was made, this is naught: for that it ought to appear that the Money was immediately paid, purſuant to the Covenant. ‡ 2 Mod. 33. 11 Mod. 34. pl. 5. Com. Rep. 515. Ld. Raym. 597, 665.

2 Ld. Raym. 1140. *Duck* and *Vincent*, adjudged. ‡ That is, that the Money was paid on making the Inſurance, for that is the proper Time for Payment.

In an Action of Covenant, the Plaintiff declared that his Father was ſeiſed in Fee of a Meſſuage, and leaſed to the Defendant for twenty-one Years, and that the Defendant covenanted to repair, ſupport and amend the ſame, during the Term, and that his Father died, &c. and that the Meſſuage was *totaliter dirut' & ruinoſ'*, and the Defendant pleaded, that before the Houſe was ruinous, &c. he aſſigned to *J. S.* and that after the Houſe was burnt, *quodque in convenienti tempore poſt deſtructionem domus præd'*, and before the Action brought, *Meſſuag' præd' cum pertinentiis ſufficienter re-ædificat' &c. fuit, & adhuc in bona reparatione ſufficienter exiſtit.* Adjudged upon a ſpecial Demurrer, that this Plea was naught; becauſe it was not ſhewn by whom it was rebuilt: though it was objected, that (*c*) it was not material by whom it was rebuilt; and if by a Stranger, it could not be built again by the Defendant: and he having aſſigned all his Intereſt before, it lay not in his Notice by whom it was built; but that it could not be preſumed to be built by the Plaintiff; for that he could not 2 Sand. 420. *Walton* and *Waterhouſe*.

(*c*) 1 Vent. 38. S. P. *dubitatur*.

intermeddle

intermeddle with the Poſſeſſion during the Term; but by the Report, it being alleged that the Plaintiff had rebuilt it at his own Charge, *Hale* refuſed to hear the Reaſons, and *quaſi* in a Paſſion, without conſidering the Matter in Law, gave Judgment for the Plaintiff.

Carth. 4, 5. Seems to be admitted, that he cannot plead Performance, without ſhewing it. All. 72. 1 Vent. 37. Sid. 50. Mod. 266.—— Where he ſwears he never had Part thereof, or hath loſt it. Sand. 8, 9. Cro. Jac. 429. *

In Debt on a Bond, for Performance of Covenants in an Indenture, the Defendant cannot plead Performance generally, without ſetting forth the Indenture.

* In ſuch Caſe he may crave Oyer of the Bond and Condition, and then Oyer of the Indenture, and the Court, on Motion, will ſtay Proceedings, until Oyer of the Indenture granted: And, if Judgment is ſigned, after Oyer, and before it is granted, the Court will ſet aſide the Judgment.

*Page 551 * Skin. 397. pl. 31. *Griffin* and *Harriſon*. 4 Mod. 249. Gilb. Eq. Rep. 252, 253. 2 Stra. 1194. Ld. Raym. 106, 124, 635, 664, 667, 673, 704, 898. Salk. 196. pl. 2. S. C. adjudged.

In Covenant by an Aſſignee of a Leaſe, againſt the Aſſignor, who covenanted to indemnify the Aſſignee from all Rent Arrear, *&c.* the Breach aſſigned was in the Non-payment of the Rent; to which the Defendant pleaded as to Part, Payment to the Leſſor; and as to the other Part, that he left Money with the Plaintiff *ea intentione quod ſolveret* to the Leſſor; and the Plea was held good, though it was objected, no Iſſue could be taken on his Intention. [*Holt* C. J. *contra*, and the Court inclined the Plea was good, but held clearly that if it had been *reliquit ad ſolvendum*, it had been good, and that *non reliquit modo et forma*, had been a good Traverſe.]

(L) What may be pleaded in Bar to the Action.

2 Brownl. 237. *Hare* and *Savil*, adjudged.

IN an Action of Covenant for Non-payment of Rent, the Defendant cannot plead *levied by Diſtreſs*, for that is a Confeſſion it was not paid at the Day; for it could not be diſtrained for till after the Day; but it was agreed, that the Covenant alters not the Nature of the Rent; but that Nothing behind, or Payment at the Day, is a good Plea.

2 Lev. 7. *Watton* and *Weddington*.

In Debt upon an Obligation, conditioned that if a ſhip that was going ſuch a Voyage ſhould return, (the Perils of the Sea excepted) the Defendant ſhould pay ſo much; but if the Ship ſhould be loſt, Nothing, *&c.* the Defendant pleaded, that the Ship did go on her Voyage, and, in her Return, ſuch a Day *amiſſa fuit*; and it was adjudged a good Plea, though it was not ſaid *quod amiſſa fuit periculo maris*; and ſhe might be loſt by the Defendant's own Default: for the Plea is in the laſt Part of the Words of the Condition, which makes the Bond void, as well as if the Ship had returned, *&c.*

(*b*) Lev. 152 *Johnſon* and *Carr*.

It has been adjudged, that to avoid Circuity of Action where there are reciprocal Covenants in the ſame Deed, that one Covenant may be pleaded in Bar to another; as (*b*) in an Indenture of a Leaſe for Years, where the Covenant was that the Leſſee might ſubduct for Charges, and he pleaded this Covenant in Bar to an Action of Debt for the Rent, and it was held good.

But

But in 2 *Mod.* 309. it is ſaid, that reciprocal Covenants cannot * be pleaded one in Bar of another, and that in the aſſigning of a Breach of Covenant it is not neceſſary to aver Performance on the Plaintiff's Side. 2 Mod. 309. *Et vide* 5 Co. 78. 7 Co. *Ugbtred's* Caſe. Cro. Jac. 645. 3 Keb. 352. 3 Lev. 411, 427. Show 391. Comb. 265.

* Yet *qu.* If the preceding Caſe is not Law?

As where a Writing was drawn in theſe Words, *It is agreed that A. ſhall pay to* B. 170l. *for his Land and Houſe*, &c. *the Money to be paid before* Midſummer. *In witneſs*, &c. It was ſealed by both Parties; the Money not being paid at the Day, *B.* without making or tendering any Conveyance of his Land, brings an Action of Debt upon the Bill; reſolved, that it was well brought. And in this Caſe it was ſaid, that *A.* might have an Action of Covenant againſt *B.* for not conveying the Land. Sand. 319. *Cordage* and *Cole.* Lev. 274. Sid. 423. Raym. 183. 2 Keb. 542. S. C.

So in an Action of Covenant the caſe was, *A.* Covenants with *B.* to make him a good Leaſe of his Land and his Sheep, and that *B.* ſhould have Firewood upon his Land, and *B.* covenants to pay one Half Year's Rent at *Michaelmas* following; in an Action of Covenant for this Rent, *B.* pleads, that *A.* refuſed to Leaſe the land before *Michaelmas*; *& per totam Curiam*, The plaintiff muſt have Judgment, for *B.* has his Remedy upon the Covenant of *A.* Hil. 29 and 30 Car. 2. *Dyeſly* and *Tuer*, adjudged.

*But if there be a Covenant, that an Obligee ſhall not put the Bond in Suit at any Time, ſuch covenant is pleadable in Bar as a Releaſe, becauſe in Effect it is ſo; but where the Covenant is that it ſhall not be put in Suit for a certain Time limited in the Deed, this is only a Covenant; and for Breach thereof an Action is maintainable, but is not pleadable in Bar to the Bond. * *Page 552 Carth. 64. *pur Cur'.*

* A Defendant cannot plead *nil habet in Tenementis*, or *non demiſit*, if the demiſe is by Indenture. 2 Vent 69. Co. Lit. 47. 1 R. 3. Lev. 146.——Nor traverſe the Demiſe. R. 2. Cro. 73.——If the Defendant pleads *nil habet* to Debt for Rent upon a Leaſe by Indenture, the Plaintiff may demur; for the Eſtoppel appears upon the Record. R. 1. Sal. 277. R. 3. Lev. 146. Otherwiſe if the Eſtoppel does not appear; for he ought by his Replication to ſhew the *Eſtoppel*, and rely thereon. R. 1. Sal. 277.

Courts, and their Juriſdiction in general.

FOR the better underſtanding the Nature and Juriſdiction of Courts, it may be neceſſary to premiſe ſome Conſiderations concerning them in general, before each particular Court comes to be treated of; and this ſhall do by conſidering,

(A) The Nature and Original of our Courts, and by what Authority conſtituted. 553.

(B) Of

(B) Of the Judges and Persons exercising a Jurisdiction. 555.
(C) What determines their Jurisdiction and Authority. 556.
(D) Of their Division, and the Subordination of one Court to another. 558.

And herein.

1. In General, of the several Kinds of Courts which exercise a Jurisdiction. 558.
2. Of such as are of Record or not. 559.
3. How inferior Courts must claim their Jurisdiction; and herein of Pleading to the Jurisdiction, and demanding Conuzance. 559.
4. Where it must appear that Inferior Courts have a Jurisdiction. 562.

(E) What is incidental to all Courts in general. 565.

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*Page 553 *(A) Of the Nature and Original of our Courts, and by what Authority constituted.

Lamb. Arch. 57, 239, 245. Mirror, c. 5. s. 1.

IN the *Saxon* Times, the *Wittingham Mote* † was the chief Court of the Kingdom, where all Matters both Civil and Criminal, and also relating to the Revenue, were debated and determined; but for Civil and Criminal Matters, it was only a Court in the first Instance, for Facts arising within the County where it sate; but by way of Appeal from the Injustice of other Courts, it heard and determined Causes from all other Counties.

† Or *Witenagemot*, or *Wittena-Gemot*, See *Squire* on the *Angle-Saxon-Government*, 165. and *post* 567.

Lamb. Arch. 239.

To this Court were summoned the Earls of each County, and the Lords of each Leet, and likewise Representatives of Towns, who were chosen by the Burgesses of the Town, who appeared on the King's summons which issued once a year at least; and here new Laws were enacted, and old ones repealed, after the Manner of our Parliaments.

Maddox, c. 7.

But *William* the Conqueror caused the States to recognize him, and fearing that these Parliaments, consisting of *Englishmen*, might prove dangerous, he established a constant Court in his own Hall, made up of the Officers of his Palace, and they transacted the Business both Criminal and Civil, and likewise the Matters of the Revenue; and as they sate in the Hall they were a Court Criminal, and when up the Stairs a Court of Revenue; the Civil Pleas they heard in either Court.

Maddox, c. 9.

The Court consisted, 1. Of the *Justiciar*, who presided, and was called *Capitalis Justiciarius totius Angliæ*, and chiefly determined all Pleas Civil and Criminal, and was also the chief Officer of State. 2. The Chancellor who formed all Patents, and put the Seal to them, and had the Custody there-

be

both for Writs and Patents. 3. The Treaſurer, before whom all Accounts were chiefly audited; and he it was that preſided in Matters relating to the Revenue. 4. The Conſtable and Marſhal, to whom all Matters of Honour and of War and Peace were referred, to determine according to the Law of Nations and of Arms. 5. The Seneſchal or Steward, and Marſhal, who determined the Quarrels and Diſputes between the King's menial Servants; the Marſhal was alſo to keep the Priſoners, and take Care that no Indecency was committed in the King's Houſe. 6. The Chamberlain, who was to count the King's Money as it came in, and iſſued out of the Treaſury.

This was the Sovereign Court of the Kingdom, where Juſtice was adminiſtered, and where all Matters of the higheſt Moment were tranſacted by the King himſelf and theſe Officers; yet, in ſome Caſes, of great Importance, as upon the levying a new War, or raiſing an Eſcuage, moſt of the great Perſons that held *in Capite* were called, and then it was termed the *Commune Concilium Regni*, or the Parliament; to whichafterwards the Repreſentatives of Boroughs that held *in Capite* were called. Maddox, c. 8.

Towards the *Norman* Period, the Power of the *Juſticiar* became formidable, and in the Barons War was turned againſt the King; the King alſo found, that the Barons who held large Diſtricts, were likely to grow more and more troubleſome to the Crown; for though in the Conqueror's Time, and for ſome Reigns after the Conqueſt, they were kept in very good Subjection, the *Norman* and *Engliſh* Barons being a Balance for each other; yet Time wearing away the Diſtinction, and the *Normans* growing up *Engliſh*, they became fond of thoſe Liberties and Privileges that the *Engliſh* had enjoyed in the *Saxon* Times; hence it was neceſſary to introduce a new Policy, and hence the Original of our Courts, as we have them at this Day in *Weſtminſter-Hall*. Maddox, c. 8.

* To give Countenance to this new Erection and Diviſion of Courts, (which was completed by *E.* 1.) as alſo that it might ſtill be ſeen, that all Juſtice flowed from the King, the King himſelf (*a*) ſat in Perſon in the Court of (*b*) *King's Bench*; and hence the Power of this Court, which it ſtill retains, of exerciſing a Superintendency over other Juriſdictions; but though the King was ſometimes preſent, yet the Chief Juſtice gave the Rule, that the King might not decide in his own Cauſe. *Page 554 Maddox, c. 19. fol. 21. and 135. Rol. Abr. 94, & *vide* 2 Inſt. 24, 25.

(*a*) Speed 521. Rol. Abr. 535. Ed. 4. * and Rich. 3. † ſat there in Perſon. *How. Mod. Hiſt. Ang.* *131, † 136. (*b*) Is ſtill ſuppoſed to have always the King himſelf in Perſon ſitting in it. Dyer 187. pl. 6 Maddox 543. Crompton of Courts 78.—And hence every Proceſs in the King's Bench is made returnable before the King himſelf. 28 Aſſ. pl 52.

But howeverthisRegulation might have been begun, or however it might have been formerly, as to the King's Sitting and Determining in Cauſes, it ſeems now agreed, That our Kings having delegated their whole judicial Power to the Judges of their ſeveral Courts, they, by the long, conſtant and uninterrupted Uſage of many Ages, have now gained a known and ſtated Juriſdiction, regulated by certain and eſtabliſhed Rules, which our Kings themſelves cannot make any Alteration in without an Act of Parliament. 2 Inſt. 73. 2 Hawk. P. C. 2.

But as the King is the Fountain of Juſtice, and the ſupreme Magiſtrate of the Kingdom, intruſted with the whole Executive Power of the Law, no Court whatſoever can claim (*c*) any Juriſdiction, unleſs it ſome Way or other derive it from the Crown. S. P. C. 54, 55. 2 Hawk. P. C. 2.

(*c*) Therefore if an Ordinary certify, or try Baſtardy, without a writ from the King's Temporal Courts, it is void; for the Spiritual Juriſdiction within theſe Kingdoms is derived from theKing, and muſt be exerciſed in the Manner the King has appointed. Rol. Abr. 361.

But

6. H. 7. 4. b. 5 a. 4 Inſt. 125, 127 6 Co. 11. b. 12. a.

But it is clearly agreed, that the King cannot give any Addition of Juriſdiction to an antient Court, but that all ſuch Courts muſt be holden in ſuch Manner, and proceed by ſuch Rules and in ſuch Caſes only as their known Uſage has limited and preſcribed; and hence it followeth, that the Court of *King's Bench* cannot be authorized to determine a mere real Action between Subject and Subject; ſo neither can the Court of *Common Pleas*, to inquire of Treaſon or Felony.

4 Inſt. 87. Sid 338.

And it is ſaid, that the King is ſo far reſtrained by the antient Forms, in all Caſes of this Nature, that his grant of a (*d*) Judicial Office for Life, which has been accuſtomed to be granted only at will, is void.

(*d*) That the King cannot grant a mere Spiritual Juriſdiction, as to ordain, inſtitute, &c. to a Lay Perſon, nor can he exerciſe them himſelf; but muſt adminiſter thoſe Laws by Biſhops, as he does the Common Law by Judges. *Vide* Cro. Eliz. 259, 314.

4 Aſſ 5. Bro. Commiſſion 3, 15, 16. 12 Co. 30, 31.

Alſo Commiſſions to ſeize the Goods, and impriſon the Bodies of all Perſons who ſhall be notoriouſly ſuſpected of Felonies and Treſpaſſes, without any Indictment or other legal Proceſs againſt them, are illegal and void.

2 Inſt. 478. A Commiſſion under the Great Seal to take *J. N.* a notorious Robber, and to ſeize his Lands and Goods, illegal. 2 Inſt. 54.

(*e*) 4 Inſt. 163. 18 E. 3. 1, 4. (*f*) 2 Inſt. 478.

And it is ſaid, that the King cannot grant any new Commiſſion whatſoever that is not warranted by ancient Precedents, however neceſſary it may ſeem, and conducive to the Public Good; and therefore (*e*) Commiſſions to aſſay Weights and Meaſures, being of a new Invention, were condemned by Parliament; and it is (*f*) ſaid, that the King could not authorize Perſons to take Care of Rivers, and the Fiſhery therein, according to the Method preſcribed by the Statute of *Weſtm.* 2. *cap.* 47. before the making of that Statute.

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*(B) Of the Judges, and Perſons exerciſing a Juriſdiction.

4 Inſt. 70, 71. 2 Inſt. 103. 8 H. 4. 13. b. S. P. C. 54. Dalt. c. 1.

THE King himſelf, though he be intruſted with the whole executive Power of the Law, yet he cannot ſit in Judgment in any Court but his Juſtice, and the Laws, muſt be adminiſtered according to the Power committed and diſtributed to his ſeveral Courts of Juſtice.

All Judges muſt derive their Authority from the Crown, by ſome Commiſſion warranted by Law; the Judges of *Weſtminſter* are (all, except the Chief Juſtice of the *King's Bench*, who is created by Writ) appointed by Patent, and formerly held their places only during the King's Pleaſure; but now for the greater Security of the Liberty of the Subject, by the 12 & 13 *W.* 3. *c.* 2. their Commiſſions are to be *Quamdiu ſe bene Geſſerint*; but upon the Addreſs of both Houſes of Parliament, it may be lawful to remove them.

4 Inſt. 74, 75. to continue during good Behaviour, notwithſtanding the Demiſe of the Crown. By ſt. 1. G. 3. c. 23. ‡

‡ This was a very great Acquiſition to the Subject, and was the voluntary Act of his preſent Majeſty.

And by the 27 *H.* 8. *cap.* 24, it is enacted, "That no Perſon or Perſons of what Eſtate, Degree or Condition ſoever they be, ſhall have any Power or Authority to make any Juſtices of *Eyre*, Juſtices of Aſſize, Juſtices of Peace, or Juſtices of Gaol-Delivery, but that all ſuch Officers

" and

" and Miniſters ſhall be made by Letters Patent under the King's Great " Seal, in the Name, and by the Authority of the King's Highneſs, in all " Shires, Counties Palatine, *Wales*, &c. or any other his Dominions, &c. " any Grants, Uſages, Allowance or Act of Parliament to the contrary " notwithſtanding."

As all Judges muſt derive their Authority from the Crown, by ſome Commiſſion warranted by Law, they muſt alſo exerciſe it in a legal Manner, and hold their Courts in their proper Perſons for they cannot act by (*a*) Deputy, nor any way transfer their Power to another, as the Judges of Eccleſiaſtical Courts may. Bro. Judges 11. Latch. 7. Cro.Car. 259. Cro. Eliz. 314.

(*a*) That a Recorder of a Town, unleſs the cuſtom allows, cannot make a Deputy; for this is a Judicial Office. *Vide* Raym. 88. Lev. 125. Keb. 538, 639, 659. and the Title *Office and Officers*.

But it ſeems, that regularly where there are divers Judges of a Court of Record, the Act of any one of them is effectual, eſpecially if their Commiſſion do not expreſsly require more. 2 Hawk.P.C.3. and *vide* the Authorities there cited.

The Judges are bound by Oath to determine according to the known Laws and antient Cuſtoms of the Realm; and their Rule herein muſt be the Judicial Deciſions and Reſolutions of great Numbers of learned, wiſe and upright Judges, upon Variety of particular Facts and Caſes, and not their own arbitrary Will and Pleaſure, or that of their Prince's. *Vide* the Statutes 18 E. 3. c. 1. 20 E. 3 c. 1, 2. 4 Inſt. 88. 109. Dalt. 13.

But though they are to judge according to the ſettled and eſtabliſhed Rules and antient Cuſtoms of the Nation, approved for many Succeſſions of Ages, yet are they freed from all Proſecutions for any Thing done by them in Court, which appears to have been an (*b*) Error of their Judgment. 5 P.C. 173. Co. 24. 12 E.4. 18. 21 E.4 67 a. Salk. 397.

(*b*) But where for wilful Corruption they have been complained of in the Star-Chamber. *Vide* Vaugh. 139. And may ſtill be called to an Account in Parliament. Hawk. P.C. 192. 12 Co. 24.

Nor is a Judge, conſtituted by the King, and thereby ſtampt with his Approbation, and to whom alone it belongs to judge of his Fitneſs, to be reflected on, cenſured, defamed or villified with reſpect to his Ability, Parts, Fitneſs for his Place, &c. for, if this were allowed, it would be impoſſible to keep in the People that Veneration of their Perſons and Submiſſion to their Judgments, without which it is impoſſible to execute the Laws with Vigour and Succeſs; and hence all ſcandalous Reflections * on the Judges of *Weſtminſter Hall*, are within the Statute of *Scandalum Magnatum*. Vaugh. 138, 139. *Page 556

No Perſon can be a Judge in his (*c*) own Cauſe, but the Chief Juſtice of the Common Pleas may bring an Action in that Court, but then the Entry muſt be Special, *viz. Placita coram Johanne Blencow milite*, &c. 8 H. 6. 19. b. 2 Rol. Abr. 92. Salk. 398.

(*c*) The Mayor of *Hereford* was laid by the Heels, for ſitting in Judgment in a Cauſe where he himſelf was Leſſor of the Plaintiff in Ejectment, though he by the Charter was ſole Judge of the Court. Salk 396.

No Judge of any Court of Record is compellable to deliver his Opinion before-hand, in relation to any Queſtion which may afterwards come judicially before him. 1 H. 7. 26. a. 3 Inſt. 29. Forteſc. Rep. 389.

By the 33 *H.* 8. *cap.* 24. it is enacted, " That no Juſtice, nor other " Man learned in the Laws of this Realm, ſhall uſe nor exerciſe the Office " of Juſtice of Aſſiſe, within any County where the ſaid Juſtice was born, " or doth inhabit, on Pain of 100*l.* &c. Provided the ſaid Act ſhall not " extend to any Perſon who ſhall be Clerk of Aſſiſes, and Aſſociate to any " Juſtice of Aſſiſe; nor to any Mayor, Sheriff, Recorder, Steward, Bailiff, " Suitor or other Officer, being born or dwelling within any City, Borough " or Town within this Realm of *England*, &c. nor to Juſtices of either " Bench See 12 Geo. 2. c. 27. whereby this Law is repealed.

" Bench for taking, hearing, or determining Aſſiſes in the one Bench or " the other; nor to the Juſtices, Juſtice Clerks or Clerk of Aſſiſes in the " Dutchy and County Palatine of *Lancaſter*."

(C) What determines their Jurisdiction and Authority.

And. 44. Dyer 165. 7 Co. 30. a. Cro. Car. 1, 2. N. Bendl. 79.

IT has been determined, that at Common Law the Patents of the Judges, (*b*) Sheriffs, Eſcheators, Commiſſioners of *Oyer* and *Terminer*, Gaol-Delivery, and of the Peace, and of the Attorney General, are determined by the Death of the King, in whoſe Name they are made. But ſee *infra*.

(*b*) But the Office of a Sheriff, in ſuch Places where he is choſen by a Corporation, having by its Charter the Inheritance of the Office, does not determine by the Demiſe of the King. 7 Co. 30. b. —Nor the Authority of a Coroner or Verderor. Dalſ. 15. Dyer 165. 2 Inſt. 175. 1 Lev. 120. —Nor does any Corporation Officer, who by the Charter is inveſted with Judicial Authority, loſe it by ſuch Demiſe. 2 Hawk. P. C. 3.

But to prevent the Diſorders and other Inconveniencies which may happen upon the Death of a King, from the Want of Perſons armed with competent Authority to execute the Laws before the Succeſſor can have Time to appoint others; by the 7 & 8 *W. & M. cap.* 27. it is enacted, " That " no Commiſſion either Civil or Military ſhall ceaſe, determine or be " void, by Reaſon of the Death and Demiſe of his ſaid late Majeſty, or " of any of his Heirs or Succeſſors, Kings or Queens of this Realm, but " that every ſuch Commiſſion ſhall be, continue and remain in full Force " and Virtue for the Space of ſix Months next after any ſuch Death or De- " miſe, unleſs in the mean Time ſuperſeded, determined or made void by " the next and immediate Succeſſor, to whom the Imperial Crown of this " Realm, according to the Act of Settlement in the ſaid Statute before " mentioned, is limited and appointed to go, remain or deſcend."

See 2 Stra. 782, 843.

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* And by the 1 *Ann. cap.* 8. it is further enacted, " That no Patent or " Grant of any Office or Employment either Civil or Military hereafter " to be made, ſhall ceaſe, determine or be void, by Reaſon of the Death or " Demiſe of any King or Queen of this Realm; but that every ſuch Patent " or grant ſhall be, continue and remain in full Force for ſix Months next " after any ſuch Death or Demiſe, unleſs in the mean Time ſuperſeded, " determined or made void by the next immediate Succeſſor, to whom " the Crown is limited and appointed to go, remain or deſcend."

And it is further enacted by the ſame Act, " That no Commiſſion of " Aſſiſe, *Oyer* and *Terminer*, General Gaol-Delivery, or of Aſſociation, " Writ of Admittance, writ of *Si non omnes*, Writ of Aſſiſtance, or " Commiſſion, of the Peace, ſhall be determined by the Death of any " King or Queen of this Realm; but every ſuch Commiſſion and Writ " ſhall be and continue in full Force for ſix Months next enſuing, notwith- " ſtanding ſuch Demiſe, unleſs ſuperſeded or determined by the next Suc- " ceſſor; and alſo no Original Writ, Writ of *Niſi Prius*, Commiſſion, " Proceſs or Proceedings whatſoever, in, or iſſuing out of any Court of " Equity, nor any Proceſs or Proceedings upon any Office or Inquiſition, " nor any Writ of *Certiorari*, or *Habeas Corpus* in any Matter or Cauſe, " either Criminal or Civil; nor any Writ of Attachment, or Proceſs for " Contempt, &c. ſhall be determined, abated or diſcontinued by the " Demiſe of any King or Queen of this Realm, but every ſuch Writ, &c. " ſhall

"shall remain in full Force, to be proceeded upon as if such King or "Queen had lived."*

*And now by the Stat. 1 Geo. 3. c 23. the Judges are to continue during good Behaviour, notwithstanding the Demise of the Crown, as observed before.

If a Judge of the Common Pleas is made a Judge of the King's Bench, by this the Inferior Authority is determined; for it would be impertinent for him to reverse his own Judgment, which otherwise he might do upon a Writ of Error. Dyer 259. Cro. Car. 128. S. C. cited and agreed.

The Authority of Justices in *Eyre Oyer* and *Terminer*, &c. is (a) determined by (b) the King's Bench sittting in the same County. Dyer 159. 4 Inst. 73. 9 Co. 118.

(a) Their Authority, how suspended by Writ of *Supersedeas*, which is grantable on Proof that their Commission was unduly obtained, *vide* Reg. 124, 125. 12 Ass. 21. 4 Inst. 163. H. P. C. 162.
(b) Whether they have Notice thereof or not. 4 Inst. 73. But *qu.* 21 H. 7. 29. b. Bro. Commission 10. ||

|| *Bro.* is Acc. if Proclamation is made, of the coming of the *King's Bench.*

If a Commission is made to Judges of Assise, and after the King makes other Judges of Assise in the same County, (c) by this the first Commission is not determined, but they may proceed thereupon (d) till Notice of the Second; and they are not bound to take Notice of a Proclamation thereof in the County, for the Law hath not provided that any such Proclamation thereof should be made. Kelw. 116.

(c) But where by the Issuing and Notice of the second Commission the first is determined, and what shall be sufficient Notice, *vide* Leon. 270. Godb. 105. 34 Ass. 8. Bro. Commission 14. Moor 186. pl. 333. H. P. C. 162. 4 Inst. 165. Dyer 355. p. 36. ——And yet the Proceedings shall not be discontinued, *vide* the Statutes of 11 H. 6. c. 6. and 1 E. 6. c. 7. and 2 Hawk. P. C. 18. (d) The old Sheriff may act till the new Patent is shewn him, so that he may have Notice of his Discharge. Cro. Eliz. 12, 440. Moor 186. pl. 353. 4 Inst, 165. S. P. *cont'*.— But Justices of the Peace left out of the new Commission, must take Notice thereof after Publication of the new Commission at the next Sessions. Moor 187. 4 Inst. 165. S. P.

If the Justices hold a Session without adjourning it, and the Commission hath no Time limited for its Continuance, as where it is appointed *pro hac vice* only, there Authority is determined; but if the Commission be granted for a certain Time, or *quamdiu nobis placuerit*, as it does not necessarily require any Adjournment, if the Court holden by Virtue of such Commission break up without any Adjournment, or upon a void one, as being made without the Consent of the Majority of the Commissioners; yet it may be holden again on a new Summons. Crom. Jur. 125. H. P. C. 161. 4 Inst. 165. Dalt. 24. Dyer 205. Leon. 270.

* It was (e) formerly holden, that by the Justice's Acceptance of any new Name of Dignity, the Commission was determined; but this is remedied by 1 *E.* 6. *cap.* 7. by which it is enacted, "That if any Person, "being in any of the King's Commissions whatsoever, shall fortune to be "made or created Duke, Archbishop, Marquis, Earl, Viscount, Baron, "Bishop, (f) Knight, Justice of the one Bench or of the other, or Ser-"jeant at Law, or (g) Sheriff, yet that notwithstanding he shall remain "Commissioner, &c." *Page 558

(e) Bro. Commission 4, 22.

(f) But it hath been doubted, whether the Equity of it. Dignity of a Baronet, which hath been created since that Statute, be within the Cro. Car. 104. Lit. Rep. 81. Sheriff, shall

(g) But now by the 1 Ma. c. 8. No Person being exercise the Office of Justice of the Peace.

"By the 2 & 3 *Ph. & M. cap.* 18. a new Commission of the Peace, or "Gaol-Delivery for the County, &c. shall not supersede a former Com-"mission for a City or Town Corporate being no County."

(D) Of

(D) Of their Diviſion, and the Subordination of one Court to another: And herein,

1. In the general, of the ſeveral Kinds of Courts which exerciſe a Juriſdiction.

Hale's An. 35. THE moſt general Diviſion of our Courts is, into ſuch as are of Record, or not; thoſe of Record are again divided into ſuch as are Supreme, Superior or Inferior.

Hale's An. 35. The Supreme Court of this Kingdom is the High Court of Parliament, conſiſting of the King, Lords, and Commons, who are inveſted with a Kind of Omnipotency in making new Laws, repealing and reviving old ones; and it is on the right Ballance of theſe three depends the Well-being, and indeed the very Being of our Conſtitution.

Hale's An. 36. Superior Courts of Record are again, thoſe that are more Principal or leſs Principal; the more Principal ones are the Lords Houſe in Parliament, the Chancery, King's Bench, Common Pleas, and Exchequer; and by *Hale*, ſuch as are the Juſtices Itinerant *ad communia Placita & ad Placita Foreſtæ*.

Hale's An. 36. The leſs Principal ones are ſuch as are held by Commiſſion of Gaol-Delivery, *Oyer* and *Terminer*, Aſſiſe, *Niſi Prius*, &c. by Cuſtom or Charter: as the Courts of the Counties Palatine of *Lancaſter*, *Cheſter*, *Durham*, or by Virtue of Act of Parliament, and the King's Commiſſion, as the Court of Sewers, Juſtices of the Peace. &c.

Hale's An. 36. The Inferior Courts of Record, as ordinarily ſo called, are Corporation Courts, Courts Leet, and Sheriff's Torn, &c.

Courts not of Record are the Courts Baron, County Courts, Hundred Courts, &c.

Vide poſt of the Admiralty and Eccleſiaſtical Courts. Alſo the Admiralty, and Eccleſiaſtical Courts, which are not Courts of Record, but derive their Authority from the Crown, and are ſubject to the Controul of the King's Temporal Courts, when they exceed their Juriſdiction*.

*See Note in the next Page.

Hale's An. 35. All theſe are bounded and circumſcribed by certain Laws and ſtated Rules, to which, in all their Proceedings and Judicial Determinations, they muſt ſquare themſelves.

*Page 559 * And here it may be proper to obſerve, that where a Statute prohibits a Thing, and appoints that the Offence ſhall be heard and determined in any of the King's Courts of Record, it can be proceeded againſt (*a*) only in one of the Courts of *Weſtminſter-Hall*, becauſe thoſe being the Higheſt Courts of Record, ſhall be intended only to be ſpoken of *ſecundum excellentiam*.

Dyer 236. 6 Co. 19. b. Cro. Jac. 538. Cro. Eliz. 737. Cro, Car. 146. 2 Hales P. C. 29. 2 Bl. Rep 906. 3 Term Rep. 362. 442. Cromp. Jur. 132. Salk 178.

(*a*) But that on a Statute ſo worded, the Proſecution may be in any Court of *Oyer* and *Terminer*. 4 Inſt. 164. H. P. C. 261.

2. Of ſuch as are of Record, or not.

Co. Lit. 17. 8 Co. 38. b. 2 Lev. 92. 3 Lev. 205. Every Court of Record is the King's Court, though the Profits may be another's; if the Judges of ſuch Court err, a Writ of Error lies: the Truth of its Records ſhall be tried by the Records themſelves, and there ſhall be no Averment againſt the Truth of the Matter recorded.

(*b*) Co. Lit. 260. a. All ſuch Courts are created (*b*) by Act of Parliament, Letters Patent or Preſcription, and (*c*) every Court by having Power given it to Fine and Impriſon,

(*c*) Salk. 200. pl. 1.

Impriſon, is thereby (*d*) made a Court of Record; the Proceedings of which can only be removed by Writ of Error or *Certiorari*. Ld. Raym. 213, 252, 454.

(*d*) The Leets and Torns are the King's Courts, and of Record. 2 Inſt. 143. 4 Inſt. 263. Hetl. 62. S. P.—But neither the Admiralty nor Eccleſiaſtical Courts are of Record. Rol. Abr 527. *Vide poſt* of theſe Courts.—Nor the *Engliſh* Court in Chancery proceeding by *Subpœna*. 37 H. 6. 14. 1 Rol. Abr. 527. Nor the County Court. Co. Lit. 117. b. 2 Inſt. 380. 4 Inſt. 264.—Though Plea held there by Juſtices. 2 Inſt. 140, 312. 6 Co. 11. b.—Nor the Hundred Court. Co. Lit. 117. 2 Inſt. 143. 4 Inſt. 264.—Nor the Court Baron. Co. Lit. 117. 2 Inſt. 143. 4 Inſt. 264.—The Proceedings thereof may be denied, and tried by a Jury, and a Writ of falſe Judgment, not of Error, lies on their judgments. Co. Lit. 117. b.

A Court, that is not of Record, cannot impoſe any Fine on an Offender, nor award a *Capias* againſt him, nor hold Plea of Debt or Treſpaſs, if the Debt or Damages amount to 40*s.* nor of a Treſpaſs done *vi & armis*, though the Damages are laid to be under 40*s.* Co. Lit. 117. b. 260. a. 2 Inſt. 311, 312. 14 H. 8. 15.

Alſo by the Statute of (*e*) *Glouceſter*, the Superior Courts ſhall not hold Plea of any (*f*) Treſpaſs under the Value of 40*s.*† (*e*) Made 6 E. 1. c. 8. (*f*) Treſpaſs is put but for an Example for Debt, Detinue, Covenant and the like. 2 Inſt. 311.

†But where the Damages are laid at 40*s.* or upwards, the ſuperior Courts hold Plea, nor can they ſtay the Proceedings on any Suggeſtion of the Defendants, that the Damages do not amount to 40*s.* for the *Quantum* of Damages is to be aſſeſſed by a Jury.

But the Superior Courts may hold Plea of Treſpaſs, *&c.* though under 40*s.* relating to the Freehold, as Detinue for Charters, *&c.* or Treſpaſs *vi & armis*. 2 Inſt. 311.

As where in Treſpaſs by Way of Original, the Plaintiff declared, That the Defendant *vi & armis clauſum ſuum apud H. fregit*, and concluded *ad damnum ipſius* 20*s.* and upon Demurrer it was held well enough; for this being done *vi & armis*, if it could not be puniſhed in the Superior Court, it could not be puniſhed at all, for an Inferior Court cannot aſſeſs a Fine. Carth. 108. *Lambert* and *Thurſton*. 3 Mod. 275. S. C. 2 Inſt. 311. Gilb. Eq. Rep. 195 to 199. 8 Mod. 371. 10 Mod. 133, 217, 275. 11 Mod. 198. pl. 14. 12 Mod. 14, 519. Ld. Raym. 395, 566. Stra. 192. 2 Stra. 1130, 1168.

3. How Inferior Courts muſt claim their Juriſdiction; and herein of pleading to the Juriſdiction, and demanding Conuzance.

The Courts of *Weſtminſter* are the Superior Courts of the Kingdom, and have a Superintendency over all other Courts by Prohibition, if they exceed their Juriſdiction, or Writs of Error, and falſe Judgment of their Proceedings; and every Thing is ſuppoſed to be done within their Juriſdiction, unleſs the contrary eſpecially appears; on the other Hand, nothing ſhall be intended within the Juriſdiction of an Inferior Court, but what is expreſsly alledged. Carth. 11, 12.

* In all tranſitory Actions they have a Juriſdiction, unleſs the Plaintiff by his Declaration (*g*) ſhews, that the Action accrued within a County Palatine; or if it be between the Scholars of *Oxford* and *Cambridge*, in which Caſe the Univerſity ſhall have Conuzance; becauſe by their Charter, confirmed by Act of Parliament, they have Juriſdiction over the Perſons of their Scholars; and though an Inferior Court might have determined it, yet the Superior Court, being once poſſeſſed of the Action, cannot be (*b*) hindered from proceeding. *Page 560 4 Co. 213. Sid. 103.

(*g*) But the Defendant muſt plead it, and cannot take Advantage of it in Arreſt of Judgment. Carth. 11.—Nor can he take Advantage of it by Way of Demurrer, but muſt plead to the Juriſdiction of the Court. Carth. 354, 355. (*b*) It was moved for an Attachment againſt the Regiſter and Commiſſioners of the Court of Requeſts, called the Court of Conſcience, confirmed by the Act 3 Jac. 1. c. 15. Becauſe that where *J. S.* had brought Debt upon an Obligation

In

4 Inſt. 224. In Local Actions Inferior Courts have a Juriſdiction, but here a Difference muſt be obſerved as to the Manner of claiming it; for as to the principal Courts of this Kind, and into which *Brevia Domini Regis non currunt*, as the Counties Palatine, they may (*e*) plead their Juriſdiction when intrenched upon by the Superior Courts.

(*e*) So antient Demeſne held of the King's Manor may be pleaded. Herne's Pleader 7, 351. Hanſ. 103. Tho. 2. Raſt. 419.—So may the Juriſdiction of the *Cinque Ports*. 4 Inſt. 224. But *vide* Carth. 109. & Q. For it is there ſaid to be ſuch a Franchiſe as *Ely*; and there reſolved, that *Ely* being no County Palatine, but only a Royal Franchiſe, the Defendant cannot plead to the Juriſdiction of a Superior Court, but muſt demand Conuzance.—And *Note*, That where ever the Defendant can plead to the Juriſdiction of the Courts at *Weſtminſter*, there the Franchiſe may demand Conuzance; but not *vice verſa*.

Rol. Abr. 489, 490. But where a Franchiſe, either by Letters Patent or Preſcription, hath a Privilege of holding Pleas within their Juriſdiction, if the Courts at *Weſtminſter* intrench on their Privileges, they muſt demand (*d*) Conuzance, that is, deſire that the Cauſe may be determined before them; for the Defendant cannot plead it to the Juriſdiction; and the Reaſon is, becauſe when a Defendant is arreſted by the King's Writ, within a Juriſdiction where the King's Writ doth not run, he is not legally convened; and therefore may plead it to the Juriſdiction; but the creating a new Franchiſe does not hinder the Writ from being made out as before, nor the Courts above from having the ſame Juriſdiction over the Cauſe, but grants Juriſdiction to the Lord of the Liberty; and whenever the King's Courts intrench on his Juriſdiction, he may make his Claim, and demand that the Cauſe be determined before him.

(*d*) There are three Sorts of Conuzance, 1. *Tenere Placita*, which does not ouſt another Court of their Juriſdiction, but only creates a concurrent one. 2. *Cognitio Placitorum*; when the Plea is commenced in one Court, of which the Conuzance belongs to another. 3. A Conuzance with an excluſive Juriſdiction; as that no other Court ſhall hold Plea, &c. Hard. 509, 510.

2 Inſt. 140. Co. Lit. 117. b. No Court can demand it unleſs it be of Record, and of a Plea of Record; becauſe all Courts of Record are the King's, though another may have the Profits of them; ſo that although the Cauſe goes out of the King's Courts at *Weſtminſter*, yet it goes to another of the King's Courts, to which he has granted the Privilege of determining the Cauſes ariſing within a limited Juriſdiction; but it is below the Dignity of the King's Court to part with any Cauſe to another's Court, ſuch as the County Court, &c.

Dalſ. 12. Rol. Abr. 489. Alſo where a Franchiſe cannot give a Remedy, and there would be a Failure of Juſtice, they ſhall not have Conuzance, although the Action accrued within their Juriſdiction.

*Page 561 * As in (*e*) a *Quare Impedit*, becauſe they cannot ſend a Writ to the Biſhop, nor in (*f*) Replevin, becauſe if the Plaintiff be nonſuited, a ſecond Deliverance ſhall be granted, which the Franchiſe cannot do.

(*e*) 44 E. 3. 29. b.

Bro. Conuzance 12. S. C. 26 E. 3. 73. Dalſ. 12. Co. Lit. 134. b. S. P. (*f*) 38 E. 3. 31. Conuzance is not grantable, becauſe the Original Writ of Replevin is in Nature of a *Juſticies*, and not returnable, and in a *Juſticies* no Conuzance can be demanded, becauſe none can demand Conuzance but he that hath a Court of Record; but the County Court, though the Plea is holden by *Juſticies*, is no Court of Record, and if the Sheriff ſhould grant the Conuzance, he could not award a Re-ſummons. 2 Inſt. 140. Bro. Conuzance 4, 23.

Obligation of 10l. for Payment of 5l. in *B. R.* againſt a Freeman of *London*; who after cited the Plaintiff in the Court of Conſcience, ſurmiſing that leſs than 40s. was due, and the Plaintiff appeared, there and ſhewed the Obligation; notwithſtanding, the Commiſſioners there, upon Allegation of the Defendant, that leſs than 40s. was due, ordered the Plaintiff to accept it, and ſtay Proceedings in *B. R.* which he refuſing, the Commiſſioners ordered the Regiſter to keep the Obligation, ſo that the Plaintiff could not proceed; upon which Matter the Court granted an Attachment againſt the Commiſſioners and Regiſter; for that Court cannot any Way prohibit or ſtay the Proceedings in a ſuperior Court. *Mich.* 27 *Car.* 2. in *B. R.* 3 Keb. 533. S. C. ill reported.

Non

Nor in Waſte, becauſe by the Statute the Writ muſt iſſue out of the Chancery at *Weſtminſter*, and thoſe Writs are returnable into the (*c*) King's Courts there, and not into any Inferior Court. 1 H. 4, 5. Dalſ. 12.

(*c*) No Conuzance can be granted upon an Attaint, becauſe all Attaints *per* 23 H. 8. c. 3. are to be taken before the King in his Bench, or before Juſtices of the Common Pleas, and in no other. Co. Lit. 294. Dyer 202. Kelw. 210. N. Bendl. 99.

Nor in Admeaſurement of Paſture, becauſe the Franchiſe cannot grant Writ *de ſecunda ſuperoneratione*. Dalſ. 12.

So if a Fine be removed out of a Franchiſe by Writ of Error in *B. R.* and a *Scire Facias* iſſues out to have Execution, they ſhall not have Conuzance; becauſe the King never parts with the Records of his Court, and without it they can do no Right to the Party. 50 Aſſ. 9. Bro. Conuzance 61. Rol. Abr. 492. S. C.

If a Borough have an antient Charter, by which it was granted to them *quod nullus Burgenſis inhabitans infra Burgum præd' placit' vel implacitetur de terris, tenementis, contractibus, &c.* within the Borough, elſewhere out of, *&c.* and the Mayor and Burgeſſes of the ſaid Borough are impleaded *in Banco* for Lands within their Borough, they ſhall not have Conuzance; for in this Action (*d*) the whole Body is impleaded. N. Bendl. 88. pl. 134.

(*d*) So where Conuzance is granted to the Chancellor of the Univerſity, to hold Plea where Scholars or privileged Perſon are concerned, this ſhall not extend to an Action againſt the Preſident and Scholars of a College. 1 Mod. 163.

If the King grants *Majori, Ballivis & Juratis quinque Portuum*, that they ſhall not be impleaded for Land or other Cauſe elſewhere than within the ſaid Ports, yet in a *Quo Warranto, &c.* where the King is directly a Party, they ſhall not be impleaded there. 22 H. 7. Kelw. 88, 89, 90.

If a Scholar of *Oxford* or *Cambridge* be ſued in Chancery for a Specific Performance of a Contract to leaſe Land in *Middleſex*, the Univerſity ſhall not have Conuzance, becauſe they cannot ſequeſter the Lands.

So in (*e*) Treſpaſs *Quare clauſum fregit, & damnum, &c. intravit in Oxford*, Conuzance was denied to the Univerſity, becauſe the Freehold might come in Queſtion. Lit Rep. 252. *Cripps* and *Webb*.

(*e*) So for the ſame Reaſon it ſhall not be granted to them in Ejectment, though nothing but a Term for Years be to be recovered. Lit. Rep. 252. Cro Car. 87, 88. S. P. adjudged.

If an Action of (*f*) Treſpaſs be brought for a Treſpaſs done within a Franchiſe, againſt a Foreigner that hath nothing within the Franchiſe, Conuzance ſhall not be granted, (*g*) becauſe they cannot do Right to the Party, for they cannot ameſne a Stranger to anſwer who hath nothing within the Franchiſe. 22 Aſſ. 83. Rol. Abr. 494. (*f*) So of Debt. 22 Aſſ. 83. Rol. Abr. 494. (*g*) So

of a Conſpiracy againſt two, for a Conſpiracy within a Franchiſe, of whom one is a Foreigner, they cannot have Conuzance, for the Action is intire. 22 Aſſ. 83.—So an Heir cannot be ſued upon an Obligation of his Anceſtor, within a Borough, where he hath not Aſſets within the Juriſdiction of the Court. Rol. Abr. 494 Cro. Jac. 502. 2 Rol. Rep. 48. S. C.

* As they ſhall not have Conuzance where there is a Failure of Juſtice, *Page 562
no ſhall they not likewiſe where the Plaintiff is a privileged Perſon in any of the Superior Courts at *Weſtminſter*; for it would be inconvenient, and below the Dignity of thoſe Courts, that their Officers ſhould be compelled to quit their Attendance to obtain Juſtice in an Inferior Court. Cro. Car. 73. Lit. Rep. 40, 304. Hetl. 25. (*b*) Bro. Conuzance 50. & *vide* Carth. 12.

But the Defendant being *in* (*h*) *Cuſtod' Mar'* in the King's Bench, or the Plaintiff's commencing a Suit in the Exchequer on (*i*) a *Quo minus*, as Debtor to the King, are not ſuch Privileges as will ouſt an inferior Juriſdiction; for they are now grown the common Methods of ſuing in thoſe Courts. (*i*) Hard. 505, 506. 2 Vent. 362 Hard. 189

Nor can they have Conuzance of ſuch Actions which were not *in eſſe* at the Time of their Charter, but (*c*) created ſince by Act of Parliament.

14 H. 4. 20.

(*c* But if an Action of Common Law is given againſt a Perſon by another Name, as Debt againſt an Adminiſtrator, they ſhall have Conuzance. 14 H. 4. 20. 22 E. 4. 23.

As to the Manner of demanding it, (*d*) if it be by Attorney, the Letter of Attorney muſt be produced in Court, and (*e*) if the Conuzance be demanded by Virtue of a Charter Time out of Mind, or by Preſcription, there an Allowance muſt be pleaded before Juſtices in *Eyre*.

(*d* Sid. 103. Lev. 87. S. C. and ſaid, the Warrant of Attorney muſt be filed in Court, & *vide* Dalſ. 12. Palm. 456. N. Bendl. 233. pl. 262. Lane 81, 87. Sid. 283. (*e*) 9 Co. 27. b. 28. a.

If by Charter, confirmed by Act of Parliament, Conuzance of Pleas, &c. is granted to the Chancellor of *Oxford*, or his Commiſſary, the Vice-Chancellor, by his Deputy, may demand it; though the Vice-Chancellor is but a Deputy himſelf, for a (*f*) Bailiff may properly demand Conuzance, and upon Notice of the Patent, the Court ought to ſuperſede.

Hard. 505. *Caſtle* and *Litchfield*, adjudged. (*f*) Bro. Conuzance 36, 50. S. P.

But (*g*) a Plea to the Juriſdiction muſt be put in *Propria Perſona*, for the Defendant cannot plead by Attorney without Leave of the Court firſt had, which Leave acknowledges their Juriſdiction; for the Attorney is an Officer of the Court; and if they put in a Plea by an Officer of the Court, that Plea muſt be ſuppoſed to be put in by Leave of the Court.

(*g*) In ſuch Plea the Defendant muſt make but half Defence, for if he makes full Defence, as *quando & ubi Cur' Conſideravit*, he ſubmits to the Juriſdiction. Co. Lit. 197. b.—Muſt be pleaded before any Imparlance. 2 H. 6. 30. 22 H. 6. 7. Hard. 365. Lutw. 46.—Except where Antient Demeſne is pleaded. Dyer 210 in Margine. Style 30. Latch 83.—So Conuzance muſt be demanded before Imparlance, and the ſame Term the Writ is returnable after the Defendant appears; becauſe until he appears there is no Cauſe in Court. Sid. 103. 6 H. 7 9, 10.

4. Where it muſt appear that Inferior Courts have a Juriſdiction.

Inferior Courts are bounded, in their original Creation, to Cauſes ariſing within ſuch limited Juriſdiction: Hence it is neceſſary for them to (*h*) ſet forth their Authority; for, as hath been already obſerved, (*i*) nothing ſhall be intended within the Juriſdiction of an Inferior Court, but what is expreſsly alledged to be ſo.

Rol. Abr. 545, 546. (*h*) Where the Style of the Court muſt be ſet forth, and that they have Power to hold Plea by Preſcription, or by Letters Patent of the King. Rol. Abr. 795. Cro. Eliz. 489. Moor. 422. Owen 50. Noy 35. S. C. Cowp. 19. But for this *vide* Moor 60. Godb. 380. Cro. Jac. 184, 493. Yelv. 46. 2 Mod 197. Style 131.—But where the Proceedings of an Inferior Court need not be ſet forth at large, but by way of *Taliter proceſſum fuit*. *Vide* 2 Lev. 81 3 Lev. 403. Carth. 53. (*i*) Sand. 74. Sid. 331. Same Rule—Whether *Hull* Bridge ſhould be intended within the Juriſdiction of the Court of *Hull*. Lev. 289. Vent. 72. *dubitatur*, & *vide* Style 200. Lev. 15

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* Therefore if an Action is brought on a (*k*) Promiſe in a Court below, not only the *Promiſe*, but the *Conſideration* muſt be alledged to ariſe within the Inferior Juriſdiction; for a Debtor, who has contracted a Debt does not, by coming into the Limits of ſuch Juriſdiction, give ſuch Court Authority to hold Plea thereof; nor is it ſufficient to alledge the Cauſe of Action within the Juriſdiction of the Court; but it muſt be proved upon the Trial; and if the Plaintiff proves a Conſideration out of the Juriſdiction it cannot be given in Evidence; and if it be, the Defendant's Counſel may propoſe a Bill of Exceptions, and upon ſuch Bill of Exceptions the Judgment will appear to be erroneous.

Rol. Abr. 545, 546. Several Caſes to this Purpoſe. (*k*) An Inferior Court cannot hold Plea of an Obligation, Contract, Battery, or other tranſitory Action, if it was not made within the Juriſdiction of the Court. 2 In. 231. (*l*) Where he muſt plead to the Juriſdiction, and if ſuch Plea be refuſed, an Attachment li

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But here a Diſtinction muſt be obſerved between Counties Palatine, and other Inferior Courts; for a County Palatine is a general Court for all the Subjects of the Palatinate, and not merely for the Cauſes ariſing within that Palatinate; for if a Debtor goes from a Foreign County into a Palatinate, his Obligations go along with him, as much as if he went from one Kingdom into another; and if it were otherwiſe, a Palatinate Juriſdiction would be a Shelter and *Aſylum* to Debtors; for no Proceſs but the ſupreme Prerogative Proceſs runs there; and therefore it is determined, that though the Cauſe of Action be out of the Palatinate, yet if the Party be a Subject of that Palatinate, as he is by coming into that Dominion, that the Action there may be brought againſt him. Saund. 74. *Peacok* and *Bell*, adjudged. Sid. 331. S. C.

In an Action upon the Caſe in the Court of *Launceſton in Cornubia*, if the Plaintiff declares, That whereas he was an Attorney of the Hundred Court of *Stratton in Cornubia*, the Defendant having Communication with *J. S.* of the ſaid Office, of the Plaintiff, ſaid theſe ſcandalous Words of him within the Juriſdiction of the ſaid Court of *Launceſton*, *Thou art a Cheater*, *&c.* after Verdict for the Plaintiff, and Damages given, the Judgment was reverſed upon a Writ of Error; for the Jury could not inquire whether the Plaintiff was an Attorney of the Hundred Court or not, being out of their Juriſdiction; and this was the principal Cauſe of the Action. Rol. Abr. 546. adjudged.

If in the Marſhal's Court the Plaintiff declares, That in Conſideration the Plaintiff, at the Requeſt of the Defendant had taken Pains to procure him a Leaſe of an Houſe in *Holborn*; the Defendant *apud S. infra jur*, *&c.* promiſed to pay him 10*l.* *&c.* this is not ſufficient to intitle the Court to a Juriſdiction; in as much as it does not appear, that *Holborn*, where the Houſe ſtands, is within the Juriſdiction, and the Jury are not only to try the Promiſe (*c*) but the Conſideration alſo. Lev. 50. *Ramſey* and *Atkinſon*, adjudged, and the Judgment in the *Marſhalſea* reverſed. Sid. 65. S. C.

(*c*) Judgment upon an *Aſſumpſit*, in Conſideration that the Plaintiff would ſolicit a Cauſe in Chancery, reverſed for Want of Juriſdiction. Vent. 28. & *vide* Lev. 289. 1 Vent. 72.—Where in Debt againſt an Heir, if he pleads *Riens per diſcent*, the Plaintiff muſt reply Aſſets within the Juriſdiction. Rol. Abr. 494.

* In an *Indebitatus Aſſumpſit* for Money for a Cow ſold, it muſt appear that the Sale was within the Juriſdiction; for the being indebted there, does not neceſſarily imply that the Sale was there, for he that is indebted in one Place is ſo in every Place. *Page 564 Sid. 87. Raym. 75. Lev. 96, 105, 137, 208. S. P. Vent. 2, 243. 2 Lev. 87. Jones. 230. S. P.

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‡ Inſt. 229, 230. 2 Lev. 230. Raym. 185. Mod. 81. Fitzgib. 82, 314. 2 Vern. 484. Will. Rep. 43, 476. pl. 135. 9 Mod. 95. 10 Mod. 166. 2 Inſt. 230. 2 Ld. Raym. 885. Keb. 946.—But ſuch Plea muſt be put in *Propria Perſona*, and whilſt the Court is ſitting, an Oath muſt be made of the Truth thereof. 6 Mod. 146. †—But *vide* Carth. 402. That a Plea to the Juriſdiction need not be on Oath, as a Foreign Plea muſt.——Where upon the Statute of *Weſtminſter* 1. c. 35. a Prohibition will be granted. Salk. 201. pl. 5. 202. and by F. N. B 45, 46. 2 Rol. Abr. 317. Though the Defendant by Plea admits the Juriſdiction, yet the Superior Court may grant a Prohibition; but in 2 Mod. 271, 272. *&c. Meudyke* and *Stint*, it is adjudged, That after Verdict and Judgment; no Prohibition lies; but there ſaid, That if any Matter appears in the Declaration, which ſheweth that the Cauſe of Action did not ariſe *infra Juriſdictionem*, a Prohibition may be granted at any Time; ſo if the Subject Matter in the Declaration be not proper for the Judgment and Determination of ſuch Court; or if the Defendant, who intended to plead to the Juriſdiction, is prevented by any Artifice, as by giving a ſhort Day, or by the Attorney's refuſing to plead it, *&c.* or if his Plea be not accepted, or is over-ruled; in all theſe Caſes, a Prohibition will lie at any Time. 2 Mod. 273. Sid. 151. Vaugh 406. 10 Mod. 127. to 440. Ld. Raym. 211, 346. 2 Ld. Raym. 935.—Where Trover, Treſpaſs, or Falſe Impriſonment lies. 22 *E.* 4. 31. 10 *H.* 6. 13. As where in an Action of Falſe Impriſonment, the Defendant juſtified the apprehending of the Plaintiff by Virtue of a Parol Command, and the Preſcription being, that it muſt be by Precept (which muſt be underſtood in Writing) the Plaintiff had Judgment. Hob. 63. But an Officer may proceed on his Duty, and execute a Proceſs, though there be no Cauſe of Action, or though it aroſe out of the Juriſdiction, unleſs the contrary appears to him. Salk. 202.——That no Act on will lie for ſuing in a Court that has not Juriſdiction. Carth. 189, 190.

† By 4 Ann. c. 16. ſ. 11. no dilatory Plea is to be received without Affidavit of the Truth, and the Affidavit muſt ſtate that the Plea is true in Subſtance.

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Lev. 104. Sid. 151. Vent. 2. S. C. *Drake* and *Beare*.

In Debt for Rent, upon a Leaſe made *infra Jur'* of an Inferior Court it muſt appear alſo, that the Lands lie within the Juriſdiction; for if Part of the Cauſe ariſe within the Inferior Juriſdiction, and Part without, the Inferior Court ought not to hold Plea.

Sid. 85, 95. Raym. 63. Lev. 69. Salk. 404. Lev. 153.

In an Action for calling the Plaintiff *Whore*, by which ſhe loſt her Marriage, the Loſs of the Marriage muſt be laid within the Juriſdiction, becauſe the Words are not actionable without Special Damage. pl. 1, 2. S. P. For the Loſs of Marriage is the Giſt of the Action, & *vide* Sid. 342. Ld. Raym. 795. Keb. 798, 837. March 48.

Rol. Abr. 546. *Howel* and *Ireland*. Cro. Car. 570. Jones 450.

But if in an Action upon the Caſe in the Court of *Bath*, *in Com' Somerſet*, the Plaintiff declares, That he was a *Taylor*, and that he uſed the ſaid Art for ſeveral Perſons inhabiting *tam infra Civitatem prædict'*, *quam alibi infra Regnum Angliæ*, and the Defendant to ſcandalize him in his ſaid Art, ſaid theſe Words of him: *Thou haſt ſtole as much Cloth out of my Suit and Cloak which thou madeſt for me, as did make thy Wife a Waiſtcoat*; by which he loſt his Cuſtomers; the Action lies in that Court, notwithſtanding the Allegation *quam alibi infra Regnum Angliæ*, for that is only Matter in Aggravation of Damages.

Sid. 151, 180. Vent. 72.

So if in the Court of *H.* the Plaintiff declares, that he lent his Horſe at *H.* for the Defendant to ride to *B.* and that the Defendant aſſumed at *H.* to re-deliver him, this is well enough; for it is not the Riding, but the Re-delivery, which is the Cauſe of the Action.

Salk. 404. pl. 1. & Ld. Raym. 795, 796. *Stannian* and *Davis*. 6 Mod. 223. S. C. 11 Mod. 7. pl. 1.

So in a Writ of Error of a Judgment in the Palace Court, in an Action on the Caſe, wherein the Plaintiff declared, that ſuch a Day, in ſuch a Pariſh in the County of *Middleſex*, he delivered to the Defendant (being an Inn-keeper) a Gelding, ſafely to be kept in his Inn, and that he ſuffered him to be taken out of his Stable, and rid ſo immoderately that the Gelding was ſpoiled; and it was objected as Error, that the Riding did not appear to be within the Juriſdiction of the Marſhal's Court; but *per Cur'* In Actions in Inferior Courts, it is neceſſary that every Part of that which is the Giſt of the Action, ſhould appear to be within their Juriſdiction; otherwiſe of ſuch Matters as are inſerted only for Aggravation of Damages, and might be omitted, and yet the Action remains as in this Caſe; and therefore the Judgment was affirmed.

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*(E) What is incidental to all Courts in general.

Rol. Abr. 526.

IF the King grants a Court by Letters Patent, to a Corporation of a Town to hold Pleas, &c. in this Caſe, though there is not any Clauſe in the Patent to make a Bailiff or Serjeant to (*a*) execute the Proceſs of the Court, and to return Juries, yet it is incident to their Grant to do it; for otherways they cannot hold a Court.

(*a*) But they cannot make a Bailiff to execute Writs of Inquiry of Damages, without a Clauſe in the Patent for that Purpoſe. Rol. Abr. 526.

Vide each reſpective Court, &. 11 H. 6. 12. Rol. Abr. 219.

Every Court of Record, as incident to it may injoin the People to keep Silence, under a Pain, and impoſe reaſonable Fines, not only on ſuch as ſhall be convicted before them of any Crime on a formal Proſecution, but alſo on all ſuch as ſhall be guilty of any Contempt in the Face of the Court

Court, as by giving (*b*) opprobrious Language to the Judge, or obſtinately refuſing to do their Duty as officers of the Court, and may immediately order them into Cuſtody. 8 Co. 38. b. 11 Co. 43. b. Cro. Eliz. 581. Sid 145.

(*b*) As was the Caſe of one *Redding*, who was convicted of tampering with *Bedloe*, one of the King's Witneſſes in the Popiſh Plot, and endeavouring to make *Bedloe* deny what before he had confirmed, concerning ſeveral great Perſons engaged in the Plot; for which he was adjudged to pay 1000l. to ſtand in the Pillory, and to be impriſoned for a Year; and this Conviction being before Commiſſioners of *Oyer* and *Terminer*, of whom Sir *Thomas Jones*, and Sir *William Dolben*, Judges of *B. R.* were two; he afterwards, being ſet at Liberty, came into *B. R.* with an Information againſt all the Commiſſioners of *Oyer* and *Terminer*, and after having demanded the Juſtice of the Court, he ſaid, That Sir *Thomas Jones*, and Sir *William Dolben*, contrary to *Magna Charta*, the King's Oath, and their Oath, have ruined me; for which Words (a Record being preſently made of them) he was adjudged to be fined 500l. and impriſoned till Payment of it, to find Surety for his good Behaviour for ſeven Years; and, being a Barriſter at Law, his Gown, by Order of Court, was pulled over his Ears by the Tipſtaff.

The Courts of Record, as incident to them, have a Power of protecting from Arreſts, not only the Parties themſelves, but alſo all Witneſſes *eundo & redeundo*; for ſince they are obliged to appear by the Proceſs of the Court, it will be unreaſonable that any one ſhould be moleſted whilſt he is paying Obedience to ſuch Proceſs. Lamb. 403. Lev. 159. Brownl 15. Raym 100. Bro. Privilege 35. Mod. 66. 10 Mod. 333. Keb. 845.

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* Court of Parliament.

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(A) Of the Original and Antiquity of Parliaments. 566.
(B) Of the Perſons of whom it conſiſts. 569.
(C) Of the Manner of their Summons and Aſſembling. 571.
(D) Of Elections. 572.

And herein.
1. Of the Electors, and their Qualifications. 572.
2 Of the Elected, and their Qualifications. 576.
3. Of the Duty of returning Officers, and the Remedies againſt them. 579.

(E) Of the Method of Paſſing Bills. 581.
(F) Of the Continuance, Adjournment, Prorogation and Diſſolution of the Parliament. 582.
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Of the Privileges of Members. *Vide* Tit. *Privilege*.

(A) Of

(A) Of the Original and Antiquity of Parliaments.

Co. Lit. 110. 4 Inſt. 36.

TO trace out exactly the Original and Antiquity of the Supreme Court of Parliament, whoſe tranſcendent Juriſdiction, ſays my Lord *Coke*, is ſuch, that it maketh, enlargeth, diminiſheth, abrogateth, repealeth, and reviveth Laws, Statutes, Acts and Ordinances concerning Matters Eccleſiaſtical, Capital, Criminal, Common, Civil, Martial, Maritime, *&c.* And to point out the ſeveral Alterations it met with, and how it came to be modelled into the Shape we ſee it at this Day, ſeems indeed, if not impoſſible, a Work of the greateſt Difficulty; but this Difficulty is not to be attributed to any peculiar Defect in our Conſtitution, but only to Time, the Loſs and Deſtruction of our Records, eſpecially in the Barons Wars; nor have the Prejudices and different Views, which conducted the Pens of thoſe who have written on this Subject, helped a little to obſcure and perplex the Matter.

However, it appears by thoſe Lights which we have ſtill remaining, and from the Inquiries and Reaſonings of our beſt Antiquaries, that there hath always been ſomething of the Nature of a Parliamentary Aſſembly, as antient as any Thing which we know of our Conſtitution, in which the People ſhared with the Prince in the Legiſlative Power: This Aſſembly was ſometimes called *Magnates Regni, omnes Regni Nobiles, Proceres & Fideles Regni, Univerſitas Regni, Communitas Regni, Diſcretio totius Regni, Generale Concilium Regni, &c.*

Spelm Gloſſ. in verb. Parl. Prynn's Right of the Commons 99.

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* In the *Saxon* Times, the general Court of the whole Kingdom was the *Wittingham Mote* or *Witenagemote*, to which were ſummoned the Earls of each County, and the Lords of each Leet; and likewiſe (*a*) Repreſentatives of Towns, who were choſen by the Burgeſſes of the Towns, and appeared on the King's Summons; this Court met once a Year at leaſt, and generally twice, about *Eaſter* and *Michaelmas*.

Wilk. L. L. Saxon. 205. Lamb. Arch. 57, 239, 245. Mirror, c. 5. ſect. 1.

(*a*) Sir *Robert Atkin* ſays, That *Spelman*, *Bede* *Selden*, and *Camden*, prove the Commons to be Part of this Court; but they do not prove, ſays he, that they were elected, or that they conſiſted of Knights, Citizens and Burgeſſes. *Sir Robert Atkins of the Juriſdiction of Parliaments*, 25 ——In the Preface to *Forteſcue*, *of abſolute and limited Monarchy*, 58. it is ſaid, that by reading the *Saxon* Laws and the Prefaces and Preambles to them, it will appear, that the Commons of *England*, always in the *Saxon* Times, made Part of that Auguſt Aſſembly.——Spelm. Gloſſ. *verb Subſidium*, the Commons attended in extraordinary Caſes, as in granting of new Aids and Taxes, as *Danegelt*, *&c.* and *Maddox*, c. 7, 8, 9. agrees herein, and gives a full Account of thoſe Aids and Taxes, which he ſays were but ſeldom raiſed; the King, in thoſe Days, being abundantly ſupplied by his Antient Demeſne Lands, Fines, Forfeitures, &c.

See Wright's Tenures.

Upon the coming in of *William the Conqueror*, every Perſon found in Arms againſt him forfeited his whole Eſtate, in which he placed his *Normans*; and he compelled all thoſe who were not in Arms againſt him, to take out Patents of their Lands to hold of himſelf; and in order to this he made a general Survey of the whole Kingdom, which was called *Domeſday*, and changed the Nature of the Tenures, which in the *Saxon* Times was *Allodial*, into *Feudal*, to be holden of himſelf by Knights Service; and by this Means made the Property of their Eſtates depend on their Allegiance to him: And hence it is, that all Lands are ſaid to be holden mediately or immediately from the Crown.

(*b*) in *Edward* the Third's Time, when

The Baronies and Earldoms were antiently created by granting ſo many Knights Fees, *viz.* if the Grant conſiſted of 13⅓ (*b*) Knights Fees, the Party was compellable to hold *per Baroniam*; and he that had twenty

Knights

Knights Fees, to hold as an Earl; but when those Grants came to be loſt by Time, they held both their Honours and Eſtates by the Preſcriptive Right of Poſſeſſion; the Earls and Barons were wont to grant out Lands to other Vaſſals, to do certain Duties, which depended on the Bounty and Agreement of the firſt Grantor; and from hence came all the Fruit of the Feudal Tenure, as Wardſhip, Marriage, Relief, &c. but thoſe who held immediately from the Crown, were called his Tenants *in Capite*, and did Suit only to the King.

the *Modus tenendi Parliamentum* is ſuppoſed to have been written, they thought the uſual Subſiſtance of a

Knight could not be leſs than 20*l. per Annum*, that of a Baron 400 Marks, and that of an Earl 400*l.* But *Seld.* Tit. *Hon.* is of Opinion, That there was no certain number of Knights Fees neceſſary to make a Baron or Earl, but that they conſiſted of ſo many Knights Fees as were contained in the Charter.

Alſo *William* the Conqueror erected a new Court*, called *Curia* or *Aula Regis*, compoſed of his principal Officers of State; to theſe when any Matter of Moment was in Agitation, as levying a new War, raiſing an Eſcuage, &c. were called moſt of the Barons, and chief Perſons who held *in Capite*, and they tranſacted all Buſineſs Civil and Criminal, and alſo that relating to the Revenue, and where the Great Court-Baron of the Kingdom, where every Thing done therein, was ſaid to be done *per concilium Regni*; it was in the Election of the King to ſummon which of his Attendants he pleaſed to this Court; and ſuch Attendance being deemed a Burthen in former Days, the Barons were ſeldom called, eſpecially when they roſe to that Grandeur as to make ſuch a Concourſe formidable to the King.

Of the ſeveral Officers, and the Manner of Judicature in this Court, *vide* Maddox, c. 2, 3.

* See *ante* 553

In this great Aſſembly of Parliament, it ſeems plain, that in the firſt Reigns after the Conqueſt, the Commons of *England* were no Part, and therefore the Tenants in Antient Demeſne, who uſed to maintain the King's Table, and alſo thoſe who held by Burgage Tenure, as by certain Rent,* ſetting out Ships in the Navy, &c. according to the Nature of their Patents, were wont upon any extraordinary Expedition, beſides the Duties of their Tenure, to grant an Aid to the King, which was demanded of them by the Juſtices Itinerant; and which, if they refuſed to pay, the King, at the End of the Expedition, might, with the Advice and Conſent of his Council, tallage them to a Tenth of all their Eſtate, but not to more; for none could be taxed at Pleaſure but Villeins, and thoſe who held by baſe Tenure.

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Maddox 491. Where there is a notable Record of the City of *London*'s being

tallaged, and alſo decimated for Non-payment; and upon ſuch Decimation they were obliged to ſwear to the Value of their Goods. *Vide* Ryley 516.

The great Controverſy, with reſpect to the Original and Antiquity of Parliaments, relates chiefly to the Power and firſt Formation of a Houſe of Commons after the Conqueſt. (*a*) Some have aſſerted that they have been always Part of the antient Conſtitution, and that the Commons of *England*, by their Repreſentatives, have always compoſed a Part of that Auguſt Aſſembly; (*b*) others hold, that the Houſe of Commons was formed 49 H. 3. when the King had given a total Overthrow, at the Battle of *Eveſham*, to *Symon Mountford*, Earl of *Leiceſter*, and the Barons that adhered to him; and to derogate from the Power of the Commons, and to lay aſide Parliaments, a notion was propagated in King *Charles* the Second's Reign, that the firſt aroſe by the Art and Management of *Symon Mountford*, to be a Balance to the Crown and Peerage; and that their firſt Inſtitution was the Invention of a Rebel to ſerve a particular Purpoſe.

(*a*) *Petit*, Sir Robert Atkins's Power and Juriſdiction of Parliaments, 14. and others.

(*b*) Camden in his *Britannia*, 13 dates the Original of the Commons, as, Part of

the Parliament, and as now elected, from the 39 H. 3. and ſays, he has it *ex fatis antiquo ſcriptore*, but does not name his Author; and herein he is followed by *Pryn*, in his Plea for the Lords, 182. *Dugdale*, in his Orig Jur. 18. Heylin's Life of Laud, 91. *Brady*, in his Anſwer to *Petit*, 131, &c. Sir *Robert Filmer*, in his Freholders Grand Inqueſt, 18.. and others, who think themſelves ſufficiently ſupported in this Opinion, becauſe the firſt Writ of Summons of any Knights, Citizens and Burgeſſes, now extant, is not antienter than 49 *H.* 3.

But,

Spelm. Gloss. 67. Seld. Tit. *Hon.* 692.

But, as neither of these Accounts seems to be the true one, the most probable Opinion is, that the House of Commons was instituted by the Crown, as a Balance to the Barons, who were grown very opulent and numerous, and as appears by their Wars, very uneasy to the Crown; hence we find, that upon the Escheat of any Barony for Want of Issue, or by Forfeiture, the Crown parcelled it out into smaller Districts; and this begot the Distinction between the *Barones Majores* and *Barones Minores*. These *Barones Minores* held by Knights Service, and being too numerous to be all called to Parliament were allowed to (*c*) sit by Representation. Hence we have the Writ to chuse *Duos Malites gladiis cinctos*; to these were added Representatives of Cities and antient Boroughs, who being equally concerned with the *Barones Minores* in all Aids and Taxes, it was reasonable they should share with them in those Matters; and this Policy was set on Foot as a Matter of the greatest Service to the Crown, both for the Balancing of the Peerage, and more conveniently taxing of the People.

(*c*) But at what Time they first sat, or were first digested into one House, with the Representatives of Cities and Boroughs, does not well appear. By some Opinions they at first sat with the *Barones Majores*; and hence my Lord *Coke* says, That Lords and Commons at first sat together, and made one House of Parliament. 4 Inst. 2. *Selden* does not determine the Point, but says, that it was attempted 17 *John*, to bring in the *Barones Minores*, as appears by the Great Charter granted by him at *Runny Mead*. Seld Tit. *Hon.* 704. But the more received Opinion is, That it was accomplished in the victorious Reign of *Henry* 3. who, instead of grasping at the Liberties of his People upon his Conquests, confirmed the Great Charter, and established a House of Commons, as a Balance to the Peerage, which they never would have permitted before he had vanquished them. Camden Britt. 13. Dugd. Orig. Jur. 18. Brady's Answer to Petit. 133. It is plain that that wise Prince *E* 1. went into this Policy, and that in his Reign we find a Parliamentary Peerage, or House of Lords established, as also a House of Commons, consisting of Knights, Citizens and Burgesses.

As one of the principal Reasons for establishing a House of Commons was for the more convenient taxing of the People; hence we find the true Reason why all Taxations began in that House, and why the Commons would never suffer it afterwards to be altered; and the Reason is, that being at first instructed by their Principals, whom they represented, *Page 569 to * give what each Man thought he could bear; to vary from these Instructions, or to suffer the Superior Peerage to alter it, would, as they rightly judged, be the highest Breach of Trust in them.

Ryley Pla. Paf. 74, 156. Hollis Jud. of the Peers 84.

Hence also we find the true Reason why the Power of Judicature was reserved to the Lord's House; for the *Barones Majores*, who constituted this House, were called to the antient *Curia Regis*, and sat there in their own Right, as *Pares Curtis* to the King; and as this Court had a Jurisdiction of (*a*) determining in the first Instance, both in Civil and Criminal Causes especially those relating to great Persons, and the King's Officers of State as also by Way of Appeal from the Injustice of all other Courts; so the Lords continued to determine on Petitions exhibited by private Persons or those exhibited by the House of Commons, called Impeachments, and were still the *Dernier Resort* to correct the Errors of Inferior Judicatures.

(*a*) A Nobleman was tried by his Peers very antiently, as appears by the Earl of *Hereford*'s Case, in the Time of *William* the Conqueror. 2 Inst. 50.——This turns on the Principle of the Feudal Law, *si inter Dominum & Vassalum Lis moveatur Pares curiæ sunt Judices*; and therefore the Peers, in the Time of Parliament, were tried by the Peers in the House of Lords, and out of Parliament by the *Justiciar*, and in his Absence by the Steward of *England*, who summoned some of his Peers upon the Trial, and twelve * at least were obliged to appear. This Summons is set forth 3 Inst. 28. where my Lord *Coke* says, there must be twelve or more appear.

* A very bad Use having been made of summoning twelve such Peers as the Crown pleased for Trial of Peers for Treason, it is enacted by 7 *W.* 3. *c.* 3. *s.* 11. that on the Trial of a Peer the Peers shall be summoned, &c.

4 Inst. 46. At the first instituting a House of Commons, the Representatives Knights, Citizens and Burgesses, were only looked upon as Trustees mana

manage the Affairs of their Principals; and therefore in former Days it was held reaſonable, that they ſhould be recompenced by their Principals, for the Trouble and Expence they were at in managing the Truſt repoſed in them. Hence the Fee of every Knight of the Shire was 4*s.* *per Diem*, and that of a Citizen or Burgeſs 2*s.* *per Diem*.

(B) Of the Perſons of whom it conſiſts.

THIS Auguſt Aſſembly conſiſts of the King ſitting there in his Royal Political Capacity; of the Lords Spiritual, as Archbiſhops and Biſhops, who ſit there by Succeſſion, in Reſpect of their Counties or (*b*) Baronies, Parcel of their Biſhopricks; of the Lords Temporal, as Dukes, Marquiſſes, Earls, Viſcounts and Barons, who ſit there by Reaſon of their Dignities, which they hold by Deſcent or Creation; theſe compoſe one Houſe; and when any Parliament is holden, each of them is to have a Writ of Summons *ex debito Juſtitiæ*; of the (*c*) Knights, Citizens and Burgeſſes, who are choſen by Force of the King's Writ, which iſſues *ex debito Juſtitiæ*, none of which ought to be omitted; theſe compoſe the Houſe of Commons, and repreſent all the Commons of the Kingdom.

4 Inſt 1. Right of Electing to Parliament, 106, 142, 181.

(*b*) Dyer 60.

(*c*) Of theſe in *Forteſcu*'s Time, *viz.* H. 6. there were 300.

Forteſcue De Laud. Leg. Ang. c. 18. f. 4. in my Lord *Coke*'s Time, 493. 4 Inſt. 1. At the Time of the Union, 513. And by the 5 Ann. c. 8. for uniting *England* and *Scotland*, 45 *Scotch* Members were added, which makes the Number at this Day 558.

In the *Saxon* Times the Lords Spiritual held by *Frankalmoigne*, but yet made great Part of the Grand Council of the Nation, being the moſt learned Perſons, that in thoſe Times of Ignorance met to make Laws and Regulations; but *William* the Conqueror turned the *Frankalmoigne* Tenures of the Biſhops, and ſome of the great Abbots into Baronies; and from thence-forward they were obliged to ſend Perſons to the Wars, or were aſſeſſed to the Eſcuage, and were obliged to attend in the King's Court; This Attendance they complained of as a Burthen, and inſiſted, that the Court took Conuſance of Treaſons and Felonies, and that by * the Canon of *Toledo*, the Clergy were forbid to give Judgment in Blood: To obviate this Objection, the Conſtitutions of *Clarendon* permitted them to withdraw in Caſes of Blood; but ſtill they were obliged to do Suit, and ſuch Suit confirmed their Eſtates as Baronies, and as Barons they ſit in the Houſe of Lords at this Day.

Pryn. of the Lords Houſe, 221, 242.

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When a Parliamentary Peerage was eſtabliſhed, which compoſed a Houſe of Lords, as alſo a Houſe of Commons, conſiſting of Knights, Citizens and Burgeſſes; *Ed.* 1. being under great Difficulties through his Wars in *Scotland*, and the Kingdom being exhauſted by the Barons Civil Wars, thought, from his Succeſs in the Holy War, that he had good Pretenſions to bring the Clergy, who held by *Frankalmoigne*, to contribute to the Taxes and Public Charges of the Kingdom; and accordingly projected a Scheme, to make them a third Eſtate dependant on himſelf; for which Purpoſe was the *Præmunientes* Writ framed: This the Clergy ſtrenuouſly oppoſed; for though thereby they were to have a Power of making Canons, yet they foreſaw, that the principal Deſign of it was to make them contribute to the Public Charges; and therefore inſiſted upon it, that their Power was totally derived from Heaven, and that they would not ſubmit to any Temporal Power, but upon the King's Perſevering they came to this Mind and Temper, that the King might ſend his Writ to the Archbiſhop, and if he allowed the King's Writ to be a good Motive, the Archbiſhop, by Virtue of his Spiritual

Wake's Authority of Chriſtian Princes, 364. Stilling Biſhop's Juriſdiction, 367, &c.

ritual Juriſdiction, might ſummon them, and then they were convened by a Spiritual Juriſdiction. From henceforward, inſtead of making one Eſtate of the Kingdom, as the King deſigned, they compoſed two Eccleſiaſtical Synods, under the Summons of each of the Archbiſhops; and being forced into this Regulation, they ſat and made Canons, by which each reſpective Province was bound, and gave Aids and Taxes to the King; but the Archbiſhop of *Canterbury*'s Clergy, and that of *York*, aſſembled each in their own Province, and the King gratified the Archbiſhop's Vanity, by ſuffering this new Body of Convocation to be formed in the Nature of a Parliament; for the Archbiſhop aſſumed the State of a King, and his ſuffragans ſat in the Upper Houſe, as his Peers; the Deans, Archdeacons, a Proctor for the Chapter, repreſented the Burgeſſes, and the two Proctors for the Clergy the Knights of the Shire; and ſo this Body, inſtead of being one of the Eſtates, as by (*a*) ſome it has been improperly called, became an Eccleſiaſtical Parliament to make Laws, and to tax the Poſſeſſions of the Church.

(*a*) Vide 4. Inſt. 1. Vent. 324.

25 H. 8. c. 19. 2 Salk. 412. pl. 2.

At the Reformation, by the Act of Submiſſion of the Clergy, theſe Convocations were to be aſſembled only by the King's Writ; whereas before, they often met on a Summons from the Archbiſhop, without his receiving any Writ from the King, becauſe they looked upon him as having Authority from Heaven; and by this Act they could not make any Canon without the King's Licence, or put them in Execution without it.

During the Time of *Cromwel*'s Adminiſtration, the Method of Taxing was by Way of Land-Tax and Poll-Tox; and though the Clergy gave a Subſidy the 13 *Car.* 2. yet it being moſt adviſable to continue the Method uſed in *Cromwel*'s Time, from hence-forwards it paſſed, that they ſhould have a Vote for Members in Parliament, and they were taxed as the Laity were.

4 Inſt. 4.

Although the Judges and Maſters in Chancery are ſummoned to attend the Parliament, yet they have no Voices; and therefore they ſit round the Table in order to aſſiſt the Speaker, or the King, when preſent, in Matters of Law.

4 Inſt. 266.

Nor has the Chancellor a voice, unleſs he is a Peer; for antiently he was none of the Peers, unleſs he held *per Baronium*, and now he is none unleſs created by Patent or Summons.

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*Page 571 *(C) Of the Manner of their Summons and Aſſembling.

THE Parliament commences by the King's Writ or Summons, agreeable to that Rule which was eſtabliſhed before the Conqueſt, *viz.* That all Judicature proceeded from the King. *William* the Conqueror ſeems to have been more jealous of this Part of his Prerogative, than of any other, and from his Time this Rule has been regularly obſerved; antiently (*b*) ſome of the Peers only were ſummoned, but when a Parliamentary Peerage was eſtabliſhed, they ſummoned them all. Hence my Lord *Coke* (*c*) ſays, That every Lord Spiritual and Temporal of full Age ought to have a Writ of Summons *ex debito Juſtitiæ*.

(*b*) For according to Spelm Gloſſ. 67. Sed. Tit Hon. 692. it would have been difficult and inconvenient to have ſummoned them all, being ſo numerous, as t be at on Time about 3000. cords 3, 4.

(*c*) 4 Inſt. 1.——For the Form of ſuch Summons, *vide* Co ton's Re

Antient

Co. Lit. 9. b. 16. b.

Antiently the Tenure first created the Honour, and such as held *per Baroniam* were summoned to do Suit or Service in Parliament; and as such Summons was an Evidence of such Tenure, so it has been since settled, that the Summons and Sitting in Parliament makes the (*c*) Baron, because when the Charters of *William* the First were lost and destroyed by Time, the Feudal Baronies had no Evidence of their Baronage, but their doing Suit and Service as Barons at the King's Court.

Vide Pryn's Plea for the Lords House, 147. Where this Matter is much controverted.

(*c*) But in all Degrees of Quality above a Baron, a Summons is not sufficient, because there are other Ceremonies requisite, which must be performed, unless dispensed with by Letters Patent; and these being Matters of Record must be produced. Seld. tit. Hon. 495, 530. Show. P. C. 5. Spelm. Gloss. 142.

Co. Lit. 16.

The first Summons of a Peer to Parliament differs from an ordinary Summons, because in the first Summons he is called up by his proper Christian and Surname, not having the Name and Title of Dignity in him till he has sat; but after he has sat, the Name of Dignity becomes Part of his Name; but the Writ of Creation, in all other Things, is the same with the ordinary Writ that calls him.

4 Inst. 4.

The Writ of Summons issues out of Chancery, and recites that the King, *de avisamento Concilii*, resolving to have a Parliament, desires *quod Interfitis cum, &c.* each (*d*) Lord of Parliament is to have a distinct Summons, and such Summons is to issue at least (*e*) forty Days before the Parliament begins.

(*d*) Of the Manner of Summoning the Judges, Barons of the Exchequer, King's Counsel, and Civilians, Masters in Chancery who have no Voices; and how the Writ differs from that to a Lord of Parliament; *vide* Reg. 261. F. N. B. 229. 4 Inst. 4. (*e*) *Vide* the 7 & 8 *W.* & *M.* c. 25.

4 Inst. 6, 10. Co. Lit. 109. b.

Also a Writ of Summons must be directed to every (*f*) Sheriff of every County in *England* and *Wales*, for the Choice and Election of Knights, Citizens and Burgesses, within each of their respective Counties.

(*f*) That the Sheriff must deliver his Precept to the proper Officer of every City and Borough, *vide* 23 H. 6. c. 15. 7 & 8 *W.* & *M.* c. 25.

4 Inst. 6.

So a writ of Summons must issue out of the Lord Warden of the *Cinque Ports*, for the (*g*) Election of the Barons for the same, who in Law are Burgesses.

(*g*) And by the 2 *W.* & *M.* c. 7. it is enacted, That all Nominations, or Recommendations, claimed, as of Right by the Lord Wardens of the *Cinque Ports*, to each of the said *Cinque Ports*, two antient Towns, and their respective Members, of one Person whom the Electors ought to elect as a Baron or Member of Parliament for such respective Port, anti nt Town or Member, were, and are contrary to the Laws of this Realm, and for the future shall be so deemed, and thereby are declared to be void.

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4 Inst. 10.

* The Substance of those Writs ought to continue in their original Essence, without any Alteration or Addition, unless it be by Act of Parliament; for, if original Writs at the Common Law can receive no Alteration or Addition, but by Act of Parliament, *a fortiori* the Writs for the Summons of the High Court of Parliament can receive no Addition or Alteration, but by Act of Parliament.

4 Inst. 6. (*b*) May be prorogued at the Day of the Return for certain urgent Causes. 4 Inst. 7.

At the (*b*) Return of the Writ the Parliament cannot begin but by the Royal Presence of the King, either in Person or by Representation; by Representation two Ways; either by a Guardian of *England*, by Letters Patent under the Great Seal, when the King is *in remotis* out of the Realm; or by Commission under the Great Seal of *England*, to certain Lords of Parliament, representing the Person of the King, he being within the Realm, in Respect of some Infirmity †.

† Or, his being engaged in other urgent Affairs.

Every

4 Inſt. 43. & *vide* 6 H. 8. c. 16. That for departing without Licence, every Knight, Citizen and Burgeſs ſhall loſe his Wages; alſo it is ſuch an Offence, that the Lords may fine one of their Body; ſo of the Houſe of Commons. 4 Inſt. 44.

Every Lord Spiritual and Temporal, and every Knight, Citizen and Burgeſs, ſhall upon Summons come to the Parliament, except he can reaſonably and honeſtly excuſe himſelf; or he ſhall be amerced, &c. that is reſpectively a Lord by the Lords, and one of the Commons by the Commons.

Vide 1 *W.* & *M.* ſeſſ. 1. c. 1. ſ. 3 by which the Form of the Oath is altered; and 13 *W.* 3. c. 6. ſ. 10. which injoins the Abjuration Oath with like Penalties, which is alſo altered in its Form by 6 Ann. c. 7. ſ. 20.

By the 30 *Car.* 2. *ſt.* 2. *cap.* 1. it has been enacted, "That if any Member of the Houſe of Commons ſhall vote in the Houſe of Commons, "or ſit there during any Debate after the Speaker is (*b*) choſen, without "having firſt taken the Oaths of Allegiance and Supremacy, &c. between "the Hours of Nine and Four, in full Houſe, he ſhall be adjudged a Po-"piſh Recuſant convict, be incapable of any Office, &c. and ſhall forfeit "500*l.* &c."

(*b*) Of the Manner of chuſing a Speaker, *vide* 4 Inſt. 8, 9.

(D) Of Elections: And herein,

1. Of the Electors, and their Qualifications.

AS the Right and Qualifications of Electors depend for the moſt part on ſeveral Acts of Parliament, it will be neceſſary to point out thoſe Statutes, as the ſureſt Rule to direct us in our Enquiries herein; but here it may be proper to obſerve, (*c*) that the Right and Qualification of Voters in Cities, Towns and Boroughs, depend on their Charters, and ſuch Cuſtoms as have prevailed in them Time immemorial.

(*c*) H b. 14. 12 Co. 120.

Alſo it may be neceſſary to obſerve, that for the better aſcertaining in general the Right of Voting, and for the greater Security of Returning Officers, by the 2 *Geo.* 2. *cap.* 24. it is enacted, "That ſuch Votes ſhall "be deemed legal, which have been ſo declared by the laſt Determinati-"on in the Houſe of Commons; which laſt Determination concerning "any County, Shire, City, Borough, *Cinque Port*, or Place, ſhall be final to "all Intents and Purpoſes."

As the chief Excellency of our Conſtitution conſiſts in our being (*d*) bound only by ſuch Laws to which we ourſelves conſent; and as * ſuch Conſent cannot be given by every Individual in Perſon, but muſt be by Repreſentation; it therefore highly concerns the whole Community, that Elections be (*e*) free, and that (*f*) every Perſon claiming a Right to vote, be duly qualified, free from Corruption, or any undue Influence whatſoever.

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(*d*) That it is one of the greateſt Privileges which a *Britiſh* Subject hath; and therefore if he be hindered from Voting, an Action on the Caſe will lie at Common Law. Salk. 19. pl. 10. 6 Mod. 45. Ld. Raym. 938. 3 Salk. 17. 8 State Tri. 89. Holt. 524. *per Holt* Ch. Juſt. And accordingly adjudged in the Houſe of Lords, in the Caſe of *Aſhby* and *White*. (*e*) By the Common Law all Elections ought to be free; and by ſeveral Statutes it is declared, that Elections of Members of Parliament ought to be free, particularly by the 1 *W.* & *M.* ſeſſ. 2. c. 2. (*f*) In many Caſes Multitudes are bound by Acts of Parliament, which are not Parties to the Elections of Knights, Citizens and Burgeſſes; as all thoſe that have no Freehold, or have Freehold in Antient Demeſne; and all Women having Freehold or no Freehold, and Men within Age of twenty-one Years, &c. 4 Inſt. 4, 5.

By

By the 10 *H.* 6. *cap.* 2. it is ordained, "That the Knights of all Counties within the Realm, to be chosen to come to Parliaments hereafter to be holden, shall be chosen in every County by People dwelling and (*a*) resiant in the same, whereof every Man shall have Freehold to the Value of (*b*) 40*s.* by the Year at the least, above all Charges, within the same County where any such Chuser shall meddle of any such Election. 10 H. 6. c. 2. (*a*) See Black. Com. 166, 169. 2 Mor. Whitel. 90. (*a*) By 1 H. 5. c. 1. Choosers of Knights of the Shire shall be resident within the same Shires the Day of the Date of the Writ of Summons of Parliament; & *vide* Crom. Juris. 3. (*b*) By the Statute 8 H. 6. c. 7 he who cannot expend 40*s.* by the Year as aforesaid, shall in no wise be Chooser of the Knights for the Parliament. By stat. 31 Geo. 2. c. 14. Copyholders are not to vote for Knights of the Shire. In what Manner Persons are to vote in Right of an Annuity or Rent-charge. Stat. 3 Geo. 3. c. 24.

By the 5 & 6 *W.* & *M. cap.* 20. "No Collector, Supervisor, Gauger, or other Officer or Person whatsoever concerned or employed in the charging, collecting, levying or managing the Duties of Excise, or any Branch or Part thereof, shall by Word, Message or Writing, or in any other Manner, endeavour to persuade any Elector to give, or dissuade any Elector from giving, his Vote for the Choice of any Person to be Knight of the Shire, Citizen, Burgess or Baron of any County, City, Borough or Cinque Port; and every Officer or other Person, Offending therein, shall forfeit the Sum of 100*l.* one Moiety thereof to the Informer, the other to the Poor of the Parish where such Offence shall be committed; to be recovered by any Person that shall sue by Action of Debt, Bill, Plaint or Information in any of their Majesties Courts of Record, &c. and every Person, convict on such Suit, shall be for ever after incapacitated to bear any Office or Place of Trust under the Crown." 5 6 & *W.* & *M.* c. 20. s. 48.

By the 12 & 13 *W.* 3. *cap.* 10. "No Commissioner, Collector, Searcher, or other Officer, or Person concerned or employed in discharging, collecting, levying or managing the Customs, or any Branch or Part thereof, shall by Word, Message or Writing, or in any other Manner, endeavour to persuade any Elector to give, or dissuade any Elector from giving, his Vote for the Choice of any Person to be a Knight of the Shire, Citizen, Burgess or Baron of any County, City, Borough or Cinque Port; and every Officer or other Person, offending therein, shall forfeit the Sum of 100*l.* one Moiety to the Informer, the other Moiety to the Poor of the Parish where such Offence shall be committed; to be recovered by any Person that shall sue for the same, by Action of Debt, Bill, Plaint or Information in any of his Majesty's Courts of Record, &c. and every Person, convict on any such Suit, shall be incapable ever to bear any Office or Place of Trust under the Crown," 12 & 13 *W.* 3. c. 10. sect. 91.

By the 7 & 8 *W.* & *M. cap.* 25. "No Person or Persons shall be allowed to have any Vote in Election of Members to serve in Parliament, for or by Reason of any Trust Estate, or Mortgage, unless such Trustee or Mortgagee be in actual Possession or Receipt of the Rents and Profits of the same Estate, but that the Mortgagor, or *Cestui que Trust* in Possession, shall and may vote for the same Estate, notwithstanding such Mortgage or Trust; and that all Conveyances of any Messuages, Lands, Tenements or Hereditaments in any County, City, Borough, Town Corporate, * Port or Place, in order to multiply Voices, or to split and divide the Interest in any Houses or Lands among several Persons, to enable them to vote at Elections of Members to serve in Parliament, are hereby declared to be void and of none Effect: and that no more than one single Voice shall be admitted for one and the same House and Tenement." 7 & 8 *W.* & *M.* c. 25. s. 7. *Page 574

And

This extends to all Sorts of Members as well for Boroughs as Counties.

And by the ſame Act, "No Perſon whatſoever, being under the Age "of twenty-one Years, ſhall at any Time hereafter be admitted to give "his Voice for Election of any Member or Members to ſerve in Parlia-"ment."

Black. Com. 167.

10 Ann. c. 23.

By the 10 *Ann. cap.* 23. it is enacted, "That all Conveyances made to "any Perſons in any colluſive Manner, to qualify them to give their Votes "at Elections of Knights of the Shire, (ſubject to Conditions to determine "or reconvey ſuch Eſtate) ſhall be taken againſt thoſe Perſons who exe-"cuted the ſame, as free and abſolute, and be holden by all ſuch Perſons "to whom ſuch Conveyance ſhall be made, freely acquitted from all "Manner of Truſts, Clauſes of Re-entry, *&c.* between the ſaid Parties, "and all Bonds, Covenants, *&c.* for the reſtoring thereof, ſhall be null and "void; and every Perſon who ſhall make and execute ſuch Conveyances, "or, being privy to ſuch Purpoſe, ſhall deviſe or prepare the ſame; or "any Perſon who, by Colour thereof, ſhall give any Vote at any Electi-"on of Knights of the Shire, ſhall forfeit 40*l.* to any one that will ſue for "the ſame; to be recovered with full Coſts of Suit, by Action of Debt, "*&c.* in any of her Majeſty's Courts at *Weſtminſter*."

(*a*) Repealed as to diſabling from voting for Lands not taxed by 18 G. 2. c. 18. ſ. 2. 19 Geo. 2. c. 28. ſ. 2.

And by the ſaid Statute, "No Perſon ſhall vote for the electing of a "Knight of a Shire in *England*, in Right of any Lands which have not "been aſſeſſed to the Public (*a*) Taxes, Church Rates and Pariſh Duties, "in ſuch Proportion as other Lands of 40*s. per Annum*, in the Pariſh "where the ſame ſhall be; and for which ſuch Perſon ſhall not have re-"ceived the Rents, or be intitled ſo to do, to the Value of 40*s.* or more, "to his own Uſe, for one Year before ſuch Election, unleſs it come by "Deſcent, Marriage, Deviſe, or Preſentation to ſome Benefice, *&c.* and "voting contrary to the true Intent thereof, ſhall forfeit 40*l.* one Moiety "to the Poor where the Lands lie, the other to the Perſon ſuing for the "ſame.

By the 12 *Ann. ſtat.* 1. *cap.* 5. it is enacted, "That the aforeſaid Act "(10 *Ann.*) ſhall not extend to reſtrain any Perſon from voting in Right "of any Rents, Tithes, or other incorporeal Inheritances, or any Meſſu-"ages or Lands in extraparochial Places, or any Chambers in the Inns of "Court, or Inns of Chancery, or any Meſſuages or Seats belonging to any "Offices, or in Right of any other Meſſuages or Land that have not been "uſually charged and aſſeſſed to all and every the Public Taxes, Church "Rates and Pariſh Duties; Provided ſuch Meſſuages or Lands have been "uſually charged or aſſeſſed to ſome one or more of the ſaid Public (*b*) "Taxes, Rates or Duties, in ſuch Proportions as other Meſſuages or "Lands of 40*s. per Annum*, within the ſame Pariſh or Townſhip where "the ſame ſhall lie, are uſually charged."

(*b*) So much of this Act as diſables any Perſon to vote for Knights of Shires, in Right of any Lands or Tenements which have not been aſſeſſed as hereinmentioned, repealed. 18. G. 2. c. 18. ſ. 2. 19 Geo. 2. c. 28. ſ. 2.

2 Geo. 2. c. 24. See And. 248.

By the 2 *Geo.* 2. *cap.* 24. for preventing Bribery and Corruption, in the Elections of Members of Parliament, it is enacted, "That every Free-"holder, Citizen, (*c*) Freeman, Burgeſs, or Perſon having or claiming to "have a Right to vote, or be polled at ſuch Election, ſhall before he be "admitted to Poll at the ſame Election, take the (*d*) following Oath, "or, being of the People called *Quakers*, ſhall make the ſolemn Affirma-

(*c*) None to vote as Freemen at Elections, but ſuch as have been admitted to their Freedom twelve Months before the Election. Stat. Geo. 3. c. 15. (*d*) For the Oaths of Allegiance and Abjuration, *vide* thoſe injoined by 1 *W. & M.* ſeſſ. 1. c. 1. 6 Ann. c. 7. 10 Ann. c. 23. 18 Geo. 2. c. 18.

"ti-

* "tion appointed for *Quakers*) in case the same shall be demanded by *Page 575
"either of the Candidates, or any two of the Electors, that is to say, *I A.
"B. do swear, or (being of the People called* Quakers) *I A. B. do solemnly
"affirm, I have not received, or had, by myself, or any Person whatsoever in
"Trust for me, or for my Use or Benefit, directly or indirectly, any Sum or
"Sums of Money, Office, Place or Employment, Gift or Reward, or any Pro-
"mise or Security for any Money, Office, Employment or Gift, in order to
"give my Vote at this Election, and that I have not before been polled at
"this Election.* Which Oath, the Officer, presiding at such Poll, is re-
"quired and impowered to administer *gratis*, if demanded, upon Pain
"of forfeiting 50*l.* and such Officer, admitting any Person to vote with-
"out taking such Oath, if demanded, shall forfeit 100*l.* and the Person
"voting, and refusing after Demand to take the Oath, in like Manner to
"forfeit 100*l.*"

And it is further enacted by the said Statute, "That if any Returning-
"Officer, Elector, or Person taking the Oath or Affirmation therein men-
"tioned, shall be guilty of wilful and corrupt Perjury, or of false Affirm-
"ing, and be thereof convicted by due Course of Law, he shall incur and
"suffer the Pains and Penalties which by Law are enacted or inflicted
"in Cases of wilful and corrupt Perjury."

And by the said Statute it is further enacted, "That no Person, con-
"victed of wilful or corrupt Perjury, shall after such Conviction be ca-
"pable of voting in any Election of any Member or Members to serve in
"Parliament."

This extends to all Sorts of Members, as well for Boroughs as Counties. Black. Com. 167.

And it is further enacted, "That if any Person who hath, or claimeth
"to have, any Right to vote in any such Election, shall ask, receive, or
"take any Money or other Reward by Way of Gift, Loan, or other De-
"vice; or agree or contract for any Money, Gift, Office, Employment, or
"other Reward whatsoever, to give his Vote, or to refuse or forbear to
"give his Vote in any such Election; or if any Person by himself, or any
"Person employed by him, doth or shall, by any Gift or Reward, or by any
"Promise or Agreement, or Security for any Gift or Reward, corrupt or
"procure any Person or Persons to give his or their Vote or Votes in any
"such Election; such Person so offending in any of the Cases aforesaid,
"shall for every such Offence forfeit the Sum of 500*l.* to be recovered as
"by the Act directed; and every Person offending in any of the Cases
"aforesaid, from and after Judgment obtained against him in any such
"Action, *&c.* or being otherwise lawfully convicted thereof, shall for
"ever be disabled to vote in any Election of any Member or Members to
"Parliament; and also shall for ever be disabled to hold, exercise or
"enjoy any Franchise, to which he and they then shall, or at any Time
"afterwards may, be intitled, as a Member of any City, Borough, Town
"Corporate, or Cinque Port, as if such Person was naturally dead.

"And if any Person offending against this Act shall, within the Space
"of twelve Months next after such Election as aforesaid, discover any
"other Person or Persons offending against this Act, so that such Person
"or Persons so discovered be thereupon convicted, such Person so disco-
"vering, and not having been before that Time convicted, of any Offence
"against this Act, shall be indemnified and discharged from all Penalties
"and Disabilities which he then shall have incurred by any Offence
"against this Act."

"*Provided*, That no Person shall be made liable to any Incapacity, Dis-
*ability, Forfeiture or Penalty by this Act laid or imposed, unless Prose-

"cution be commenced within two Years after such Incapacity, Disabi-
"lity, Forfeiture or Penalty shall be incurred; or in case of a Prosecu-
"tion, the same be carried on without wilful Delay."

*Page 576 * By the 5 *Ann. cap.* 8. for uniting *England* and *Scotland*, forty-five shall be the Number of the Representatives of *Scotland*, in the House of Commons of the Parliament of *Great Britain*, and sixteen Peers to sit and vote in the Lords House.

But for the Manner of electing them, *vide* the said Statute 5 Ann. c. 8. 6 Ann. c. 6. 9 Ann. c. 5. 12 Ann. stat. 1. c. 5. and 7 Geo. 2. c. 16. of electing Members for *Chester*, *vide* 34 & 35 H. 8. c. 13. For *Wales*, 35 H. 8. c. 11. For *Durham*, 25 Car. 2. c. 9. And for the City of *London*, 11 Geo. 1. c. 18.

2. Of the Elected, and their Qualifications.

4 Inst. 46, 47. A Knight Baneret, or any other under the Degree of a Baron, may be elected Knight, Citizen or Burgess.

Molloy 382, 4 Inst. 47. See the Statutes 12 & 13 *W.* 3. c. 2. 6. Ann. c. 7. 1 Geo. 1. stat. 2. c. 4. sect. 1. An Alien, though made a Denizen, cannot sit in Parliament; for to have a Power of making Laws, it is necessary that he should be totally received into the Society, which he cannot be without the Consent of Parliament.

A Sheriff is not eligible, Hale of Parl. 114. but this must mean for the County of which he is Sheriff, for a Sheriff of one County may be elected in another. 4 Com. Dig. 287.

4 Inst. 47. (*a*) By the 7 & 8 *W.* 3. c. 25. s. 8. One under the Age of twenty-one Years is not (*a*) eligible; neither can any Lord of Parliament sit there until he be of the full Age of twenty-one Years.

No Person hereafter shall be capable of being elected a Member to serve in Parliament, who is not of the Age of twenty-one Years; and every Election or Return of any Person under that Age, is hereby declared to be null and void; and if any such Minor, hereafter chosen, shall presume to sit or vote in Parliament, he shall incur such Penalties and Forfeitures, as if he had presumed to sit and vote in Parliament without being chosen and returned. Black. Com. 169.

4 Inst. 47. Whitel on Gov. 37c. (*b*) Because they sit in the Lords House. Black. Com. 169. None of the (*b*) Judges of the King's Bench, Common Pleas, or Barons of the (*c*) Exchequer, that have Judicial Places, can be chosen Knight, Citizen or Burgess, of Parliament; but any that have Judicial Places in the Court of Wards, Court of Dutchy, or other Courts Ecclesiastical or Civil, are eligible.

(*c*) See 4 Com. Dig. 285.

4 Inst. 47. Moor 783. pl. 2083. Black. Com. 169. None of the (*d*) Clergy can be elected Knight, Citizen or Burgess of Parliament, because they are of another Body, *viz.* the Convocation.

(*d*) Though of the inferior order. 4 Com. Dig. 285.

A Person attainted of Treason or Felony, *&c.* is not eligible; for he ought, according to the Writ, to be *Magis idoneus, discretus & sufficiens.*

4 Inst. 48. Whitel on Gov. 370. 4 Com. Dig. 285.

4 Inst. 49. (*e*) Nor can the King grant a Charter of Exemption to a Lord of Parliament, to discharge him from his Attendance in the Lords House. 4 Inst. 49. The King cannot grant a Charter of Exemption to any Man, to be freed from Election of (*e*) Knight, Citizen or Burgesses of the Parliament, because the

the Elections of them ought to be (*f*) free, and his Attendance is for the Service of the whole Realm, and for the Benefit of the King and his People, and the whole Commonwealth hath an Interest therein.

(*f*) For the Incapacities of Sheriffs, Mayors of Towns, &c. and the Reasons why they may or may not be elected Knights, Citizens or Burgesses, *vide* 4 Inst. 48. Bro. Abr Tit. *Parliament* 7. Cromp. Jur. 3, 16. Sir Simon D'ewes, Jour. 38, 436, 624, Rush. Coll. Vol. 1. 684. Townsh. Coll. 185.

By the 8 *H.* 6. *cap.* 7. it is enacted, "That they who have the greatest "Number of Voices that may expend 40*s.* by the Year, and above, shall "be returned (*g*) Knights of the Shire, &c. and that they which shall be "chosen, shall be dwelling and (*h*) resident within the same Counties." 8 H. 6. c. 7.

(*g*) As the Writ for Election of Knights, &c. was *Duos Milites gladiis cinctos*, &c it required an Act of Parliament, *viz.* 23 H. 6. c. 15. That notable Esquires might be eligible. 4 Inst. 10. (*h*) The Like is enacted by 1 H. 5. c. 1. as to Knights, Citizens and Burgesses; but these Regulations seem not necessary at this Day.

* And now by the 9 *Ann. cap.* 5. it is enacted, "That no Person shall "be capable to sit or vote as a Member of the House of Commons, for any "County, City, &c. within that Part of *Great Britain*, called *England*, "&c. who shall not have an Estate of Freehold or Copyhold for his own "Life, or for some greater Estate either in Law or Equity, to his own "Use, in Lands, Tenements or Hereditaments, above what will satisfy and "clear all Incumbrances within that Part of *Great Britain* called *England*, "&c. of the Annual Value of 600*l.* above Reprizes, for every Knight of "a Shire; and of 300*l.* above Reprizes, for every Citizen, Burgess, &c. "and if any Persons elected or returned to serve in any Parliament, as a "Knight of the Shire, or as a Citizen, Burgess, &c. shall not, at the "Time of such Election and Return, be seised of or entitled to such an "Estate before required, such Election and Return shall be void. *Page 577 9 Ann. c. 5.

"*Provided*, That nothing in this Act contained shall extend to make "the eldest Son or Heir apparent of any Peer or Lord of Parliament, or "of any Person, qualified by this Act to serve as Knight of a Shire, unca- "pable of being elected and returned, and sitting and voting as a Mem- "ber of the House of Commons in any Parliament.

"*Provided also*, That nothing in this Act contained shall extend to "either of the Universities in that Part of *Great Britain* called *England*, "but that they may elect and return Members to represent them in Par- "liament, as heretofore they have done."

Also by the said Statute, "No Person shall be qualified to sit in the "House of Commons, within the Meaning of this Act, by Virtue of any "Mortgage whereof the Equity of Redemption is in any other Person, "unless the Mortgagee shall have been in Possession of the mortgaged "Premisses for seven Years before the Time of his Election."

"Every Person (except as aforesaid) who shall appear as a Candidate, "or shall by himself or any others be proposed to be elected, shall upon "Request (at the Time of such Election, or before the Day to be prefix- "ed in the Writ of Summons for the Meeting of the Parliament) by any "Person who shall stand Candidate at such Election, or by any two or "more Persons having Right to vote at such Election, take a Corporal "Oath in the form following, *viz.* I A. B. *do swear, that I truly and "bona fide have such an Estate in Law or Equity, to and for my own Use "and Benefit, of, or in Lands, Tenements or Hereditaments (over and above "what will satisfy and clear all Incumbrances that may affect the same) of "the Annual Value of* (*a*) 600*l. above Reprizes, as doth qualify me to be "elected and returned to serve as a Member for the County of———accord- "ing to the Tenor and true Meaning of the Act of Parliament in that Behalf*; "*and*

(*a*) The like Oath (*mutatis mutandis*) as to the annual Value of 300*l.*

per Ann. to be taken by Candidates for a City, Borough, &c.

" and that my said Lands, Tenements, or Hereditaments are lying or being
" within the Parish, Township or Precinct of——or in the several Parishes,
" Townships or Precincts of——or in the County of——or in the
" several Counties of——(as the Case may be); and if any of the said
" Candidates, &c. shall wilfully refuse to take the Oath, the Election and
" Return of such Person shall be void."

7 & 8 W. & M. c. 4.

" By the 7 & 8 *W. & M. cap.* 4. it is enacted, " That no Person or
" Persons hereafter to be elected to serve in Parliament, for any County,
" City, Town, Borough, Port or Place within the Kingdom of *England*,
" Dominion of *Wales*, or Town of *Berwick upon Tweed*, after the *Teste*
" of the Writ of Summons to Parliament, or after the *Teste*, or the
" Issuing out, or Ordering of the Writ or Writs of Election upon the
" Calling or Summoning of any Parliament hereafter, or after any such
" Place becomes vacant hereafter, in the Time of this present, or of any
" other Parliament, shall or do hereafter, by himself or themselves, or by
" any other Ways or Means, on his or their Behalf, or at his or their
" Charge, before his or their Election, to serve in Parliament, for any
Page 578 " County, City, Town, Borough, &c. directly or indirectly give, * present,
" or allow to any Person or Persons, having Voice or Vote in such Elec-
" tion, any Money, Meat, Drink, Entertainment or Provision, or make
" any Present, Gift, Reward, or Entertainment, or shall at any Time
" hereafter make any Promise, Agreement, Obligation or Engagement to
" give or allow any Money, Meat, Drink, Provision, Present, Reward
" or Entertainment, to or for any such Person or Persons in particular, or
" to any such County, City, Town, Borough, Port or Place in general,
" or to or for the Use, Advantage, Benefit, Employment, Profit or
" Preferment of any such Person or Persons, Place or Places, in order to
" be elected to serve in Parliament for such County, City, Town, Borough,
" Port, or Place."

And it is further enacted, " That every Person so giving, presenting and
" allowing, making, promising or engaging, doing, acting or proceeding
" shall be, and are hereby declared and enacted, disabled and incapacita-
" ted, upon such Election, to serve in Parliament for such County, City,
" Town, Borough, Port or Place; and that such Person or Persons shall
" be deemed and taken, and are hereby declared and enacted to be deem-
" ed and taken, no Members in Parliament, and shall not act, sit, or have
" any Vote or Place in Parliament, but shall be, and are hereby declared
" and enacted to be, to all Intents, Constructions and Purposes, as if they
6 Ann. c. 7. " had never been returned or elected Members for the Parliament."

f. 25. 15 Geo. 2. c. 22. *Vide* the Statute 5 & 6 *W. & M.* c. 7. f. 57. 11 & 12. *W.* 3. c. 2. f. 150. 12 & 13 *W.* 3. c. 10. f. 89, 91. how far they are repealed by this Act. Members are to deliver in their Qualifications upon Oath; but this is not to incapacitate the Heir apparent of any

By the 6 *Ann. cap.* 7. it is enacted, " That no Person who shall have in
" his own Name, or in the Name of any Person or Persons in Trust for
" him, or for his Benefit, any new Office or Place of Profit whatsoever
" under the Crown, which at any Time hereafter shall be created or
" erected; nor any Person who shall be a Commissioner, or Sub Com-
" missioner of Prizes, Secretary or Receiver of the Prizes, nor any Comp-
" troller of the Accounts of the Army, nor any Commissioner of Trans-
" ports, nor any Commissioner of the Sick and Wounded, nor any Agent
" for any Regiment, nor any Commissioner for Wine Licences, nor any
" Governor, or Deputy Governor of any of the Plantations, nor any Com-
" missioner, of the Navy employed in any of the Out-Ports, nor any Per-
" son having Pension from the Crown during Pleasure, shall be capable
" of being elected, or of sitting or voting as a Member of the House of
" Commons, in any Parliament which shall be hereafter summoned and
" holden."

Provided, " That if any Person, being chosen a Member of the House
" of Commons, shall, at any Time after the Dissolution or Determination
" of this present Parliament, accept of any Office or Profit from the Crown
" during such Time as he shall continue a Member, his Election shall be
" and is hereby declared to be void, and a new Writ shall issue for a new
" Elec-

"Election, as if such Person so accepting was naturally dead: Provided "nevertheless, that such Person shall be capable of being again elected, "as if his Place had not become void as aforesaid."

Peer, or of any Person qualified to serve as Knight of the Shire. Stat. 33 G. 2. c. 20.

Provided also, and be it enacted, "That in order to prevent for the future too great a Number of Commissioners to be appointed or constituted for the executing of any Office, that no greater Number of Commissioners shall be made or constituted for the Execution of any Office, "than have been employed in the Execution of such respective Office, at "some Time before the first Day of this present Session of Parliament."

"*Provided also*, That nothing herein contained, shall extend, or be "construed to extend to any Member of the House of Commons, being an "Officer in her Majesty's Navy or Army, who shall receive any new or "other Commission in the Navy or Army respectively."

"And it is further enacted, "That if any Person hereby disabled, or *Page 579 "declared to be incapable to sit or vote in any Parliament hereafter to "be holden, shall nevertheless be returned as a Member to serve for any "County, City, Town, or *Cinque Port*, in any such Parliament, such "Election and Return are hereby enacted and declared to be void, to all "Intents and Purposes whatsoever; and if any Person disabled or declared incapable by this Act to be elected, shall at any Time, after the "Dissolution or Determination of this present Parliament, presume to sit "or vote as a Member of the House of Commons, in any Parliament "hereafter to be summoned, such Person so sitting or voting, shall forfeit "the Sum of 500*l.* to be recovered by such Person as shall sue for the "same, &c."

By the 2 & 3 *Ann. cap.* 4. *sect.* 22. it is enacted, "That no Register (for "the Registring Memorials of Deeds, Conveyances and Wills) within the "*West-Riding* in the County of *York*, or his Deputy for the Time being, "be capable of being chosen a Member to serve in Parliament." See also 6 Ann. c. 35. s. 32.

By the 1 *Geo.* 1. *stat.* 2. *cap.* 56. it is enacted, "That no Person having "any Pension from the Crown for any Term or Number of Years, either "in his own Name, or in the Name or Names of any other Person or Persons in Trust for him, or for his Benefit, shall be capable of being elected or chosen a Member of, or for sitting or voting as a Member of this "present, or any future House of Commons which shall hereafter be summoned.——Any Person offending shall forfeit 20*l.* for every Day in "which he shall sit or vote in the said House of Commons, to such Person who shall sue for the same, &c." 1 Geo. 1. c. 4.

By the 3 *Geo.* 1. *cap.* 8 *sect.* 43. it is enacted, "That no Director, &c. "of the Bank of *England*, shall be disabled from being a Member of "Parliament." 3 Geo. 1. c. 8. s. 43. Nor Contractors for circulating Exchequer Bills, 30 Geo. 2. c. 3. s. 167.

By the 3 *Geo.* 1. *cap.* 9. *sect.* 7. "No Member of the (*a*) *South Sea* Company shall be disabled from being a Member of Parliament. 3 Geo. 1. c. 9. (*a*) *Vide* the 7 Geo. 1. c. 28. By which the late Governor, Deputy Governor and Directors, &c. therein named, are disabled for ever to sit or vote in either House of Parliament.

By the 6 *Geo.* 1. *cap.* 18. *sect.* 10 it is enacted, "That no Governor, "Director or other Officer of the Corporations for Assurance of Ships, "shall be disabled from being a Member of Parliament."* 6 Geo. 1. c. 18. s. 10.

*To regulate the Trial of controverted Elections, or Returns of Members to serve in Parliament, 10 Geo. 3. c. 16.—The Speaker of the House of Commons impowered to issue his Warrant to make out new Writs for the Choice of Members, during the Recess of Parliament, 10 Geo. 3. c. 41.—For preventing Delays of Justice, by Reason of Privilege of Parliament, 10 Geo. 3. c. 50.

3. Of the Duty of Returning Officers, and the Remedies against them.

The Duty of Sheriffs, and other Officers presiding at Elections, seems to be chiefly (*a*) Ministerial; therefore (*b*) if one be duly elected Knight, Citizen or Burgess, and the Sheriff return another, the return must be reformed and amended by the Sheriff, and he that is duly elected must be inserted; for the Election in these Cases is the Foundation, and not the Return.

(*e*) If the Party or the Freeholders demand the Poll, the Sheriff cannot deny the Scrutiny; for he cannot discern who be Freeholders by the View; and though the Party would have the Poll, yet the Sheriff must proceed in the Scrutiny. 4 Inst. 48.—If one, having a Right to vote, is hindered by the presiding Officer, an Action on the Case lies at Common Law. Salk. 19. pl. 10. 6 Mod. 45. *Ashby* and *White*. 2. Ld. Raym. 938.—Whether for a double or false Return any Action lay at Common Law, *vide* 2 Lev. 114. 3 Keb. 365, 369.——*Barnardiston* v. *Soams*. 2 Sid. 168. *Nevil*'s Case. 2 Vent. 37. *Onslow*'s Case. 2 Salk. 502. pl. 1. *Prideaux* and *Morris*. 2 Salk. 504. pl. 3. *Condell* v. *John*. (*b*) 4 Inst. 49.

*Page 580 By the 23 *H.* 6. *cap.* 14. reciting, "That the several (*c*) Statutes then "in Force were not found sufficiently effectual for preventing undue Elec- "tions and Returns of Knights, *&c.* it is ordained, that every Sheriff, "after the Delivery of the Writ to him, shall make and deliver, without "Fraud, a sufficient Precept under his Seal, to every Mayor and Bailiff, "or to Bailiffs or Bailiff, where no Mayor is, of the Cities and Bo- "roughs within his County, reciting the said Writ, commanding them "by his Precept if it be a City, to chuse by Citizens of the same City, "Citizens, and in the same Manner and Form if it be a Borough, by Bur- "gesses of the same, to come to the Parliament."

(*c*) As 7 H. 4. c. 15. 11 H. 4. c. 1. 1 H. 5. c. 1. 6 H. 6. c. 4. 8 H. 6. c. 7. 10 H. 6. c. 2. But now for the Duty of presiding Officers, *vide* 7 & 8 *W.* & *M.* c. 7. made perpetual by 12 Ann. sess. 1. c. 15. & 10 & 11 *W.* 3. c. 7.

See 16 Geo. 2. c. 11. to regulate Elections in *Scotland*, 19 Geo. 2. c. 28. to regulate Elections for Cities and Towns, which are Counties of themselves.

"And that the same Mayor and Bailiffs, or Bailiffs or Bailiff where no "Mayor is, shall return lawfully the Precept to the same Sheriff, by In- "dentures betwixt the same Sheriff and them, to be made of the said "Elections, and of the Names of the said Citizens and Burgesses by them "so chosen; and thereupon every Sheriff shall make a good and rightful "Return of every such Writ, and of every Return by the Mayors and "Bailiffs, or Bailiffs or Bailiff where no Mayor is, to him made."

"And that every Sheriff, at every Time that he doth contrary to this "Statute, or any other Statutes for the Election of Knights, Citizens "and Burgesses, to come to the Parliament, before this Time made, shall "incur the Pain contained in the Statute made in the eighth Year of this "King, (*viz.* the Penalty of 100*l.* payable to our Lord the King) and "moreover shall forfeit and pay to every Person hereafter chosen Knight, "Citizen or Burgess in his County, to come to any Parliament, and not "duly returned, or to any other Person, which in Default of such Knight, "Citizen or Burgess, will sue, 100*l.* whereof every Knight, Citizen and "Burgess so grieved, severally, or any other Person, which in their De- "fault will sue, shall have his Action of Debt against the said Sheriff, his "Executors or Administrators, with Costs, *&c.*

"And

" And in the ſame Manner, at every Time that any Mayor and Bailiff, " or Bailiffs, or Bailiff where (*b*) no Mayor is, ſhall return others than " thoſe which be choſen by the Citizens and Burgeſſes of the Cities and " Boroughs where ſuch Elections be, or ſhall be made, ſhall incur and " forfeit to the King 40*l.* and moreover, ſhall forfeit and pay to every " Perſon hereafter choſen Citizen or Burgeſs, to come to the Parliament, " and not by the ſame Mayor and Bailiff, or Bailiff or Bailiffs where no " Mayor is, returned, or to any other Perſon, which in Default of ſuch " Citizen or Burgeſs ſo choſen, will ſue, 40*l.* whereof every of the Citi- " zens and Burgeſſes ſo grieved, ſeverally, or any other Perſon which in " their Default will ſue, ſhall have his ſaid Action of Debt, *&c.*

(*b*) In the Conſtruction of this Statute has been held That the Partygrieved may declareagainſt the Bailiff, without averring that there was no Mayor; for it ſhall be intended that there was no Mayor, except it be ſhewn; and if there were one, it ſhould come properly on the other Side; and though the Parliament was as none, becauſe there was no Act nor Record of it, yet the Action may lie. Hob. 78.

And it is further enacted by the ſaid Statute, " That every Sheriff " that maketh no due Election of Knights to come to Parliament in con- " venient Time, *i. e.* every Sheriff in his full County, (*c*) betwixt the " Hours of eight and eleven before Noon, without Colluſion in this Be- " half, ſhall incur the Pain of 100*l.* to the King, and 100*l.* to him who " will ſue, *&c.*

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(*c*) No Election can be made of any Knight of the Shire but between 8 and 11 of the Clock in the Forenoon; but if the Election be begun within that Time, and cannot be determined within thoſe Hours, the Election may be made after. 4 Inſt. 48.——After the Precept of the Sheriff directed to the City or Borough for making of Election, there ought, *ſecundum Legem & conſuetudinem Parliam.* to be given a convenient Time for the Day of the Election, and ſufficient Warning given to the Citizens or Burgeſſes that have Voices, thatthey may be preſent; otherwiſe the Election is not good. 4 Inſt. 49.——Any Election, or Voices given before the Precept be read and publiſhed, are void and of no Force; for the ſame Electors, after the Precept read and publiſhed, may make a new Election, and alter their Voices *ſecund' Legem & conſuetudinem Parliament'*. 4 Inſt. 49.

" Provided, That every Knight, Citizen and Burgeſs, to come to any " Parliament hereafter to be holden, in due Form choſen, and not return- " ed, as afore is ſaid, ſhall begin his Action of Debt aforeſaid, within " three Months after the ſame Parliament commenced, to proceed in the " ſame Suit effectually without Fraud; and if he doth not ſo, another " that will ſue ſhall have the ſaid Action, *&c.*"

(E) Of the Method of paſſing Bills.

AN Act of Parliament muſt have the Conſent of the Lords, the Commons, and the Royal (*d*) Aſſent of the King; and (*e*) whatſoever paſſeth in Parliament by this threefold Conſent, hath the Force of an Act of Parliament.

4 Inſt. 25. Hob. 111. Forteſ. Laud. cap. 18. Dyer 92.

(*d*) By the 33 H. 8. c. 21. The King's Royal Aſſent by his Letters Patent under his Great Seal, and ſigned with his Hand, and declared and notified in his Abſence to the Lords Spiritual and Temporal, and to the Commons aſſembled together in the High Houſe, is as effectual as if the King were perſonally preſent. (*e*) Difference between an Ordinance and an Act of Parliament is, that an Ordinance wanted the three-fold Conſent, and is only ordained by one or two of them. 4 Inſt. 25*.

* But no ſuch Ordinance now can have the Force of a Law, unleſs Power is given by an Act of Parliament, to the Crown, *&c.* to make an Ordinance, *&c.*

Antiently

4 Inſt. 25, 26. Goodal 286. Dyer 131. 8 Co. 1.

Antiently the Manner of Proceeding in Bills, was much different from what it is at this Day; for formerly the Bill was in Nature of a Petition, and theſe Petitions were entered upon the Lords Rolls, and upon theſe Rolls the Royal Aſſent was likewiſe entered; and upon this, as a Groundwork, the Judges uſed, at the End of the Parliament, to draw up the Act of Parliament into the Form of the Statute, which was afterwards entered upon the Rolls called the *Statute Rolls*; which was different from thoſe called the *Lords Rolls*, or the *Rolls of Parliament*: Upon which *Statute Rolls*, neither the Bill nor Petition from the Commons, nor the Anſwer of the Lords, nor the Royal Aſſent, was entered, but only the Statute, as it was drawn up and penned by the Judges; and this was the Method till about *Henry* the Fifth's Time: and in his Time it was deſired, that the Acts of Parliament might be drawn up and penned by the Judges before the End of Parliament; and this was by reaſon of a Complaint then made that the Statutes were not equally and fairly drawn up and worded. After the Parliament was diſſolved or prorogued, in *Henry* the Sixth's Time, the former Method was altered, and then Bills *continentes formam actus Parliamenti* were firſt uſed to be brought into the Houſe; the Bills were (before they were brought into the Houſe) ready drawn, in the Form of an Act of Parliament, and not in the Form of a Petition, as before; upon which Bills it was written by the Commons, *Soit Baile al Seigneurs*; and by the Lords, *Soit Bayle al Roye*; and by the King, *Le Roy le veut* (*a*); all this was written upon the Bill; and the Bill, thus indorſed, was to remain with the Clerk of the Parliament, and he was to enter the Bill thus drawn at firſt, in the Form of an Act of Parliament, or Statute, upon the Statute Rolls, without entering of the Anſwer of the King, Lords or Commons, upon the Statute Rolls, and then iſſued out Writs to the Sheriff, with Tranſcripts of the Statute Rolls, *viz.* of the Bill drawn at firſt in the Form of a Statute, and without the Anſwer of the King, Lords and Commons, to the Bill, to (*b*) proclaim the Statute.

(*a*) See *Obſerv. on Stat.* 35. Note (*s*)

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(*b*) Were antiently proclaimed by the Sheriff, but upon the Invention of Printing this Method was diſcontinued; ſo that at this Time every Body is obliged to take Notice of an Act of Parliament at his Peril. 4 Inſt. 26.

4 Inſt. 34.

In the Lords Houſe, the Lords give their Voices from the *Puiſne* Lord *ſeriatim*, by the Word of *Content*, or *Non Content*.

4 Inſt. 35.

The Commons gave their Voices upon the Queſtion by *Yea*, or *No*; and if it be doubtful, and neither Party yield, two are appointed to number them; one for the *Yeas*, another for the *No's*; the *Yeas* going out, and the *No's* ſitting; and thereof Report is made to the Houſe. At a Committee, though it be of the whole Houſe, the *Yeas* go of one Side of the Houſe, and the *No's* on the other, whereby it will eaſily appear which is the greateſt Number.

4 Inſt. 12.

To the paſſing of a Bill, the Aſſent of the Knights, Citizens and Burgeſſes muſt be in Perſon, but the Lords may give their Votes by Proxy; and the Reaſon hereof is, That the Barons did always ſit in Parliament in their own Right, as Part of the *Pares Curtis* of the King; and therefore, as they were allowed to ſerve by Proxy in the Wars, ſo they had Leave to make their Proxies in Parliament; but the Commons coming only as repreſenting the *Barones Minores*, and the Socage Tenants in the County, and the Citizens and Burgeſſes, as repreſenting the Men of their Cities and Boroughs, they could not conſtitute Proxies, becauſe they themſelves were but Proxies and Repreſentatives of others, and therefore could not conſtitute a Proxy in their Place; according to that Maxim of Law, *Delegata Poteſtas non poteſt delegari.*

(F) Of the Continuance, adjournment, prorogation, and diſſolution of the Parliament.

THE Parliament can neither begin nor end without the King's Preſence, either in Perſon, or by (*a*) Repreſentation. 4 Inſt. 38. (*a*) *Vide* 33. H. 8. c. 25.

The Paſſing of any Bill or Bills, by giving the Royal Aſſent thereunto, or the giving any Judgment in Parliament, doth not (*b*) make a Seſſion, but the Seſſion doth continue until that Seſſion be prorogued or diſſolved. 4 Inſt. 27. (*b*) That the Courts of Juſtice are to take Notice of the Commencement of Parliaments, and alſo of Prorogations and Seſſions. Lev. 296. Raym. 191. Hetl. 119. Dyer 203.

The Diverſity between a Prorogation and an Adjournment, or Continuance of the Parliament, is, That by the Prorogation in open Court there is a Seſſion, and then ſuch Bills as paſſed in either Houſe, or by both Houſes, and had no Royal Aſſent to them, muſt at the next Aſſembly begin again, &c. for every ſeveral Seſſion of Parliament is, in Law, a ſeveral Parliament; but if it be only adjourned or continued, then there is no Seſſion, and conſequently all Things continue ſtill in the ſame State they were in before the Adjournment or Continuance. 4 Inſt. 27. Raym. 120.

* When a Parliament is called, and doth ſit, and is diſſolved without any Act of Parliament paſſed, or Judgment given, it is (*c*) no Seſſion of Parliament, but a Convention. *Page 583 4 Inſt. 38. (*c*) The Statute of *Jeofails*, made in *Oxford*, 16 & 17 Car. 2. c. 8. was to continue and be in Force for three Years, and from thence to the End of the next Seſſion of Parliament; but becauſe the Parliament convened next after the Expiration of the three Years, was prorogued without paſſing any Act, the Court held it no Seſſion, at leaſt not ſuch a Seſſion as was intended to determine the aforeſaid Act. Raym. 187. Lev. 442. 2 Keb. 529.

The Houſe of Commons is, to many Purpoſes, a (*d*) diſtinct Court, and therefore is not prorogued or adjourned by the Prorogation or Adjournment of the Lords Houſe; but the Speaker, upon Signification of the King's Pleaſure, by the Aſſent of the Houſe of Commons, doth ſay, This Court doth prorogue, or adjourn itſelf; and then it is prorogued or adjourned, and not before; but when it is diſſolved, the Houſe of Commons are ſent for up to the Higher Houſe; and there the Lord Keeper, by the King's Commandment, diſſolveth the Parliament; and then it is diſſolved, and not before. 4 Inſt. 28. (*d*) Both Houſes muſt be prorogued together, and diſſolved togeth r, for one cannot ſubſiſt without the other. Sir Robert Atkins's Argument 51.

By the Statute 4 *E.* 3. *cap.* 14. "Parliaments ought to be holden once "a Year, and oftener, if Need be." *Vide* 36 E. 3. c. 10. to the ſame Purpoſe.

By the 16 *Car.* 2 *cap.* 1. it is enacted, "That the holding of Parlia- "ments ſhall not be diſcontinued above three Years at the moſt."

By the 6 *W. & M. cap.* 2. it was enacted. "That the Parliament ſhould "not have Continuance longer than for three Years at the fartheſt, to "be accounted from the Day on which, by the Writs of Summons, the "Parliament ſhould be appointed to meet." 6 *W. & M.* c. 2.

But

1 Geo. 1. st. 2. c 38. But now by the 1 *Geo.* 1. *st.* 2. *cap.* 38. it is enacted, "That the then "present Parliament, and all Parliaments that shall at any Time thereafter "be called, assembled, or held, shall and may respectively have Continu- "ance for seven Years, and no longer, to be accounted from the Day on "which, by the Writ of Summons, the Parliament shall be appointed to "meet, unless sooner dissolved by his Majesty, his Heirs or Successors."

(G) Of the Jurisdiction of the House of Lords.

The Lords House is the highest Court of Justice in this Kingdom, and the Jurisdiction it exercises at this Day, with Respect to Impeachments, the Trial of its own Members, Writs of Error, and Appeals, is deduced chiefly from the Jurisdiction and Power of the King's antient Court, or *Aula Regis*, established at the Conquest.

This Court, established by the Conqueror, consisted not only of the principal Officers of State, but also of such as held *per Baroniam*, whom the King had a Right to summon, as holding immediately from himself, to do Suit in his Court, and to hear Causes; these were the *Pares Curiæ* to the King. And hence this Court was considered as the great Court-Baron of the Kingdom, where all Petitions against great Persons, and the Prince's Officers, were heard.

Ryley, Pl. Par. 156. This Court had not only an original Jurisdiction of determining Causes brought before them by Petition, but was also the *Dernier Resort* to correct the Errors of Inferior Judicatures; but as Petitions began to multiply, there are several Instances where original Causes have been referred to Inferior Courts.

Every Suit commenced by Petition, containing the Grievances certainly and particularly; and Process was sent out to bring the Defendant in to answer; when these Petitions increased, Receivers and Triers of Petitions, who determined what Petitions were proper to be received or rejected, were * appointed; and afterwards, upon the assembling of the Knights, Citizens and Burgesses, and their constituting a House of Commons, the Commons in Matters of great Moment, and as they were the Grand Inquisitors of the whole Kingdom, presented their Petitions; as those Petitions came stronger from them than from any particular Person, so they were never rejected by the Lords: And hence the Original of Impeachments by the House of Commons.

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The great Officers that constituted this Court, were tried by their (a) Peers, when this grand Assembly or Parliament were sitting; but out of Parliament by the *Justiciar*, and in his Absence by the Steward of *England*, who summoned some of his Peers, and twelve, * at least, were obliged to appear.

(a) This turns upon a Principal of the Feudel Law. *si inter Dominum & Vassalum lis moveatur Pares Curiæ sunt Judices*; and this, as to Treason and Felony, is confirmed by the Clause in *Magna Charta*, c. 29. *nec super eum ibimus, nec super eum mittemus nisi per Legale Judicium Parium suorum vel per Legem terræ*; but for all other Crimes out of Parliament, as a *Præmunire*, Riot, seducing a young Lady from her Parents in order to debauch her, &c a Peer at this Day shall be tried by a Jury. 2 Hawk. P. C. 424.

* Now by Stat. 7 *W.* 3. c. 3. s. 11. On the Trial of a Peer, all the Peers are to be summoned.

4 Inst. 21. *Vide* Title *Error*. As this Court was the *Dernier Resort* to correct the Errors of Inferior Judicatures, so at this Day there lies a Writ of Error of a Judgment given in the

the King's Bench, before this Court, † which begins by Petition to the King; whereto when the King had answered *Fiat Justitia*, then goes out a Writ directed to the Chief Justice of the King's Bench, for removing of the Record *in* (*b*) *Præsens Parliamentum*; and thereupon the Roll itself, and a Transcript in Parchment, is to be brought by the Chief Justice of the King's Bench into the Lords House in Parliament; and after the Transcript is examined by the Court with the Record, the Chief Justice carrieth back the Record itself into the King's Bench, and then the Plaintiff is to assign the Errors, and thereupon to have a *Scire Facias* against the adverse Party, returnable either in that Parliament or the next, and the Proceedings thereupon shall be *super tenorem recordi & non super recordum*.

(*b*) That Writ of Error may be returnable *ad proximam Sessionem Parliamenti*, *vide* Dyer 375. And so of a *Scire Fac*, *Vide* Fitz. Tit. *Error*, 58. Rast. Ent. 805.

† Error, when to be redressed in Parliament, 14 Ed. 3. c. 5.——Writs of Error in Judgments of the *King's Bench* in certain Actions, returnable in the *Exchequer Chamber*.——After Judgment affirmed or reversed there, Error may be brought in Parliament.——And where Proceedings are in the *King's Bench*, by Original, Error lies, in the first Instance, in Parliament, and not in the Exchequer.——The Party grieved by a Judgment of the *King's Bench*, may sue in Parliament, at his Election. 31 Eliz. c. 1. s. 4.

Towards the latter End of the Reign of King *Charles* the First, the House of Lords asserted their Jurisdiction of hearing Appeals from the Chancery, which they do upon a Paper Petition, without any Writ directed from the King; and for this their Foundation is that they are the great Court of the King, and that therefore the Chancery is derived out of it, and by Consequence, that a Petition will bring the Cause and the Record before them. This was much controverted by the Commons in the Reign of *Charles* the Second, but is now pretty well submitted to; because it has been thought too much that the Chancellor should bind the whole Property of the Kingdom without Appeal. Gilb. Hist. Ch. 190.

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*Court of Chancery.

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TOWARDS the *Norman* Period, upon the breaking the Courts into distinct Jurisdictions, the Chancellor, or Keeper of the Great Seal, retained Part of that Jurisdiction which he exercised in the great Court of the Kingdom, called *Aula Regis*: But for the better Understanding hereof, and of its Jurisdiction at this Day we shall consider this Court.

(A) As an Officina Brevium out of which all original Writs flow. 585.

(B) As

(B) As an ordinary and limited Court, proceeding according to Law, commonly called the Petty-Bag. 587.
(C) As an extraordinary Court, proceeding according to Equity. 588.

And herein,
1. Of its original Jurisdiction, and how at first it has been impugned by the Common Law Courts. 588.
2. What Jurisdiction it exercises at this Day. 590.

(A) As an Officina Brevium, out of which all original Writs flow.

(a) 4 Inst. 80. Of superseding such Writs. *vide* Abr. Eq. 416. and Tit. *Writs*.

BEfore the Division of the Courts, the Chancellor put the Seal to all Patents, Commissions and Writs: And hence this Court is considered at this Day, as the great Shop of Justice, out of which (a) all original Writs which give other Courts a Jurisdiction, issue, and are made returnable into such Courts on a common Return-Day, and may be sued out at any Time, as well in Vacation as in Term-Time, from whence this Court is said to be always open.

The Reasons of the Institution of this *Officina Brevium* were many.

1st, That it may appear that all Power of Judicature whatsoever flowed from the King, and therefore there was a Summons even to the Peers in Parliament, that sat *in proprio Jure*; so likewise for the Lower House of Commons, the Basis of the same were made by Writs that issued out of this Court, and were returned into the same Office; and so in Judicature, there were particular Patents that shewed the extent of the Commission, and that their Power was derived from the Crown.

2dly. That the Crown might have its proper Fines, these were antiently paid to purchase Justice from the Crown; for Persons were not suffered to come into the King's Courts, and engaged the Power of the King to do Right to private Persons, without first receiving something from the Subject towards the Charges of the Court, and the Expence of the Judicature; in as much as in antient Times the King used to summon several of the Barons to attend the Hearing of such Causes; but *Page 586 afterwards by * *Magna Charta*, by reason of the Exorbitancy of Officers, and that the Crown might not be cheated, these were reduced to Fines certain.

3dly, The Writs were taken out of the Court of Chancery, returnable in the other Courts, that one Court might be a Check upon the other.

4thly. To keep an Uniformity in the Law; for whether these Writs went out to the Sheriff in the Nature of a *Justicies*, or whether they were returnable before the Justices in *Eyre*, or Justices of the Common Bench, or of Assise, they were still made in one Form, according to the Nature of the Complaint, which was both a Direction to the Judge, and Limitation of his Authority.

The Court of Chancery being thus erected to issue Process, the Chancellor, or Lord Keeper that had the Government of that Court, had the Great Seal, by Authority of which all Process was to issue; and from hence Masters

Masters were appointed in that Court, that made out the Forms of the Writs, and entered them in a Book kept for that Purpose, thence called the *Register*; and such Writs were Precedents for the future, in like Cases; and Exceptions were taken to Writs in the Courts to which they were directed, for not agreeing with the *Register*, and divers other Informalities.

After the Masters in Chancery had settled proper Writs and Commissions, and those Things began to be of Course, they had proper Under-Officers, who made out their Writs of Course, and they only attended on the making out new Writs in extraordinary Cases, the ordinary Writs being made out by the proper Officers: Hence it came to pass that the Officer, called the Clerk of the Crown, made out Commissions after the Forms of them were settled, as Commissions for Justices Errant, and of Assises, General Gaol-Delivery, *Oyer* and *Terminer*, and of the Peace, Writ of Association, *Dedimus Potestatem* for taking of Oaths, and all General and Special Pardons; also Writs of Execution upon a Statute-Staple, which were annexed to this Office in the Time of Queen *Mary*, for their continual and chargeable Attendance; other Writs that were settled were made out by the *Custitors*, who were formerly Clerks to the Masters, but afterwards settled in a distinct Office, to make out the *Brevia de cursu*.

At the first Division of the Courts, the Chancery was tender in making out Writs in Cases where there had been formerly no Precedents in the antient *Curia Regis*, which now are called *Actiones Nominatæ*, because they thought the antient Footsteps which were in the former Courts of Justice, were the Bounds of their Jurisdiction, and indeed of the Law; therefore, wherever there was a new Case that seemed to require Remedy, the original Jurisdiction referred them to Petition the next Parliament, but because this multiplied Petitions to Parliament, therefore there was a particular Law made, whereby it gave the Court Power in a new Case to invent a Writ, and this was by the Statute of (*a*) *Westm.* 2 *cap.* 24. *Et quotiescunque de cætero evenerit in Cancellat' quod in uno casu reperitur Breve, & in consimili casu cadente sub eodem Jure & simili indigente remedio, non reperitur, concordent clerici de Cancellaria in brevi faciendo, vel atterminent querentes in Proximum Parliamentum, & scribantur casus in quibus concordare non possunt, & referant eos ad Proximum Parliamentum, & de consensu Jurisperitorum fiat Breve, ne contingat de cætero quod curia Domini Regis deficiat conquerentibus in Justitia perquirenda.*

Gilb. Hist. Chanc. 16. Dalrymp. Feud. Law. 304. 8vo Edition.

(*a*) Upon this Statute (which *vide* exp ained 2 Inst. 405, &c.) was formed the Writ of Entry *in consimili casu*, relating to Land; also upon this Statute were founded Actions upon the Case upon several Trespasses, in which Cases there were not found any Writs in the *Register*. 2 Inst. 407.

(B) Of the ordinary and limited Court, proceeding according to Law, commonly called the Petty-Bag.

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TO understand the Nature of this Court, we must observe, That in antient Times the Chancellor was likewise Chaplain to the King, and it was his Business, in the Time of the *Justiciar*, to write the *Diplomata*, that is, all Charters and Commissions from the King; therefore, when the Power of the *Justiciar* was broke, he obtained the *Officina Brevium & Chartarum regiarum*; from whence all the extraordinary Jurisdictions touching granting

granting of Charters, as likewiſe all Inqueſts of Office to intitle the Crown, were returned into this Office; and the Exchequer; in which theſe Things were antiently tranſacted, became only an ordinary Court of Revenue, to (a) ſet Leaſes to the King's Farmers, and to get in the King's Debts; and therefore the Office in the Exchequer was only an Office of Inſtruction, of what Lands were in the King in particular Counties; but, to veſt Lands in the Crown *de novo*, it was neceſſary to have an Office under the Great Seal, and ſo to grant Lands from the Crown, unleſs it were merely Farms that were granted for Years.

(a) *Vide* 2 Co. 16. Plow. 320. 4 Co. 93.

From hence, at this Day, this Court has a Juriſdiction to hold Plea upon a *Scire facias*, to repeal the King's Letters Patent upon Petitions, *Monſtrans de droit*, Traverſes of Offices, *Scire facias*, upon Recognizances, Executions upon Statutes, &c. which being regiſtered in this Court, the Proceſs thereupon iſſued out of the ſame, and were returnable there, and entered in the Office called the (b) Petty-Bag; whereas the Writs, which were the Foundation of the Buſineſs of the other Courts were put together in the Hamper which gave the Diſtinction to thoſe Names, and begat diſtinct Officers in the Court.

4 Inſt. 80.

(b) The Proceedings in this Court were heretofore in *Latin*, but were not inrolled in Rolls, but remained only *in Filaciis*. 4 Inſt. 80.

If in this Court the Parties deſcend to iſſue, the Chancellor cannot try it, but is to deliver the Record, with his proper Hand, into the King's Bench, where (c) Judgment is to be given, and the Reaſon hereof ſeems to be, that the Chancery being *Officina Brevium*, if it could both make Writs returnable here, and alſo try Iſſues, it would incroach too much on other Juriſdictions; beſides, there was no Jury Proceſs in the antient *Aula Regis*, but upon (d) a Demurrer the Chancellor ſhall give Judgment.

4 Inſt. 80.

(c) That the Judgment is to be given in *B. R.* and that for this Purpoſe both Courts are but one.

Vide All. 16, 17. Cro. Jac. 12. 2 Rol. Abr. 349.——So if there be a Demurrer for Part, and Iſſue for Part, the whole Record may be tranſmitted into *B. R.* and the Judgment given there. 2 Sand. 23. Lev. 283. Mod 29. (d) So if the Iſſue is to be tried otherwiſe than by a Jury, as by the Biſhop's Certificate, &c. Judgment ſhall be given in Chancery. Jones 80. Latch. 3.

Abr. Eq. 128 pl. 8. *The King* and *Warden of the Fleet.*

An Inquiſition was taken, and a Forfeiture of the Office of Warden of the *Fleet* found, and the Defendant pleaded to Iſſue, and after Iſſue joined, ſeveral other Perſons came in by Way of *Monſtrans de droit*, and pleaded, and a Demurrer to them, and the Record was carried into *B. R.* by the Clerk of the Petty-Bag, without any Order of the Court, in order to have the Iſſue tried; and it was reſolved, 1ſt, That though the Clerk had committed a Fault to the Court of Chancery, in carrying the Record without any Order, yet that it was well removed; for that which is done by the proper Officer, is done by my Lord Chancellor, and may be ſaid to be done *propria manu*. 2dly, That though there were an Iſſue and Demurrer both, yet the removing the whole Record * was proper and well enough, on the (e) Authorities cited in the Margin, by which it appears, that Judgment is moſt properly to be given in *B. R.* both on the Iſſue and the Demurrer; otherwiſe there might be two diſtinct Judgments, and conſequently diſtinct Executions taken out.

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(e) 8 Co. the Prince's Caſe. 3 Sand. 6, 23, 157. 2 Keb. 621. Lev. 283. Sid. 436. Mod. 29. S. C.

4 Inſt. 80. (f) But cannot hold Plea of Land. 2 H. 6. 32.

Alſo all (f) Perſonal Actions, by or againſt any Officer or Miniſter, in reſpect of their Service or Attendance, may be determined in this Court; but in theſe no Jury Proceſs can iſſue, but the Record is to be removed *ut ſupra*.

(C) Of

(C) Of the extraordinary Court, proceeding according to Equity: And herein,

1. Of its original Jurisdiction; and how at first it has been impugned by the Common Law Courts.

THIS Court was (c) newly erected after the Division of the Courts, and from a very small and inconsiderable Beginning, hath (though (d) impugned even towards its first original Creation) grown up to that Degree, as to swallow up most of the other Business of the Common Law †

(c) That, like the other Courts of *Westminster*, it was Time out of Mind. 9 E. 4. 53. b. 12 Co. 113. *Dr. & Stud.* c. 7.—By Lamb. Archaion. 62. When the King's Courts ceased to be ambulatory, and became settled in a certain Place, then the King committed to his Chancellor, together with his Great Seal, his only legal, absolute and extraordinary Pre-eminence of Jurisdiction, &c. And in Lev. 242. it is said to be established by an Act of Parliament 36. E. 3. But Q. (d) For which *vide* the Petitions of the Commons against this new invented Jurisdiction. 3 H. 4. N° 69. 4 H. 4. N° 78. 3 H. 5. N°. 46. Rol. Abr. 327.

† It is not so now: for, since Lord Mansfield hath presided in the Court of King's Bench, the Action at Law, for Money had and received, having been much encouraged, it is found nearly equivalent to a Bill in Equity, for an Account, &c. And certainly, to a Subject of a free State, like ours, it must be more agreeable, more consonant to the Spirit of our Constitution, and consequently much more advantageous, to have Questions of Property determined by a Jury, than by any one Man, let his Integrity and his Abilities be ever so great. This Mode of proceeding at Law, has much diminished the Business of the Court of Chancery.

That there were some Footsteps in the antient *Curia Regis*, which was the Foundation of this Jurisdiction, appears from the *English* Jurisdiction exercised in the Court of Exchequer, where, on informations on the King's Behalf, Articles are administered, to which the Party is to answer upon Oath; as likewise by Impeachments in the House of Lords, where Articles are exhibited in *English* for the Party to answer to. Reg. 25.

But notwithstanding this, the Establishment of this Jurisdiction seems to be owing to the Statute of *Westm.* 2. *cap.* 24. above-mentioned, by which a Power was given, in new and extraordinary Cases, to invent a new Writ: Hence it was, that *John Waltham*, then Bishop of *Salisbury*, and Chancellor, as the Commons mention in their Petition, out of his Subtilty, found out and began a Novelty against the Form of the Common Law, and that was the Invention of the Writ of (e) *Subpœna*; which Writ summoned the Party to appear under a Pain, to answer to such Things as should be objected against him, and a Petition was lodged in Chancery, containing the Articles to which he was obliged to answer; and upon such Articles this new invented Writ issued.

(e) The *Subpœna* seems to have been taken up by the Court of Chancery, in order to oblige a Man to answer upon Oath as to the Truth of the Plaintiff's Allegations, because it came nearest the Common Law Process, called also a *Subpœna*, which issues to bring in Witnesses to attest the Truth.

By this Construction not only a new Writ was framed, but a new Jurisdiction erected, and this was towards the Time of *R.* 2 occasioned chiefly by the Statute of *Mortmain*; for when that Statute had restrained the growing Riches of the Clergy, they found out this Invention to avoid it, by giving away Lands to Trustees for pious Uses, and the Feoffees of such Trust did the Duties of such Tenure in Behalf of the Trust; but if they perverted the Trust, the ordinary Jurisdiction not reaching a Thing that was

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was againſt the Statute of *Mortmain*, the Chancellor exerted this extraordinary Juriſdiction, and examined them as to the ſeveral Facts alledged againſt them.

After the Eſtabliſhment of this Court, it was thought reaſonable to give Damages to ſuch Perſons as were drawn into it by falſe Suggeſtions, and therefore by the 7 *R.* 2. *cap.* 6. reciting, "For as much as People be compelled to come before the King's Council, or in the Chancery, by Writs grounded upon untrue Suggeſtions, *it is enacted*, That the Chancellor for the Time being, preſently after that ſuch Suggeſtions be duly found and proved untrue, ſhall have Power to ordain and award Damages according to his Diſcretion, to him which is ſo troubled unduly."

For the Conſtruction of this Statute, *vide* 4 Inſt. 83.

The Juriſdiction of this Court was not only impugned towards its original Creation, but even in the Reign of Queen *Elizabeth* it was ſtrongly holden by the Judges of the Common Law Courts, that the Chancellor could not by his Decree ſequeſter the Party's Lands, that is, could only *agere in Perſonam*, but not *in rem*; and agreeably hereto it was reſolved 16 *Eliz.* in the Caſe of * *Coleſton* and *Gardner*, That if a Man killed a Sequeſtrator in the Execution of ſuch Proceſs, it was no Murder.

Cro. Eliz. 651. *Brograve* and *Watts*. 4 Inſt. 84. Rol. Rep. 86, 190. Lit. Rep. 166. 27 H. 8. 15.

* 2 Ch. Caſ. 43. Cowp. 419.

But theſe were ſuch bloody and deſperate Reſolutions, and ſo much againſt common Juſtice and Honeſty, which requires, that the Degrees of this Court, which preſerved Men from Deceit, ſhould not be rendered illuſory, that they could not long ſtand; but this Proceſs got the better of thoſe Reſolutions, on theſe Grounds. 1ſt, That the extraordinary Juriſdiction might puniſh Contempts by the Loſs of Eſtate, as well as Impriſonment of the Perſon, becauſe that Liberty being a greater Benefit than Property; if they had Power to commit the Perſon, they might take from him his Eſtate till he had anſwered his Contempt. 2dly, To ſay that a Court ſhould have Power to decree about Things, and yet ſhould have no Juriſdiction *in rem*, is a perfect Soleciſm in the Conſtitution of the Court itſelf.

Alſo in the Reigns of Queen *Elizabeth* and King *James* the Firſt, there are (*a*) ſeveral ſtrong Opinions, That a Court of Equity could not examine or give any Redreſs in a Cauſe after Judgment at Law, and that Suits in Equity, to relieve againſt a Judgment at Law, are within the Statutes which make it a *Præmunire* to appeal to any Foreign Court, eſpecially if the End thereof be to controvert the very Point determined at Law, or to ſeek Relief after Judgment in a Caſe wherein the Law may relieve, as againſt exceſſive Damages, *&c.*

(*a*) As where a Perſon committed to the *Fleet* for not performing a Decree made ſubſequent and contrary to a Judgment at Law, was, by *Habeas Corpus* out of the *King's Bench*, admitted to Bail, and afterwards diſcharged. Cro. Jac. 341. And to this Purpoſe, *vide* 4 Inſt. 36, 91. Inſt. 123. Dalſ. 81. Moor 836. pl. 1129, 916. pl. 1300. Leon. 241. 2 Leon. 115. 3 Leon. 11. 2 Brownl. 97. Godb. 244. Rol. Rep. 71, 72, 252. 3 Bulſt. 118, 120. Lit. Rep. 37. Cro. Jac. 335, 344. March 54, 83.

But as theſe Opinions tended to render the Juſtice of this Court illuſory, whoſe peculiar Province it is to give Remedies in Caſes not remedial by the ordinary Juriſdiction, and to relax and mitigate the Rigour of the Common Law; they ſeem now to be wholly exploded; and this ſeems highly reaſonable, when it is conſidered how uncertain and doubtful the Law in many Caſes is before it is determined; and conſequently that before ſuch Determination it would be impoſſible to relax and mitigate the Rigour thereof.

Hard. 125. Mod. 59. 3 Keb. 221. Lev. 241. 2 Ch. Ca. 97. Abr. Eq. 130.

2. Wh

* 2. What Juriſdiction it exerciſes at this Day. *Page 590

The antient *(a)* Rule for the Juriſdiction of the Extraordinary Court of Chancery, was confined to Frauds, Accidents and Truſts; and though at this Day, by its Power in granting Injunctions, it curbs the Juriſdiction of other Courts, and thereby has ſwallowed up the greateſt Part of the Buſineſs of the Common Law; yet it is ſtill under ſome of theſe Notions that it exerciſes a Juriſdiction in relieving againſt Forfeitures, Penalties, where a Compenſation can be made, in preventing Multiplicity of Suits, decreeing a ſpecifick Execution of Agreements, aſſiſting defective Conveyances, *&c.* but in no Caſe will relieve againſt an Act of Parliament, directly againſt *(b)* a Fundamental Rule or Maxim of the Common Law, nor retain a Suit where the Party appears to have a plain and adequate Remedy at Law.

(a) Three Things, ſays my Lord *Coke*, are to be adjudged in a Court of Equity. 1. All Covins, Frauds and Deceits †, for which there is no Remedy by the ordinary Courſe of Law. 2. Accidents, as when a Servant, Obligor, or Mortgagor, is to pay Money on a certain Day, and they happen to be robbed in going to pay it. 3. Breaches of Truſt and Confidence. 4 Inſt. 84. 10 Mod. 1. See Caſes Temp. Talb. 40. *(b)* Therefore if Tenant for Life or Years levy a Fine, or ſuffer Recovery, Equity will not relieve againſt the Forfeiture. Preced. Chan. 570.—Alſo upon this Foundation, That a Court of Equity could not relieve againſt a Maxim of the Common Law; it was formerly holden, That one Executor could not compel the other to Account. Rol. Rep. 263.—That one Jointenant could not ſue his Companion. Rol Abr. 376.—That if an Obligee loſt his Bond he was without Remedy. Rol. Abr. 375.—So where the Leſſor entered upon his Leſſee, and ſuſpended his Rent, and it was held that he had no Remedy. Latch 149.—So where the Party became remedileſs by his own Act, as by paying Money without an Acquittance. Rol. Abr. 374.—So where one on valuable Conſideration promiſed to make a Leaſe, and it was held, That the Party could not ſue on this Promiſe in Equity, becauſe he might have an Action on the Caſe. Rol. Abr. 380. But theſe laſt Opinions are now of no Weight or Authority, as appears by daily Experience.

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† There are many Caſes of Covin, Fraud, and Deceit, where the Common Law will give Relief. There is one Species of Action which is called *An Action upon the Caſe for a Deceipt. Vide* 1 Com. Dig. 174. *&c.*

All Matters of Truſt are peculiarly within the Juriſdiction of the Court of Chancery; but if a Truſtee does by Fraud and Combination with the *Ceſtui que Truſt* endeavour to evade any Penal Law, under Pretence that a Truſt is only cognizable in Equity, and that Equity ſhould not aſſiſt a (*c*) Penalty, or (*d*) Forfeiture, yet Chancery will aid remedial Laws, and not ſuffer its own Notions to be made Uſe of to elude any beneficial Law. Abr. Eq. 131. *Vide* Tit. *Uſes and Truſts.*

(*c*) That a Penalty cannot be demanded in Equity. 2 Chan. Ca. 88. (*d*) That all Forfeitures muſt be waved, as in Waſte, ſo in a Bill for the Recovery of Tithes. Vern. 60. 2 Vern. 127. *Vide* Abr. Eq. 40, 127, *&c.* for the Authority of the Chancery of *Great Britain.* ſee Stra. 149.

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* Court of King's Bench.

Madox, c. 19. Bract. Lib. 3. c. 7. f. 105. 4 Inſt. 70. 2 Inſt. 24. Co. Lit. 71. Dyer 187. Cromp. of Courts 78. Rol. Abr. 94.

TOWARDS the latter End of the *Norman* Period, the *Aula Regis*, which was before one great Court, where the *Juſticiar* preſided, was divided into four diſtinct Courts, *i. e.* the Court of Chancery, King's Bench, Common Pleas, and Exchequer.

The Court of King's Bench retained the greateſt Similitude with the Antient *Curia*, or *Aula Regis*, and was always ambulatory, and removed with the King where-ever he went: Hence the Writs returnable into this Court are *Coram nobis Ubicunque fuerimus in Anglia*; and all Records there are ſtyled *Coram Rege*, as it is ſtill ſuppoſed to have always the King himſelf in Perſon ſitting in it; from whence it obtained the Name of the Court of King's Bench, and hath always retained a Supreme original Juriſdiction in all criminal Matters; for in theſe the Proceſs both iſſued, and was returnable into this Court; but in Treſpaſs it might be made returnable into either the King's Bench or Common Pleas, becauſe the Plea was Criminal as well as Civil.

(A) Of the Juriſdiction of the Court of King's Bench. 591.

And herein,

1. Of its Juriſdiction in Criminal Matters. 591.
2. Of its Juriſdiction in Civil Cauſes. 593.
3. Of its Juriſdiction in reforming and keeping Inferior Juriſdictions within their proper Bounds. 594.

(B) How far its Preſence ſuſpends the Power of all other Courts. 594.

(C) Of the Form of its Proceedings. 595.

(A) Of the Juriſdiction of the Court of King's Bench: And herein,

1. Of its Juriſdiction in Criminal Matters.

Sid. 168. 2 Hawk. P. C. 6.

THIS Court is termed the *Cuſtos morum* of all the Realm, and by the Plenitude of its Power, where-ever it meets with an Offence contrary to the firſt Principles of Juſtice, and of dangerous Conſequence if not reſtrained, adapts a proper Puniſhment to it.

4 Inſt. 71. 11 Co. 98. 2 Hawk. P. C. 6.

It has a peculiar Juriſdiction, not only over all Capital Offences, but alſo over (*a*) all other Miſdemeanors of a public Nature, tending either to a Breach of the Peace, or to Oppreſſion or Faction, or any Manner of Miſgovernment; and it is not material whether ſuch Offences

(*a*) Nor is it neceſſary to ſhew a Precedent of the like Nature formerly puniſhed here, agreeing in all Circumſtances with the Preſent. 2 Hawk. P. C. 7.

being

* being manifeſtly againſt the Public Good, directly injure any particular Perſon or not. *Page 592

And for the better reſtraining ſuch Offences, it has a Diſcretionary Power of inflicting exemplary Puniſhment on Offenders, either by Fine, Impriſonment, or other infamous Puniſhment, as the Nature of the Crime, conſidered in all its Circumſtances, ſhall require; and it may make uſe of any Priſon which ſhall ſeem moſt proper; and it is ſaid, That no other Court can remove or bail Perſons condemned to Impriſonment by this Court. 2 Hawk. P. C. 7.

Alſo it hath ſo Sovereign a Juriſdiction in all Criminal Matters, that an Act of Parliament, appointing that all Crimes of a certain Denomination ſhall be tried before certain Judges, doth not exclude the Juriſdiction of this Court, without expreſs negative Words; and therefore it hath been reſolved, that 33 *H.* 8. *cap.* 12. which enacts, That all Treaſons, *&c.* within the King's Houſe, ſhall be determined before the Lord Steward of the King's Houſe, *&c.* doth not reſtrain this Court from proceeding againſt ſuch Offences. 2 Inſt. 549. 2 Jones 534. 2 Hawk. P. C. 7.

But where a Statute creates a new Offence, which was not taken Notice of by the Common Law, and erects a new Juriſdiction for the Puniſhment of it, and preſcribes a certain Method of Proceeding, it ſeems queſtionable how far this Court has an implied Juriſdiction in ſuch a Caſe. Sid. 296. 2 Hawk. P. C. 7.

Alſo this Court, by the Plenitude of its Power, may as well proceed on Indictments removed by *Certiorari* out of Inferior Courts, as on thoſe originally commenced here, whether the Court below be determined, or ſtill *in eſſe*, and whether the Proceedings be grounded on the Common Law, or on (*a*) a Statute making a new Law concerning an old Offence. Dalſ. 25. 44 E. 3. 31. b. Cromp. Juriſdiction 131.

(*a*) As the Statutes of Forcible Entries. 9 Co. 118. *vide* Tit. *Forcible Entry and Detainer* —And the Statute of *Pb. & Ma.* againſt Perſons taking away Females under the Age of ſixteen Years, from their Guardians. Cro. Car. 465. 2 Inſt. 549. 2 Lev. 179. 2 Mod. 128. 2 Jones 53. 3 Keb. 594, 106, 273. 2 Hawk. P. C. 9.

But the Court of King's Bench will not give Judgment on a Conviction in the Inferior Court, where the Proceedings are removed by *Certiorari*, * but will allow the Party to wave the Iſſue below, and to plead *de novo*, and to go to a Trial upon an Iſſue joined in *B. R.* Carth. 6. adjudged in the Caſe of one *Baker*, who was convicted at *Kingſton* upon *Hull*, for ſpeaking ſeditious Words.

* There are many Caſes where a *Certiorari* is not to be granted, and others, where grantable, to be grantable under Terms, *&c.* See Table to Stat. Tit. *Certiorari*.

Nor can a Record, removed into the King's Bench from an Inferior Court, regularly be remanded after the Term in which it came in; yet if the Court perceives any Practice in endeavouring to remove ſuch Record, or that it is intended for Delay, they may in Diſcretion refuſe to receive it, and remand it back before it is filed. 2 Hawk. P. C. 7. and ſeveral Authorities there cited.

Alſo by the Conſtruction of the Statutes, which gave a Trial by *Niſi prius*, the King's Bench may grant ſuch a Trial in Caſes of Treaſon or Felony, as well as in common Caſes, becauſe for ſuch Trial, not the Record, but only a Tranſcript is ſent down. 4 Inſt. 74. Raym. 364.

And by the 6 *H.* 8. *cap.* 6. it is enacted, "That the King's Bench have full Authority, by Diſcretion, to remand as well the Bodies of all (*b*) Felons removed thither, as their Indictments, into the Counties where the Felonies were done; and to command all Juſtices of Gaol-Delivery, Juſtices of the Peace, and all other Juſtices, to proceed thereon after the Courſe of the Common Law, as the ſaid Juſtices might have done, if the ſaid Indictments and Priſoners had not been brought into the ſaid King's Bench."

(*b*) Extends not to High Treaſon. Raym. 367.

(a) 4 Inſt. 73. 9 Co. 118. b. (b) 4 Inſt. 73. *Page 593 (c) 4 Inſt. 74. Vaugh. 157.

The Judges of this Court, are the (a) Sovereign Juſtices of *Oyer* and *Terminer*, Gaol-Delivery, Conſervators of the Peace, &c. as alſo the (b) Sovereign Coroners; and therefore, where the Sheriff and Coroners * may receive Appeals by Bill, *a fortiori* they may; alſo this Court may (c) admit Perſons to Bail in all † Caſes according to their Diſcretion.

† *Qu.* As to this, if it is for Treaſon, Murder, or a Capital Felony, plainly expreſſed in the Warrant, and there is not any Circumſtance, in favour of the Priſoner?

2. Of its Juriſdiction in Civil Cauſes.

17 E. 3. 50. Rol. Abr. 536, 537.

At the firſt Diviſion of the Courts, the original Intention appears plainly to have been to confine the Juriſdiction of the Court of King's Bench to Matters merely Criminal; and accordingly ſoon afterwards it was thus enacted by (d) *Magna Charta, cap.* 11. (e) *That Common Pleas ſhall not follow* (f) *our Court, but be held in a certain Place:* Hence it is, that at this Day this Court cannot determine a mere Real Action.

(d) For the Expoſition of this Statute, and what ſhall be ſaid a Common Plea, *vide* 2 Inſt. 21, 22. Rol Abr. 536, 537. (e) But theſe general Words bind not the King, for he may bring an Action there for a Common Plea. 2 Inſt. 23. 2 Rol. Rep. 290. (f) This extends both to the King's Bench and Court of Exchequer. 2 Inſt. 23, 550. But *vide* 4 Inſt. 113.

2 Inſt. 23. 4 Inſt. 72, 113. & *vide* 2 Sand. 256. Show. P.C. 57.

But notwithſtanding Common Pleas cannot be immediately holden in *Banco Regis*, yet where there is a Defect in the Court, where by Law they may be holden originally, they may be holden in *B. R.* As if a Record come out of the Common Pleas by Writ of Error, there they may hold Plea to the End; ſo where the Plea in a Writ of Right is removed out of the County by a *Pone* in *B. R.* ſo on a Writ of Meſne, Replevin, &c.

2 Inſt. 23.

So any Action *vi & armis*, where the King is to have a Fine, as Ejectment, Treſpaſs, Forcible Entry, &c. being of a mixed Nature, may be commenced in *B. R.*

2 Inſt. 23. 4 Inſt. 71. 2 Bulſt. 123.

Alſo any Officer or Miniſter of the Court, intitled to the Privilege thereof, may be there ſued by Bill in Debt, Covenant, or other Perſonal Action; for the Act takes not away the Privilege of the Court.

4 Inſt. 71. Cro. Car. 330. Cowp. 455. Tidd's Prac. 186, 193.

And this begat the Notion, That if a Man was taken up as a Treſpaſſer in the King's Bench, and there in Cuſtody, they might declare againſt him, in Debt, Covenant or Account; for this likewiſe was a Caſe of Privilege ſince the Common Pleas could not procure the Priſoners of the King's Bench to appear in their Court; and therefore it was an Exception out of the Statute of *Magna Charta*.

(g) It was a Maxim of the Common Law

(g) By the Statute of *Glouceſter, cap.* 8. None ſhall have Writs of Treſpaſs before Juſtices, unleſs he ſwear by his Faith that the Goods taken away were worth forty Shillings.

quod placita de Catallis, Debitis, &c. quæ ſummam 40s. attingunt, vel eam excedunt, ſecundum Legem & conſuetudinem Angliæ ſine Brevi Regis placitari non Debent. 2 Inſt. 312. 6 E. 1. For Expoſition whereof, *vide* 2 Inſt. 310, &c. put but for Example; for ſo it is in Debt, Detinue, Covenant, &c. 2 Inſt. 391. *Secus* in Treſpaſs *vi & armis*, where the King is to have a Fine, for a Fine cannot be aſſeſſed but by a Court of Record. 2 Inſt. 391. F. N. B. 47. 3 Mod. 276.—So in Treſpaſs for taking Charters concerning a Freehold; for it is a Maxim in Law, that ſuch Pleas ſhall not be in any Court but of Record. 2 Inſt. 391. F. N. B. 47. Raym. 293. This Courſe of making an Affidavit, by Experience, was ſo dangerous and troubleſome, that it was forborn; and the Defendant left to take ſuch Exceptions as the Common Law gave him. 2 Inſt. 391. If upon a Nonſuit in an inferior Court 16*s.* is given for Coſts, by 23 H. 8. c. 15. Debt lies for it in *B. R.* becauſe given by a ſubſequent Statute. Cro. Eliz. 96. Leon. 316. For as the Inferior Courts which are not of Record, regularly cannot hold Plea of Debt, &c. or Damage, unleſs under 40*s.* So the Superior, which are of Record, cannot unleſs above 40*s.* 2 Inſt. 391.—[But if the Damages are laid in the Declaration, to 40*s.* at leaſt, the Superior Courts, hold the Plea, and will not ſtay the Suit on Motion.—And it is the Privilege of the Subject to ſue in any of the King's Courts (according to the Nature of the Action) as he pleaſes. The Court of King's Bench now holds Plea in all Actions, (*Real* and *Quare Impedit* excepted) ſuppoſing the Defendant to be in the Cuſtody of the Marſhal, if the Proceedings are by Bill.—If by Original, there is not any Occaſion for that Fiction.]

3. Of its Juriſdiction, in reforming and keeping inferior Juriſdictions within their proper Bounds. *Page 594

The Court of King's Bench, as it is the Higheſt Court of Common Law, hath not only Power to reverſe erroneous Judgments for ſuch Errors as appear the Defect of the Underſtanding, but alſo to puniſh all inferior Magiſtrates, and all Officers of Juſtice, for wilful and corrupt Abuſes of their Authority againſt the obvious Principles of natural Juſtice; the Inſtances of which are ſo numerous, and ſo (*a*) various in their Kinds, that it ſeems needleſs to attempt to inſert them. 2 Hawk. P. C. 8. Vaugh. 157 Salk. 201. pl. 3.

(*a*) Where the Court of King's Bench called the Sheriff of *Middleſex*, and appointed that Watches ſhould be ſtrictly kept in the Suburbs, and about the New Building, as a Thing belonging to the Care of this Court. Sid. 218.

Judgment was given in an Action in the Sheriff's Court of *London*, and after it was removed to the Mayor's Court by a *Levata Querela*, within which Court there are four Attornies, and by excluſive Cuſtom no other can be Attorney there; and one of the Attornies there was aſſigned to the Plaintiff by the Recorder; but becauſe the preſent Mayor was concerned in the Cauſe, the ſaid Attorney, and all others refuſed to act for him: And by *Maynard*, No Perſon can withdraw himſelf out of the Juriſdiction of this Court, which hath ſuperintendant Power, if an Officer refuſes to do his Duty; and he mentioned a Caſe cited by *Noy*, where the Biſhop of *Exon* refuſed to allow Criſm, or Baptiſmal Oil to the Pariſhioners of *D.* and a *Mandamus* was directed to him out of this Court: So in all Caſes, as where the Ordinary refuſes to grant Probate of Wills, *&c.* *Wild* was of the ſame Opinion, That if any Court refuſes to do Juſtice, this Court may command it; and in this Caſe it will be in the Power of the Attornies to delay Juſtice; and therefore the Court ſent for the Recorder and informed him of the Matter, and declared, that this was good Cauſe to forejudge the Attorney, and that it was a dangerous Matter to deny Juſtice in ſuch a Manner; and mentioned the Abbot of *Crowland*'s Caſe, 20 *E.* 4. where the Liberties were ſeized becauſe he had not Officers. *Buxton*, v. *Singleton*, Hil. 26 Car. 2. 3 Keb. 432. S. C.

(B) How far its Preſence ſuſpends the Power of all other Courts.

THIS Court being the Supreme Court of *Oyer* and *Terminer*, Gaol-Delivery and *Eyre*, its Preſence ſuſpends the Power and avoids the Proceedings of all other Courts of the ſame Nature in the County wherein it ſits, during its Sitting there, (*b*) eſpecially if the Juſtices of ſuch Courts have Notice of its ſitting. H. P. C. 156. 9 Co. 118. 27 Aſſ. pl. 1. 3 Inſt. 27. 2 Hawk. P. C. 8.

(*b*) Or without Notice, *Per* 4 Inſt. 73.

But if an Indictment in a foreign County be removed before Commiſſioners of *Oyer* and *Terminer* into the County where the King's Bench ſits, they may proceed; for that the King's Bench not having the Indictment before them cannot proceed for this Offence. 4 Inſt. 73.

But if an Indictment is found in the Vacation-time in the ſame County in which the King's Bench ſits, and in Term-time the King's Bench is adjourned, there may be (*c*) a ſpecial Commiſſion to hear and determine it. 4 Inſt. 73.

(*c*) That it is beſt if ſuch Commiſſion bear *Teſte* in Term-time. 3 Inſt. 27. & *vide* Keilw. 152. Dyer. 286. pl. 45. 2 Hawk. P. C. 8.

(C) Of

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* (C) Of the Form of its Proceedings.

Vide Head of *Proceſs.*

THE Civil Side in the King's Bench commences on a Suppoſition a Treſpaſs committed by the Defendant in the County where it re ſides, and that he is taken up by Proceſs of that Court, as the Sovereig *Eyre*, and committed to the Marſhal, in which Caſe he may be declare againſt in any Civil Action whatſoever.

The firſt Proceſs therefore is a Bill either Real or Feigned, and ſo calle becauſe its Foundation was the Bill of Complaint in Court touching th Treſpaſs; on this is founded the *Latitat*, which ſuppoſes that the Defe dant had eſcaped, and therefore iſſues in the King's Name, to apprehe the Party wherever he may be found; for the King has an univerſal J riſdiction over all his Subjects, and conſequently may call any of the that fled from the Juſtice of his own Court.

2 Hawk. P. C. 8, 9.

All Proceſs or Writs of Appeal, and all Proceſs on Indictments remo ed hither by *Certiorari* from a *(a)* foreign County, ought to be returnab *Coram nobis ubicunque fuerimus.* *

(a) But all Proceſs upon Bills of Appeal againſt one in *Cuſtodia Mareſchalli*, ought to be returnable *Coram no apud Weſtmonaſterium.* 2 Hawk. P. C. 8, 9. Of Indictments commenced in the King's Ben 2 Hawk. P. C. 9. Q.

* And ſo are Proceedings in Civil Suits, in this Court, by Original.

9 Co. 118. Co. Lit. 134. Lev. 61. Sid. 72. 2 Rol. Abr 626. 3 Inſt. 550.

Alſo it hath been reſolved, That where the Court proceeds on an O fence committed in the ſame County wherein it ſits, the Proceſs may made returnable immediately; but that where it proceeds on an Offen removed by *Certiorari* from another, there muſt be fifteen Days betwe the *Teſte* and Return of every Proceſs.

Court of Common Pleas.

Maddox, c. 9.

TOWARDS the *Norman* Period, the Power of the *Juſticiar* broken, and the *Aula Regis*, which was one great Court, divid into four diſtinct Courts, as we have them at this Day in *Weſtmin Hall*; the Common Pleas was eſtabliſhed for the Determination (*b*) Pleas merely Civil, and was at firſt ambulatory, and removed w the King wherever he went; but by (*c*) *Magna Charta, cap.* 11. *Com nia placita non ſequantur* (*d*) *Curiam noſtram ſed teneantur in aliquo Loco.*

(*b*) Becauſe the Cauſes between Subject and Subject were to be there determined, therefore the Style of this Court was *Placita coram*, &c. or *mon Pleas*; the Word *Pleas*, antiently ſignifying the Convention of the States *in Campis*, *Germanice in* Placts; and becauſe in thoſe Conventions of the States all Cauſes were heard, bated and determined, therefore by Corruption they got the Name of *Pleas* from the C where they were decided: Hence the Court that was particularly erected to hear and de mine ſuch and ſuch Cauſes, was called the Court of Pleas. Dufr. 395. (*c*) That this C was not created by or ſoon after the making of *Magna Charta*, *vide* Co. Lit. 71. b. 2 Inſt. And for my Lord *Coke*'s Opinion of the Antiquity of it, *vide* the *Prefaces* to the 8 and 9 and 8 Co. 145. (*d*) Before this Act, Common Pleas might have been held in *B. R.* an original Writs were returnable there. 2 Inſt. 21.

* The Juriſdiction of this Court is founded on (a) original Writs iſſuing out of the Chancery, which are the King's Mandates for them to proceed on, to determine ſuch and ſuch Cauſes; theſe Writs iſſue out of Chancery, becauſe, when the King's Court was but one, the Chancellor had the Seal; and therefore, when they were divided, he ſealed all original Writs. By this Method the Seal was a Check on the other Courts, to know what Cauſe was there, and likewiſe, that the (b) Fines for having Juſtice in the King's Court ſhould be anſwered incontinently before there were any Proceedings. *Page 596

4 Inſt. 99.

(a) Bracton lib. 3. f. 105, b. pl. 2. ſays, *Sine Warranto Juriſdictionem non habent*; and to the ſame Purpoſe is Fleta, lib 2. c. 34. f. 85. Briton 2. b. ſays, On the Eſtabliſhment of this Court, that they ſhall plead ſuch Common Pleas as we ſhall command them by our Writ, ſo that the Proceedings on our Writs may be recorded. (b) In Maddox 293 to 314. there are Variety of Inſtances of Fines recorded for having Juſtice in the King's Courts. See Anc. Dial. of Exchеq. 56.

But this is to be underſtood when the Cauſe is between common Perſons; for when an Attorney, or any Perſon belonging to the Court, is Plaintiff, he ſues by Writ of Privilege, and is ſued by Bill, which is in Nature of a Petition; both which originally commence in the Common Pleas and have no Foundation in the Chancery. 4 Inſt. 99.

This Court, my Lord *Coke* ſays, is the Lock and Key of the Common Law in Common Pleas; for herein are Real Actions, whereupon Fines and Recoveries do paſs; as alſo all other Real Actions by original Writs; alſo Common Pleas Mixt or Perſonal, in divers * of which the *King's Bench* has a (c) concurrent Juriſdiction with this Court. 4 Inſt. 99.

(c) But the Juriſdiction of each Court is ſo well eſtabliſhed, that at this Day the Court of King's Bench cannot be authorized to determine a meſe Real Action; ſo neither can the Court of Common Pleas, to inquire of Felony or Treaſon. 2 Hawk. P. C. 2. *Vide* Tit. *Court of King's Bench.*

* See Note *ante*, at the End of f. 593.

This Court, without any Writ, may upon a Suggeſtion grant Prohibitions, to keep as well Temporal as Eccleſiaſtical Courts within their (d) Bounds and Juriſdiction, without any Original or Plea depending; for the Common Law, which in theſe Caſes in a Prohibition of itſelf, ſtands inſtead of an Original. 4 Inſt. 99.

Said to be adjudged by all the Judges of *England*, Mich. 7. Jac. 1. And that there were ſeveral Precedents to this Purpoſe. (d) All Prohibitions for incroaching Juriſdiction iſſue as well out of the Common Pleas as King's Bench. Vaugh. 157. *per Vaughan* Ch. Juſt.

This Court, in Term Time, may award a *Habeas Corpus* by the Common Law, † for any Perſon committed for any Cauſe under Treaſon or Felony, and thereupon diſcharge him, if it ſhall clearly appear by the Return, that the Commitment was againſt Law, as being made by one who had no Juriſdiction of the Cauſe, or for a Matter for which, by Law no Man ought to be puniſhed. Vaugh. 154. *&c.* & *vide* 2 Jones 14.

† So it may by the *Habeas Corpus Act*, 31 Car. 2. c. 2. So by the ſame Stat. any Judge of this Court, may in the Vacation award an *Habeas Corpus*.

This Court, upon an Adjournment, upon a Foreign Voucher may hold Plea likewiſe upon other Foreign Pleas, and upon general Baſtardy, *Ne unques accouple in Loiale Matrimony*, *&c.* for none but the King's Courts, and no inferior Court, ſhall write to the Biſhop; ſo likewiſe upon Antient Demeſne pleaded. 4 Inſt. 100.

Court

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* Court of Exchequer.

(A) Of the Nature and Antiquity of this Court. 597.
(B) In what Cases it has a Jurisdiction. 598.
(C) Of the Manner of its Proceedings. 600.

(A) Of the Nature and Antiquity of this Court.

4 Inst. 103. THE Court of (a) Exchequer is an (b) ancient Court of Record, for all Matters relating to the Revenue of the Crown.

(a) The Common Derivation of the Word is from the old *French* Word *Eſchequier*, which ſignifies a *Cheſs-board*, or *Chequer Work*; and becauſe a Cloth of that Kind was laid upon the Table upon which the Accountants told out the King's Money, and ſet forth their Accounts, in the ſame artificial Manner as is done in the Cofferer's Account at this Day, it was called the Court of Exchequer. Maddox 109. Spelm. Gloſſ. Tit. *Scacc' Forteſc. on Monarchy*, the Notes there, 117, 118. (b) It was formed from the Exchequer in *Normandy*, which was a Court of Sovereign Juriſdiction, and ſuperintended all Manner of Complaints, by and againſt the Sheriffs and Bailiffs who exerciſed an ordinary Juriſdiction, and whoſe Duty it was to gather the Duke's Rents in each Bailiwick, and to account for the ſame in this great Court; and as in the Court of *Normandy* the great Officers of State ſat as Judges, ſo with us, before the Diviſion of the Courts, the great Miniſters, as the Juſticiar, Conſtable, Seneſchal, Chancellor and Treaſurers, ſat in this Court; but the Treaſurer uſually preſided, as beſt acquainted with all Matters relating to the Revenue. Maddox 109. *Vide* alſo for the Antiquity of this Court, and of its ſeveral Officers, and their Duty. 4 Inſt. 103. Sav. 48. 2 Inſt. 104. 105, 551.

(c) The Court of First-Fruits and Tenths, erected *tempore* H. 8. was diſſolved by Queen *Mary*, Parl. 1. ſeſſ. 2. c. 10. and the Clergy diſcharged thereof by 2 & 3 *Ph. & Ma.* c. 4. But by the Firſt of Eliz. c. 4. the Firſt-Fruits and Tenths are re-united to the Crown, but no Court is revived, but the ſame to be within the Rule, Survey and Government of the Exchequer, &c. 4 Inſt. 120.—The Court of Augmentations was erected by 33 H. 8. c. 39. But Queen *Mary* according to the Power given her by the Statute 1 *Ma.* c. 10. by Letters Patent dated 23 *January* in the ſame Year, diſſolved the ſame Court; and the next Day, by other Letters Patent, united the ſame to the Exchequer, which was utterly void, becauſe ſhe had diſſolved the ſame before. 4 Inſt. 118. Moor 289. But *vide* Plow. 377, 542. and the Banker's Caſe, where, by the Opinion of Lord *Sommers*, the Uniting of the Court of Augmentations to the Court of Exchequer was not abſurd, nor an impracticable Thing. (d) This is the true Centre, into which all the King's Revenue and Profit ought to fall. 2 Inſt. 197. (e) What Cauſes are to be adjourned thither, and the Method there, as to the arguing of them by the Judges. 2 Bulſt. 146. Lev. 7. (f) 4 Inſt 68, 110. (g) Erected by 31 Ed. 3. c. 12. (h) Erected by 27 Eliz. c. 8. (i) The Lord Treaſurer, Chancellor, and Barons of the Exchequer, are the Judges of this Court; and their Juriſdiction is as large, for Matters of Equity, as that of the Barons in the Court of Exchequer, for the Benefit of the King, by the Common Law. 4 Inſt. 118.

In the (c) Exchequer there are ſeven Courts, 1. The Court of Pleas. 2. The Court of Accounts. 3. The Court of (d) Receipt. 4. The Court of Exchequer (e) Chamber, being the (f) Aſſembly of all the Judges of *England*, for Matters of Law. 5. (g) The Court of Exchequer Chamber, for Errors in the Court of Exchequer. 6. (h) The Court of Exchequer-Chamber, for Errors in the King's Bench. 7. (i) The Court of Equity in the Exchequer-Chamber.

* (B) In what Cases it has a Jurisdiction. *Page 598

BY the (a) Statute of *Rutland*, made 10 *E.* 1. (b) "No Plea shall "be held in the Exchequer, unless it specially concern the King or "his Ministers."

(a) It hath been doubted, whether this is an Act of Parliament, or an Ordinance only, made by the King, for the better Order of this Court. Plow. 209. 4 Inst. 113.—But 2 Inst. 551. it is said, there is a Writ in the *Register* under Title *Brevia de Statut'*. which recites the Words of this Statute; and in the Margent of the Writ *Statut' de Rutland* is quoted; so that without Question this Statute was made by Authority of Parliament. And 4 Inst. 113. it is said, it is entered in the Parliament Rolls, & *vide* 8 Co. 20. —But 4 Inst. 114. it is said, the Writ is founded upon the Common Law and Custom of the Realm. (b) This is only in Affirmance of the Common Law.

The King's (c) Farmer may sue one that detains from him Part of the Possessions that he hath from the King, out of which the Farm is to be paid, by which he cannot pay his Farm to the King.

38 Ass. 20. Rol. Abr. 538.

(c) So of his Debtor †. 2 Inst. 551.

† And by this Fiction, the Court of Pleas hath a Concurrent Jurisdiction with the Common Pleas and King's Bench in Civil Suits, (except *Real Actions* and *Quare Impedit.*)

The Debtor (d) of the King's Debtor may sue here by *Quo minus*.

4 Inst. 112.

(d) That the Lessee of the King's Lessee is not intitled to the Privilege of the Court of Exchequer. Owen 38.——[But see the preceding Note, and the same Fiction is used on the Equity Side.]

An Information for the Queen and Party, upon the Statute of Liveries, 8 *E.* 4. *cap.* 2. was brought in the Exchequer, though by the express Words of the Statute it ought to be in the King's Bench, or Common Pleas, before Justices of the Peace, &c. but the Exchequer is not mentioned; and it was adjudged it lay in this Court, because the Queen was Party, and there were no Negative Words; without which (e) this being a Superior Court shall have Jurisdiction.

Sav. 134. *Agard* and *Cavendish*, adjudged. Cro. Eliz. 326. S. C. *adjornatur*. Moor 564. S. C. upon a Writ of Error *in Cam'*. *Scacc.* reversed as to the Informer; for the Penalty was given to him only that informed in the Courts specially named. 2 And. 127. S. C. reversed accordingly.

(e) Plow. Com. 208.

If the King's Farmer sues in the Exchequer against a Person for detaining of Tithes, Parcel of the Possessions to him leased in Farm by the King though the Right of Tithes comes in Debate between them, yet the Court shall not be ousted of Jurisdiction.

38 Ass. 20. Rol. Abr. 538.

If *J. S.* be Parson impropriate of *D.* and *B.* Vicar there, and the King Patron of the Vicarage, and there is a Debate between the Parson and Vicar for Tithes, the Suit for these Tithes ought to be in the Exchequer.

Lane 100. Rol. Abr. 538. S. C.

If (f) a Copyholder of the King's Manor be sued in the Ecclesiastical Courts for Tithes, upon a Suggestion *in Scaccario*, that he prescribed to pay a certain *Modus decimandi*, he shall have a Prohibition there, and this *Modus* shall be tried there.

Lane 39. Rol. Abr. 539. S. C.

(f) So of the King's Farmer. Lit. Rep. 525.

If a Man be amerced in the King's Leet, and upon Process out of the Exchequer the Bailiff distrains him for the Amercement, and he brings Trespass,

Lane 55. Rol. Abr. 539. S. C.

Treſpaſs, he ought to bring this Action of Treſpaſs in the Office of Pleas of the Exchequer; for the Bailiff levied it as an Officer of this Court.†

† *Sed qu.* If ſuch Action may not be brought in *B. R.* or *C. P.*?

Rol. Abr. 539. Lane 98. S. C. *adjornatur.* If an erroneous Judgment be given in a *Formedon* in a Copyhold Court, in the County where the King is Lord, the Party againſt whom the Judgment is given may ſue, by Petition or Bill to the King, in the *Exchequer-Chamber*, in the Nature of a Writ of Falſe Judgment, for the Reverſal of this Judgment; for as in the Court of a common Perſon, the proper Suit for Reverſal thereof is to the Lord, by Petition; ſo it is here to the King; *Page 599 * and the Exchequer-Chamber is the more proper to ſue to the King by Petition than the Chancery, becauſe it concerns the King's Manor.

Rol. Abr. 539 Lane 53. S. C. *Vide Tit. Sheriff.* An Action of falſe Impriſonment, or other Action, may be brought againſt the Under-Sheriff, in the Exchequer, though the Sheriff be the Officer of the Court, for the Court takes Notice of the Under-Sheriff alſo.

4 Inſt. 118. If *A.* holds Lands of the King by Fealty and Rent, and makes a Leaſe thereof for Years to *B.* and *C.* pretends a prior Leaſe to him by *A.* though there is a Rent iſſuing out of thoſe Lands to the King, yet neither *B.* nor *C.* can ſue in this Court by any Privilege, in reſpect of the Rent; for that the King can have no Prejudice or Benefit thereby; for, whether *B.* or *C.* prevails, the Rent muſt be paid.*

* *Sed qu.* If he may not ſue here, by uſing the common Fiction.

4 Inſt. 118. But if the King extends Lands, as the Lands of *A.* for the Debt of *A.* and leaſes the ſame to *B.* for Years, reſerving Rent, and *C.* pretends that *A.* had nothing in the Land, but that he was ſeiſed thereof, &c. this is within the Privilege of the Court; (*a*) for if *C.* prevails the King loſes his Rent.

(*a*) The King brought Debt againſt a Prior Alien, and the Prior had Proceſs againſt *A.* who detained Goods from him, without which he could not anſwer the King; and *A.* came and claimed the Goods as his Tithe as Parſon of *B.* and thereupon Iſſue was taken for the King triable in the Exchequer. 4 Inſt. 111.

4 Inſt. 119. If the King leaſes to *A.* for Years, rendering Rent, the King may diſtrain in all other the Lands of *A.* for his Rent, yet *A.* hath no Privilege for his other Lands, to bring them within the Juriſdiction of this Court.

Hard. 160. If a Man files a Croſs Bill in this Court, he need not intitle himſelf to the Juriſdiction of the Court, becauſe the Croſs Bill is grounded upon another Bill in Court.

Hard. 160. So if a Man be ſued in the Office of Pleas, he may have an *Engliſh* Bill to be relieved againſt that Suit, without ſetting forth Matters of Juriſdiction.

Hard. 176. If *A.* is outlawed at the Suit of *B.* and Lands in the Poſſeſſion of *A.* extended, and *C.* claims Title to them, and pleads to the Inquiſition, if *C.* will bring an Ejectment for them, it muſt be in this Court, becauſe the King's Revenue is concerned.

Hard. 193. If *A.* hath Title to Lands under an Extent out of the Exchequer, for Debts in Aid, he muſt bring his Ejectment for them in this Court, and having brought his Ejectment for them in the (*b*) Common Pleas, upon Motion he was ordered to proſecute here.

(*b*) Where not allowed to proſecute in Chancery. 2 Vern. 416. & *vide* Vern. 220, 469.

Sav. 22. Hard. 33. By the 33 *H.* 8. *cap.* 39. ſ. 57. the Court of Exchequer has Power to diſcharge all Debts and Duties due to the King, upon any Equity diſcloſed and

and it is by Virtue of this Act that they discharge Recognizances; and it seems by the said Act, they may discharge Penal Laws † made before this Statute; but all Penal Laws made after the Statute cannot be discharged, but must be compounded. ‡

† *Qu?*

‡ The Author must, I conceive, mean that Actions on Penal Statutes may be compounded by Leave of the Court, the Parties interested consenting, and moving the Court, where the Action is depending, for that Purpose.——But certainly the Courts cannot suspend the Operation of Laws in Force.

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* (C) Of the Manner of its Proceedings. *Page 600

IF prohibited Goods are seised, and Proclamation made according to the Course of the Court, the Owner shall not have them (*a*) delivered unto him upon Security, without putting in (*b*) a Plea, shewing Cause why he should have them. Sav. 10. (*a*) By 13 & 14 Car. 2. c. 11. No. Writ of Delivery shall be granted but upon good Security, and for Goods perishable, or where the Informer shall delay the Trial. (*b*) Upon a Bill in Equity to discover the Value of Cordage seized to the King's Use, the Defendant, in his Answer, made Title to it as his own; and upon giving Security had a Writ of Delivery, though the King claimed the Property as his own Goods, and not as Goods forfeited. Hard. 191. But it was said, it would have been otherwise if the King's Title had appeared by Inquisition or other Record.

Before the 5 *R.* 2. so great Care was taken of the King's Revenue, that no Man might sue or plead for their Discharge of any Debt, Account or Demand in this Court, without express Command, or Letter of the Great Seal. 4 Inst. 110.

But by 5 *R.* 2. *cap.* 9. this Practice was declared illegal, and ordained, That the Barons should have Power to hear every Answer of every Demand in this Court; so that every Person, &c. may plead, sue &c. without suing any Writ or other Commandment. 4 Inst. 110.

In case of an Outlawry, it is the Course of the Exchequer to prefer an Information, in Nature of a Trover and Conversion, against him that hath the Goods of the Party outlawed. Mod. 90. *Per Hale*, Ch. Just. Will. Rep. 445. pl. 128, 684, 687, 690. 2 Wil. Rep. 269. pl. 68. 270 Comyns 51. pl. 34. Ld. Raym. 305. Salk. 395, 408. pl. 4. 5 Mod. 109. Carth. 441. Skin. 617. pl. 13. Comb. 107, 470. Fitzgib. 265, 266. 10 Mod. 188, 189, 357, 380, 409. 11 Mod. 173. pl. 15. 12 Mod. 175, 176, 177, 438.

Court

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* Court of the Conſtable and Earl Marſhal.

Maddox 27. Fleta, lib. 2. c. 31. Spelm. Gloſſ. *(a)* The Name is of *Norman* Extraction,

IN the King's own Court, eſtabliſhed by *William* the Conqueror, there were High Officers, called the (*a*) Conſtable and (*b*) Marſhall, to whom chiefly belonged the Conuzance of Matters of Honour, War and Peace; and therefore all foreign Facts committed by the King's Subjects were referred to them to determine, according to the Law of Nations and of Arms.

and came from their *Comes Stabuli*; there was the like Officer in *France*, called *Le Conſtable de Franc*, who was the Great General of the Army, whoſe Power was confined to Matters of War only: But it ſeems the Conſtable of *England* had a Civil as well as a Military Juriſdiction, eſpecially as to Matters tranſacted in foreign Parts: This Officer was firſt created in *William* the Conqueror's Time, and was antiently hereditary, and went to Females; but, being an Office of ſuch high Power and Dignity, it became formidable to the Crown; and therefore H. 8. got rid of it, ſince which there has been no ſuch Officer for a Conſtancy, but only one created *pro hac vice*. *Vide* the Notes to Forteſ. on Monarchy 130. 48 E. 3. 3. 13 H. 4. 4. 5. 4 Inſt. 127. Dyer 285. *(b)* Of the ſeveral Kinds of Marſhals that were Attendants on the King's Court, and the Nature of their Offices, *vide* Maddox 31, 32, 33. And that the Marſhal who was joined with the Conſtable, ſat as Judge with him, and was called the Earl Marſhal, or Marſhal of *England*, *vide* Fleta, lib 2. c. 3. Maddox 33. Show. P. C. 60. Co. Lit. 74. 4 Inſt. 123.

But to underſtand the Nature and Juriſdiction of this Court, at preſent I ſhall conſider,

(A) **Of the Manner of holding this Court; and herein, whether it can be held by Commiſſion, by the Earl Marſhal only; and whether it may be prohibited if it exceeds its Juriſdiction.** 601.
(B) **In what Caſes it has a Juriſdiction.** 602.
(C) **Of the Form and Manner of its Proceedings.** 603.

(A) Of the Manner of holding this Court; and herein, whether it can be held by Commiſſion, by the Earl Marſhal only; and whether it may be prohibited if it exceeds its Juriſdiction.

(c) So reſolved in *Parker*'s Caſe. Lev. 230. and Sid. 353. S. C. *cont' Twiſden*, who held ſuch Commiſſion illegal, and againſt the Petition of Right. 3 Car. 1. But *per* 2 Hawk. P. C. 14. ſuch Commiſſions, founded on the plain Neceſſity of

IT ſeems (*c*) agreed, that during the Lunacy of the Earl Marſhal, this Court may be holden before Commiſſioners deputed to exerciſe his Office.

It

* It has been a Matter greatly debated, whether this Court can be holden before the Lord Marſhal only, without a Conſtable; and thoſe who are for the Negative, ground their Opinions chiefly on the Statutes, (a) ancient Law Books and Records, which ſeem to mention the Conſtable as the only, or at leaſt as the principal Judge of this Court. *Page 602

(a) To this Purpoſe are 13. H. 4. 46.

37 H. 3. 5. a. 48. E. 3. 3. 37 H. 6. 29. 30. H. 6. 6. 13 H. 4. 5. *Ruſhworth's* Coll. vol. 1. 107. S. P. C. 65. 2 Inſt. 51. 3 Inſt. 123. Co. Lit. 74. b. Cromp. Jur. 82.

But notwithſtanding this, the conſtant Practice, eſpecially ſince the Extinguiſhment of the hereditary Office of Conſtable in *Henry* the Eighth's Time, of holding this Court by the Earl Marſhal only, and the general Notions of our (b) Judges and Lawyers, of the Legality of ſuch Court, ſeem in a great Meaſure to eſtabliſh a contrary Opinion, and that at this Day it may be holden before the Earl Marſhal only.

Hob. 121. Rol. Rep. 87. 2 Lev. 134. Show. 153. Sid. 353. Lev. 430. Show. P. C. 60, 61.

(b) That in the Reigns of Queen *Elizabeth* and *James* the First, the Judges aſſiſted in this Court, when holden before the Earl Marſhal only. Show. P. C. 60. 4 Inſt 126.—& *vide* 2 Hawk. P. C. 12, 13. That according to the common Uſage of other Courts, which generally may be holden before one Judge, in the Abſence of the Reſt, it ſeems a reaſonable Conſtruction to allow this Court to be ſo holden.

But it is agreed, that Appeals of capital Matters cannot be brought before the Marſhal alone, becauſe 1 *H.* 4. *cap.* 14. which ſhews how ſuch Appeals ſhall be brought, is expreſs, that they ſhall be tried and determined before the Conſtable and Marſhal of *England*. †

2 Hawk. P. C. 13.

† See the Stat. under the next Head.

If this Court, holden before the Earl Marſhal (c) only, exceed its Juriſdiction, it has been (d) reſolved, that it may be prohibited by the Common Law Courts.

(c) But if before the Conſtable and Marſhal &. & *vide* Show. P. C. 60, 61. (d) In *Oldis*'s Caſe, Show. P. C. 61, 65. 2 Hawk. P. C. 14.

(B) In what Caſes it has a Juriſdiction.

THE Juriſdiction of this Court is declared by the 13 *R.* 2. *cap.* 2. by which it is recited, that the Commons made grievous Complaints, "That the Court of the Conſtable and Marſhal daily incroached Contracts and Treſpaſſes, and many other Actions at the Common Law; "*and thereupon it is declared*, That to the Conſtable it appertaineth to "have Conuzance of Contracts touching Deeds of Arms, and of War out "of the Realm, and alſo of Things which touch War within the Realm, "which cannot be determined nor diſcuſſed by the Common Law; with "other Uſages to the ſame Matters appertaining, which other Conſtables "before have reaſonably uſed; joining to the ſame, that every Plaintiff "ſhall declare plainly his Matter in his Petition, before that any Man be "ſent to anſwer thereto; and if any will complain that any Plea is "commenced before the Conſtable and Marſhal, that might be tried by "the Common Law, he ſhall have a Privy Seal to the ſaid Conſtable "and

Vide 8 R. 2. c. 5. 2 Hawk. P. C. 10.

of the Caſe, and intended to prevent a Failure of Juſtice, as to Caſes of which no other Court hath Conuzance, ſeem not againſt the Purview of the Petition, which complains, that Commiſſions had been granted for the Trial of certain capital Offences and other Outrages, by the Martial Law, &c.

" and Marſhal, to ſurceaſe till it be diſcuſſed by the King's Counſel, " if the Matter of Right pertain to that Court, *&c.*

And it is further enacted by 1 *H.* 4. *cap.* 14. " That all Appeals of " Things done within the Realm ſhall be tried and determined by the " good Laws of the Realm; and that Appeals of Things done out of the *Page603 " Realm * ſhall be tried and determined before the Conſtable and Mar- *Vide* the " ſhal, and that no Appeal be made or purſued in Parliament."

ſeveral Statutes 26 H. 8. c. 13. 35 H. 8. c. 2. 5 & 6 E. 6. c. 11. 1 & 2 *Ph. & M.* c. 10. and 2 Hawk. P. C. 14. as to its Juriſdiction at this Day, with Reſpect to Things done beyond Sea.

Ruſhworth's Coll. Part 2. vol. 2. 1055. 2 Hawk. P. C. 11.

As the Juriſdiction of this Court is reſtrained to Things touching War within the Realm, it can have no Juriſdiction as to a Civil Matter, and therefore cannot proceed againſt a Perſon for bare ſcandalous Words, reflecting on the Honour and Gentility of Families.

Lev. 230. Sid. 353. Show. Rep. 353. Show. P. C. 58. 4 Mod. 128.

Alſo, though the Marſhaling of public Funerals belongs to the Heralds, who are the Attendants of this Court, and no other Perſons, without their Licence, can lawfully intermeddle in it; yet it ſeems to be ſettled, that this Court cannot puniſh thoſe who ſhall be guilty of ſuch an Incroachment, becauſe it is a proper Ground for an Action on the Caſe; and by the above Statutes, this Court has nothing to do with Matters which may be determined by the Common Law.

2 Hawk. P. C. 11.

But by the conſtant Practice, and the general Opinion of Lawyers, it ſeems at this Day to have a Juriſdiction as to Diſputes concerning Precedency and Points of Honour, and Satisfaction therein; and may proceed againſt Perſons for falſly aſſuming the Name and Arms of honourable Perſons, *&c.*

(C) Of the Form and Manner of its Proceedings.

3 Inſt. 125. 2 Hawk. P. C. 13.

THIS Court is to be governed by its own Uſages, as far as they go, and in other Caſes, by the Civil Law; but ſince it is no Court of Common Law, no Condemnation in it cauſes any Forfeiture of Lands, or Corruption of Blood; neither can an Error in it be remedied by Writ of Error, but only by Appeal to the King; yet the Judges of the Common Law take Notice of its Juriſdiction, and give Credit to a Certificate of its Judges.

Hutton 3.

It is made a Doubt, whether the King hath any Remedy in this Court againſt an Offender, by way of Indictment or Information by the Attorney General.

Of

* Of the Court of the Juſtices of Oyer and Terminer, and Gaol-Delivery.

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JUSTICES of Aſſiſe, *Oyer* and *Terminer*, and Gaol-Delivery, were appointed in the Room of the Juſtices in *Eyre*, who formerly went their Circuits once in ſeven Years, and ſuperſeded the Power of the Sheriff's Torn wherever they came, and tranſacted all Manner of Civil and Criminal Buſineſs; theſe were Part of the King's Court, who exerciſed their Juriſdiction in the ſeveral Counties of the Kingdom, and, by communicating with the King's Court, kept an Uniformity in the Law.

Co. Lit. 2. 3. 4 Inſt. 184. Bacon's Elem. 15. 16.

(A) Of the Manner of authorizing Commiſſioners of Oyer and Terminer, and Gaol-Delivery: And herein of the Determination of their Power. 604.
(B) Of their Juriſdiction when appointed. 606.
(C) Of the Form of their Proceedings and holding their Courts. 607.

(A) Of the Manner of authorizing Commiſſioners of Oyer and Terminer, and Gaol-Delivery: And herein of the Determination of their Power.

AS all Juſtice proceeds from the King, ſo theſe Commiſſions muſt receive their Authority from the (*a*) Prerogative of the Crown; and this the Common Law requires, and it is alſo expreſsly enacted by the 27 *H.* 8. *cap.* 24.

Lamb. B. 1. chap. 5. Co. Lit. 114. Lev. 219.

(*a*) That the King is the proper Judge, and may determine to whom, and upon what Occaſions, ſuch Commiſſions may be granted. 2. Inſt. 419. 2 Hawk. P. C 22, 23.

The common (*b*) Form of theſe Commiſſions is to authorize the Commiſſioners, or three or four of them, of which Number ſuch or ſuch a Perſon is to be one, to inquire, by the Oaths of twelve Men, of all Treaſons, Felonies and Miſdemeanors, &c. in ſuch and ſuch Place, and to hear and determine the ſame at ſuch Times and Places as ſuch Commiſſioners ſhall appoint, &c. for which Purpoſe the King acquaints them,

4 Inſt. 162. Crom. Jur. 131. Plow. 384. 2 Inſt. 419. 2 Hawk. P. C. 20. 23.

(*b*) Whether ſuch Juſtices may be appointed as well by Writ as by Commiſſion: and for the Difference, *vide* 2 Hawk. P. C. 15, 16.——That the Court of Seſſions in *London* does not differ from other Commiſſions of *Oyer* and *Terminer*, &c. Vaugh. 140.

that

*Page 605 * that he has ſent a Writ to the Sheriffs of ſuch Counties, commanding them to return Juries before them at ſuch Days and Places as ſhall be notified by them, &c.

And. 296. 2 Hawk. P. C. 16. The Validity of ſuch Commiſſions muſt be determined according to their Conformity to ancient Precedents; and therefore a Commiſſion to a Corporation, appointing ſome of its principal Members to be Juſtices of Gaol-Delivery, together with thoſe whom the King ſhall appoint from Time to Time, was adjudged void; for ſuch an Authority, depending on the precarious Appointment of other Juſtices, is not agreeable to the known Forms of ſuch Commiſſions. But new Commiſſions of *Oyer* and *Terminer* may be added to the former by a Writ, or Commiſſion of Aſſociation, which ſetting forth the Purport of the former Commiſſion, adds new Commiſſioners to thoſe appointed by it; provided ſuch new Commiſſioners attend at the Times and Places appointed by the Former; and it is uſual to direct another Writ to the former Juſtices, commanding them to admit ſuch new Juſtices as their Aſſociates; but ſuch Writ (*a*) binds not ſuch Juſtices to admit the new ones, unleſs they alſo produce one directed to themſelves; and ſuch Writ to the Perſons aſſociated is always Patent, but that to the others to admit them is Cloſe.

Reg. 124. F.N.B. 111. H. P. C. 159. 2 Hawk. P. C. 19.

(*a*) The King can grant but one Patent of Aſſociation to one Commiſſion.

2. Hawk. P. C. 19. And Q. whether a Commiſſion of Aſſociation, relating only to a Special Cauſe, can aſſociate the Perſons named in it to thoſe appointed by a general Commiſſion. 2 Hawk. P. C. 19.

Reg. 128. F.N.B. 111. 2. Hawk. P. C. 19. Upon the Death of ſuch Commiſſioners, after an Indictment taken before them, and Proceſs thereupon, a new Commiſſion may authorize others to proceed, and a Writ ſhall go to the Executors of the firſt Commiſſioners to ſend the Records and Proceſſes before the new ones.

Reg. 124. F.N.B. 111. 2 Hawk. P. C. 19. After a Writ of Aſſociation, it is uſual to make out a Writ of *Si non omnes*, which authorizes ſuch a Number of the Juſtices appointed by the former Commiſſions to proceed, if all of them cannot conveniently be preſent.

But for theſe *vide* 2 Hawk. P. C. 20, 21. There are ſeveral ancient Precedents of Special Commiſſions of *Oyer* and *Terminer*, as thoſe for inquiring and determining of ſome particular enormous Violence done to the Party who ſues it out, &c.

2 Hawk P. C. 20. and ſeveral Authorities there cited. As to the Difference between a Commiſſion of *Oyer* and *Terminer* and Gaol-Delivery, it may be proper to obſerve, that where the ſame Perſons at the ſame Time are both Commiſſioners of *Oyer* and alſo of Gaol-Delivery, they may proceed by Virtue of the one Commiſſion, in ſuch Caſe wherein they have no Juriſdiction by the other, and execute both at the ſame Time, and make up their Records accordingly.

4 Inſt. 163. H. P. C. 162. Theſe Commiſſions may be ſuſpended by the Court of King's Bench ſitting in the ſame County; but the Juriſdiction of the Juſtices is revived of Courſe, when the ſaid Court no longer ſits there; alſo their Authority may be ſuſpended by a Writ of *Superſedeas*, which is grantable on Proof that their Commiſſion was unduly granted; in which Caſe their Power may be reſtored by a Writ of *Procedendo*; but a Commiſſion once (*b*) determined cannot be revived, nor can the Juſtices be authorized a-new without another Commiſſion.

(*b*) That ſuch Commiſſion may be determined expreſsly or impliedly, and for the ſeveral Ways it may be done, *vide* 2 Hawk. P. C. 16, 17.

* (B) Of their Jurisdiction when appointed. *Page 606

JUSTICES of Gaol-Delivery may, by the (a) Common Law, proceed on any Indictment of Felony or Treſpaſs, found before any (b) other Juſtices, againſt any Perſon in the Gaol, mentioned in their Commiſſion and not determined. H. P. C. 158. 4 Inſt. 164. Bro. Coron. 179. 12 Co. 32.

(a) And by 4 E. 3. c. 2. that the Juſtices aſſigned to deliver Gaols ſhall have Power to deliver the ſame Gaols of thoſe that ſhall be indicted before the Juſtices of the Peace. (b) But Juſtices of *Oyer* and *Terminer* have regularly no ſuch Power. 2 Hawk. P. C. 21.

It ſeems the better Opinion, that Juſtices of Gaol-Delivery may take Indictments againſt any Perſons within their Commiſſion. Cro. Eliz. 90, 179. And. 111. 4 Inſt. 168.

2 Hawk. P. C. 24. H. P. C. 158.

Alſo, that they may, by Virtue of a general Commiſſion, deliver the Gaol of Perſons committed for Treaſon. *Vide* 2 Hawk. P. C. 24.

But Juſtices of Gaol-Delivery have no Power to proceed againſt any except thoſe who are in actual Cuſtody; and therefore they have no more to do with one let to Mainprize, than if he were at Large. *Vide* 2 Hawk. P. C. 25.

Juſtices of Gaol-Delivery have not only Power to diſcharge Priſoners acquitted before them on a Trial, but alſo (c) all ſuch againſt whom on Proclamation, no Evidence ſhall appear to indict them: Alſo Juſtices of Gaol-Delivery may award Execution againſt Priſoners outlawed for Felony before Juſtices of Peace; and though their Commiſſion be in Strictneſs determined after the End of their Seſſion, yet may they, after their Seſſion, order the Reprieve or Execution of the Perſons condemned before them. 2 Hawk. P. C. 25. (c) Which neither Juſtices of the Peace, nor Juſtices of *Oyer* and *Terminer* can do.

By the 4 *E.* 3. *cap.* 2. it is enacted, "That Juſtices aſſigned to deliver "Gaols ſhall have Power to inquire of thoſe in whoſe Ward Perſons in- "dicted before Wardens of the Peace ſhall be, if they make Deliverance, "or let to Mainprize any ſo indicted which be not mainpernable, and to "puniſh them if they do any Thing againſt this Act." 2 Hawk. P. C. 25. That by the Common Law they may puniſh thoſe who unduly bail Priſoners.

By the 1 & 2 *Ph. & M.* "If any Juſtice of Peace of the *Quorum*, or "Coroner, ſhall offend againſt that Statute, either as to bailing Priſoners "or taking their Examinations, or the Information of thoſe that bring them "before them, or not putting the ſame in Writing, or not certifying them "to the next Gaol-Delivery, or not putting in Writing the Evidence to a "Jury on a Coroner's Inqueſt of Murder or Manſlaughter, or not binding "over material Witneſſes, or not certifying ſuch Evidence and ſuch Re- "cognizances, the Juſtices of Gaol-Delivery ſhall, on due Proof by Exa- "mination, ſet ſuch Fine for every ſuch Offence as ſhall ſeem meet." 2 Hawk. P. C. 25.

By the 4 *E.* 3. *cap.* 5. "Juſtices of Gaol-Delivery ſhall puniſh Sheriffs "and Gaolers refuſing to take Felons into their Cuſtody from Conſtables "and Townſhips, without being paid for ſuch Receipt."

By the 1 *E.* 6. *cap.* 7. "Where any Perſons ſhall be found guilty of "Treaſon or Felony, for which Judgment of Death may enſue, and "ſhall be reprieved to Priſon (d) without Judgment at that Time, thoſe "Perſons who ſhall at any (e) Time after be aſſigned Juſtices to (f) de- "liver the Gaol where ſuch Perſons ſhall remain, ſhall have Authority "to give Judgment of Death againſt ſuch Perſons, as the ſame Juſtices (d) But ſuch ſubſequent Juſtices have no Power to award the

Execution of Perſons condemned by former Juſtices, and reprieved by them. Dalſ. 20. Dyer 56. 2 Hawk. P. C. 27. (e) Extends to ſubſequent Commiſſioners authorized by a Succeſſor, as well as to thoſe authorized by the ſame King. 7 Co. 31. Dalſ. 20. (f) Extends not to Juſtices of *Oyer* and *Terminer*. 12 Co. 33.

" before

*Page 607 " * before whom they were found guilty might have done, if their Com-
" miſſion of Gaol-Delivery had continued."

(C) Of the Form of their Proceedings and holding their Courts.

2 Hawk. P. C. 18. and ſeveral Authorities there cited.

IF a Commiſſion of *Oyer* and *Terminer* be awarded to certain Perſons to inquire, &c. at ſuch a Place, they can neither open it at another, nor *(a)* adjourn it thither, nor give Judgment there; and if they do, their Proceedings will be *coram non Judice*; yet Juſtices appointed *pro hac vice* may adjourn from one Day to another, though their Commiſſion have no Words to that Purpoſe.

(a) That it is moſt proper to enter their Adjournments in the *Preſent Tenſe*; but by the Multitude of Precedents the Entry of them in the *Preter Tenſe* is good. Raym. 115. 2 Hawk. P. C. 18. But an Adjournment, of which no Entry appears, ſhall not be intended to have been made. Sid. 348. 2 Keb. 284, 292.

By the 9 *E.* 3. *cap.* 5. " Juſtices of Aſſize, Gaol-Delivery, and of *Oyer*,
" ſhall ſend their Records and Proceſſes determined and put in Execution,
" to the *Exchequer* at *Michaelmas* every Year; and the Treaſurer and
" Chamberlains for the Time being, having the Sight of the Commiſſions
" of ſuch Juſtices, ſhall receive the ſame Records and Proceſſes of the ſaid
" Juſtices under their Seals, and keep them in the Treaſury as the Manner
" is; ſo that the Juſtices firſt take out the Eſtreats of the ſaid Records and
" Proceſſes, to ſend to the Exchequer, as they were wont before."

By the 6 *R.* 2. *cap.* 9. " Juſtices aſſigned to take Aſſizes, and deliver
" Gaols, ſhall hold their Seſſions in the principal Towns of the Counties
" where the Shire Courts were then holden, or after ſhould be holden."

Of the Court of the Juſtices of Aſſize and Niſi prius.

4 Inſt. 158. Cromp. Jur. 204.

JUSTICES of *(b)* Aſſize derive their Authority from the Commiſſion by which they are impowered to inquire of all Diſſeiſins, and to reſtore ſuch, as have been diſſeiſed of their Lands or Tenements, to the Poſſeſſion of them, by Trial at one Aſſizes.

(b) Are ſo called from the Writ of Aſſize; but for this *vide* Title *Aſſize*, and 4 Inſt. 158. Co. Lit. 153.

2 Inſt. 424. 4 Inſt. 159.

To theſe, by Writ of *Niſi prius*, directed to the Judges or Commiſſioners of Aſſize, and Clerk of Aſſize, is annexed an Authority and Juriſdiction of trying ſuch Iſſues as are joined in the Courts at *Weſtminſter*, if the

their proper Counties; and this Method was introduced after the Laying aside the Justices Itinerant, and was contrived for the Ease of the Subject, that the Jury and Witnesses might not be obliged to come out of their proper Counties. *Page 608

The Manner of contriving it was, to direct the *Venire Distringas*, or *Habeas Corpora Juratorum*, to return the Jury at some Day the next Term, unless the Justices *Prius tali die & loco venerint*; there were no Issues returned on the *Venire* to make them appear at *Nisi prius*; yet it was so much a greater Difficulty to them to appear afterwards at *Westminster*, which if they did not, the *Distringas* issued, that it had its Effect to convene them in their proper Counties; the Writ was contrived to command them to come into Court, because it would have been improper for the Court to have commanded them to come into any other Place; so that their Appearance before the Justices of Assize, is an Excuse for their Non-appearance in *Bank*; but if they did not appear at the Assize, nor at *Westminster*, then issued a *Habeas Corpus* and *Distringas* to bring them up. 4 Inst. 159.

The Day at *Nisi prius* and in *Bank* are in Consideration of Law the same, because the Writ of *Nisi prius*, which gives Authority to the Judge to try the Cause in the County, is instead of the Court; and therefore the *Postea* certified by him on the Day of *Bank* is the same as if the Jury had come up to the Court, and the Trial had been had in open Court. 6 Mod. 9.

The Justices have large Jurisdiction, by several Statutes, as to all Criminal Matters, and may punish Offences in Sheriffs, Gaolers, and other Officers, &c. which see in 2 *Hawk. P. C.* 28, to 32.

Of the Court of Sessions of Justices of the Peace.

A COURT of Sessions of Justices of Peace is *(a)* an Assembly of two or more, whereof one is of the *Quorum*, at a Day and Place before appointed by them, in order to inquire of, hear and determine Matters within their Jurisdiction. Lamb. Book 4. c. 2. *Vide* Tit. *Justices of the Peace.*

(a) Pursuant to the Statute 34 E. 3. c. 1. by which it is enacted, that two or three of the best Reputation in the Counties shall be assigned Keepers of the Peace by the King's Commission, and at what Time Need shall be, the same with other Wise and Learned in the Law shall be assigned by the King's Commission, to hear and determine Felonies and Trespasses done against the Peace in the same Counties, and to inflict Punishment reasonably, according to Law and Reason, and the Manner of the Deed.

Any Justices, whereof one is of the *Quorum*, may direct their *(b)* Precept under their *Teste* to the Sheriff, for the *(c)* Summons of such a Sessions, thereby commanding him to return a Grand Jury, and to warn Lamb B. 4. c. 29.

(b) That such Precept can only be superseded by Writ out of Chancery. Lamb. B. 4. c. 2. Crompt. Jurisd. 122. *(c)* That a Sessions may be holden without any Summons, as to Proceedings on Indictments, or on other particular Occasions which need no Attendance of Grand Jurors or Officers. Lamb. Book 4. c. 2. 2 Hawk. P. C. 41.

*Page 609 * all (*a*) Stewards, Conſtables and Bailiffs of Liberties, to be preſent before them or their Fellow Juſtices, at ſuch a Day and Place, and alſo to attend there himſelf, and to proclaim in proper Places that ſuch Seſſions will be holden.

(*a*) Who are all obliged to attend, on Pain of being amerced at the Diſcretion of the Juſtices. 2 Hawk. P. C. 41. As is the Keeper of the Houſe of Correction. *Vide* 7 Jac. 1. c. 4.

Lamb. B. 4. c. 3. Cromp. 122. 2 Hawk. P. C. 31.

Juſtices of the Peace, in their Seſſions, have no Juriſdiction one over the other, according to that Rule *inter Pares non eſt Poteſtas*, therefore they cannot amerce a Juſtice for his Non-attendance, nor bind a Brother Juſtice to his good Behaviour for uſing ſuch Expreſſions (*b*) in Court, for which if he were a private Perſon, he might be committed, or bound to his good Behaviour.

(*b*) But in other Inſtances, any Juſtices of Peace may require his Fellow to find Sureties of the Peace; for Matters of this Kind require an immediate Remedy. 2 Hawk. P. C. 41.

Lamb. B. 4. c. 19, 20 2 Salk. 474. pl. 11. 2 Hawk. P. C. 42.

Seſſions holden for the general Execution of the Authority of Juſtices of Peace, and which are uſually holden in the four Quarters of the Year, are called General Seſſions; and a Seſſions holden on a Special Occaſion, for the Execution of ſome particular Branch of the Authority of Juſtices of Peace, is called a Special Seſſions.

[They are to hold four Seſſions in the Year, 36 *Ed.* 3. *cap.* 12. 12 *R.* 2. *cap.* 10.

By 2 *H.* 5. *ſtat.* 1. *cap.* 4. Juſtices of Peace are to keep their Seſſions in the firſt Week after the Feaſt of Saint *Michael*, the firſt Week after the *Epiphany*, the firſt Week after the Clauſe of *Eaſter*, and the firſt Week after the Tranſlation of Saint *Thomas* the Martyr, and oftener, if need be.

By 14 *H.* 6. *cap.* 4. The Seſſions of the Peace for the County of *Middleſex* are to be holden twice a Year, and oftener, if Occaſion ſhall require. They are now held ſix Times in the Year, beſides two Adjournments.]

Of the Eccleſiaſtical Courts.

Godolp. *Repert. Canonic.* 129 to 133. 5 Co. 1. *Caudry's* Caſe.

THE Church, before the Converſion of *Conſtantine*, was a diſtinct and independent Society from the State, and, as ſuch, it was neceſſary they ſhould have Rules and Orders among themſelves; for the better Government of the Body of Chriſtians, the Power of Judicature was placed in the Biſhops, who had by their Wiſdom and Gravity obtained an Authority in the Church, and who uſed to ſend abroad their Miniſters to propagate the Goſpel in their ſeveral Precincts; and therefore they determined all Controverſies among them, which could not be carried into a Heathen Court without great Scandal to the quiet and peaceable Way of Living which was the Glory of the Primitive Chriſtians; and this they founded on the Direction of St. *Paul* himſelf, *Dare any of you having*

having a Matter againſt another, go to Law before the Unjuſt, and not before the Saints. After the Converſion of the Emperors, their Zeal for Chriſtianity made them allow the Biſhops the ſame Juriſdiction; but then thoſe Biſhops, in their Sentences, followed the Laws of their Country; but, when the Pope afterwards pretended to Infallibility, he would no more conform his Decrees to the Laws of particular States and Kingdoms; and therefore thoſe States were under a Neceſſity of exerting their original Right and Power of Judicature: Hence it is truly ſaid, That (a) the Spiritual Juriſdiction, within theſe Kingdoms, is derived from the King, and that ſuch Juriſdiction when exceeded, is ſubject to the Controul of the King's Temporal Courts. (a) Rol. Abr. 361. Dav. 97.

* But, for the better underſtanding the Juriſdiction allowed the Spiritual Court at this Day, we ſhall conſider, *Page 610

(A) **The ſeveral Eccleſiaſtical Courts which exerciſe a Juriſdiction.** 610.

And herein,

1. Of the Court of Convocation. 610.
2. Of the Court of Arches. 611.
3. Of the Prerogative Court. 611.
4. Of the Court of Audience. 612.
5. Of the Court of Faculties. 612.
6. Of the Court of Peculiars. 612.
7. Of the Conſiſtory Courts. 612.
8. Of the Court of the Archdeacon. 612.
9. Of the Court of Delegates. 613.
10. Of the Court of Commiſſioners of Review. 613.

(B) **Of appealing from an inferior to a ſuperior Court.** 614.

(C) **Of citing one out of his own Dioceſe: And herein of the Boundaries of their Juriſdiction.** 614.

(D) **In what Caſes the Eccleſiaſtical Courts are allowed to have a Juriſdiction.** 617.

(E) **How they are to proceed as to thoſe Matters in which they have a Juriſdiction, otherwiſe will be controuled by the Temporal Courts.** 620.

(A) The ſeveral Courts which exerciſe a Juriſdiction: And herein,

1. Of the Court of Convocation.

THE *Convocation* is commonly called a National Synod, convened by the King's (b) Writ, directed to the Archbiſhops of *Canterbury* and *York*, requiring them to ſummon every Biſhop, Dean and Archdeacon, a Proctor for the Chapter, and two Proctors for the Clergy of each Dioceſe in (b) That they were always aſſembled by the King's

Writ, *vide* 4 Inst. 323. Godolp. Repert. 99 in the province of (*a*) *Canterbury*; but in *York*, two Proctors for each Archdeaconry.

and the 25 H. 8. c. 19. The Act of Submiſſion of the Clergy, by which it is expreſsly declared that they can only aſſemble by Virtue of the King's Writ, &c. (*a*) The Provincial Synod of *Canterbury* conſiſts of twenty-two Biſhops, twenty-two Deans, twenty-four Prebendaries, fifty-four Archdeacons, and forty-four Clerks, repreſenting the Dioceſan Clergy. Godolp. Repert. 98.—The Archbiſhop of *York*, at the ſame Time and in like Manner, holds a Convocation of all his Province, conſtantly correſponding, debating and concluding the ſame Matters with the Provincial Synod of *Canterbury*. Godolp. Repert 98.

4 Inſt. 322. This Aſſembly are to meet at the Time and Place appointed by the King's Writ, and conſtitute an Eccleſiaſtical Parliament, the Archbiſhop and his Suffragans as his Peers ſitting together, and compoſing one Houſe called the Upper Houſe of Convocation; the Deans, Archdeacons, a Proctor for the Chapter, and two Proctors for the Clergy, the Lower †Page 611 Houſe; in * which they chuſe a Prolocutor in the Nature of a Speaker of the Houſe of Commons.

4 Inſt. 322. (*b*) That the Convocation may declare what Opinions are heretical; but whether at this Day they have a Power to convene the Heretick, Q. & *vide* Rol. Abr. 226. Hawk. P. C. 4. Their Juriſdiction is in the Matters of (*b*) Hereſy, Schiſms, and other mere Spiritual and Eccleſiaſtical Cauſes; but they cannot meddle with any Matters relating to the Laws of the Land, or the King's Crown or Dignity; and in thoſe in which they have a Juriſdiction they are to proceed *Juxta Legem Divinam & Canones Sanctæ Eccleſiæ*.

Vide 4 Inſt. 323. That this Statute is only declaratory of the Common Law, & *vide* Co. 72. 2 Rol. Abr. 226. Moor 783. Vaugh. 327. 2 Vent. 44. 2 Salk. 412. pl. 2. Alſo by 25. *H.* 8. *cap.* 19. it was enacted, That no Canons, Conſtitution or Ordinance, ſhould be made or put in Execution within the Realm by Authority of the Convocation of the Clergy, which were contrariant or repugnant to the King's Prerogative Royal, or the Cuſtoms, Laws, or Statutes of this Realm: And by this Act the Court of Convocation, as to the making of new Canons, is to have the King's Licence, as alſo his Royal Aſſent for the putting the ſame in Execution, with the Proviſo, that ſuch Canons as were made before that Act, which be not contrariant nor repugnant to the King's Prerogative, the Laws, Statutes or Cuſtoms of the Realm, ſhould be ſtill uſed and executed, as they were before the making of the Act.

"By 8 *H.* 6. *cap.* 1. the Clerks of the Convocation, their Servants "and Families, ſhall have ſuch Privilege in coming, tarrying and going "as the Commons called to Parliament."

2. Of the Court of Arches.

4 Inſt. 337. (*c*) That by Agreement the Archbiſhop of *Canterbury* and Biſhop of *London* remit their Courts to each other, ſo that for Matters ariſing within the Dioceſe of *London*, the Suit may be either in the Arches, or in the Conſiſtory Court of *London*. Cro. C. 339, 456. But whether ſuch Compoſition be good, and out of the Statute 23 H. 8. c. which prohibits the citing a Perſon out of his own Dioceſe, *vide* 13 Co. 4. Raym. 3. Sid. 178. Lev. 225. Keb. 597. The Archbiſhop of *Canterbury* hath a peculiar Juriſdiction in 13 Pariſhes within *London*, which are (*c*) exempt from the Juriſdiction of the Biſhop of *London*; the Chief of theſe is *Bow*; and, as this Court was antiently held in the Church of *Bow*, it was called the Court of Arches from the Faſhion of the Pillars of the Steeple bent *Arch-wiſe*.

4 Inſt. 337. 13 Co. 4. &c. Godolp. Repert. 100. Dyer 241. The Juriſdiction of this Court extends not only to Eccleſiaſtical Cauſes ariſing within theſe 13 Pariſhes, of which it may take Conuzance in the firſt Inſtance, but alſo by way of Appeal may examine, affirm or reverſe the Sentence

Sentences and Decrees of all inferior Eccleſiaſtical Courts within the Province of *Canterbury*.

3. Of the Prerogative Court.

In this Court all Teſtaments are to be proved, and all Adminiſtrations granted, where the Party dying within the Province of the Archbiſhop of *Canterbury* hath *Bona Notabilia* in ſome other Dioceſe than where he died, which regularly is to be to the Value of 5*l.* but in the Dioceſe of *London* it is 10*l.* By Compoſition the Archbiſhop of *York* hath the like Court. 4 Inſt. 338. *Vide* Head of *Executors and Adminiſtrators*.

The *Probate* of every Biſhop's Teſtament, or granting of Adminiſtration of his Goods, although he hath not Goods but within his own Juriſdiction, doth belong to the Archbiſhop. 4 Inſt. 335.

* 4. Of the Court of Audience. *Page 612

This Court is kept by the Archbiſhop in his Palace, in which are tranſacted Matters of Form only, as Confirmations of Biſhops, Elections, Conſecrations, the Granting of the Guardianſhip of the Spiritualties, *ſede vacante* of Biſhops, Admiſſions and Inſtitutions to Benefices, diſpenſing with Banns of Matrimony, and ſuch like. 4 Inſt. 337. For the original Inſtitution of this Court, and that it meddles not with contentious Matters, *vide* Godolph. Repert. 106.

5. Of the Court of Faculties.

This is a Court which belongeth to the Archbiſhop, in which his Officer, called *Magiſter ad Facultates*, grants Diſpenſations, as to (*a*) marry, to eat Fleſh on Days prohibited, to ordain a Deacon under Age, that the Son may ſucceed the Father in a Benefice, that one may have two or more Benefices, incompatible, *&c.* 4 Inſt. 337. (*a*) That every Dioceſan may do the ſame 4 Inſt. 337.

This Authority was raiſed and given to the Archbiſhop of *Canterbury* by the Statute of * 25 *H.* 8. *cap.* 21. whereby Authority is given to the ſaid Archbiſhop and his Succeſſors, to grant Diſpenſations, Faculties, *&c.* by himſelf, or his ſufficient and ſubſtantial Commiſſary or Deputy, for any ſuch Matter whereof heretofore ſuch Diſpenſations, Faculties, *&c.* then had been accuſtomed to be had at the See of *Rome*, or by Authority thereof. 4 Inſt. 337. * 8 Mod. 364.

6. Of the Court of Peculiars.

Theſe Courts, which exerciſe an Eccleſiaſtical Juriſdiction, and are exempt from and not ſubject to the Controul of the Ordinary of the Dioceſe, are called Peculiars, and muſt be either Regal, (*b*) Archiepiſcopal, Epiſcopal, or Archidiaconal; and in every one of theſe the Owner has (*c*) a Power of common Right to grant Adminiſtration, *&c.* on Suppoſition of an original Compoſition between him and the Ordinary of the Dioceſe for that Purpoſe. 4 Inſt. 338. Godolp. Repert. 119. (*b*) Within the Province of the Archbiſhop of *Canterbury* there are 57 Peculiars, all which belong to the Archbiſhop. Godolph. Repert. 119. (*c*) See 42. pl. 10. 41. 6 Mod. 241. See 6 Mod. 308. 11 Mod. 6.

7. Of the Conſiſtory Courts.

4 Inſt. 338. Godolph. Repert. 83.

The Conſiſtory Court of each Archbiſhop, and every Biſhop of every Dioceſe within this Realm, is holden before the Biſhop's Chancellor in the Cathedral Church; or before his Commiſſary in Places of his Dioceſe, far remote and diſtant from the Biſhop's Conſiſtory, ſo as the Chancellor cannot call them to Conſiſtory with any Conveniency, or without great Travel and Vexation, for which Reaſon ſuch Commiſſary is called *Commiſſarius Foraneus*.

8. Of the Court of the Archdeacon.

4 Inſt. 339. Godolp. Repert. 60. &c.

This Court is holden by the Archdeacon, in ſuch Places as the Archdeacon, either by Preſcription or Compoſition, hath Juriſdiction in Spiritual Cauſes within his Archdeaconry; he is called *Oculus Epiſcopi*, and exerciſes an Eccleſiaſtical Juriſdiction, either concurrently with the Biſhop or excluſively.

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* 9. Of the Court of Delegates.

4 Inſt. 339.

This Court is erected by Virtue of the King's Commiſſion, which iſſues out of Chancery upon an Appeal or Petition directed to him, complaining of ſome Grievance or Injury the Party has ſuffered by the Sentence or Proceedings of the Eccleſiaſtical Court.

(a) Theſe Commiſſioners may be as well Laymen as Eccleſiaſticks,

On ſuch Appeal the King appoints (*a*) Commiſſioners called (*b*) Delegates, who are to hear the Grievances complained of, and who by Force of ſuch Delegation have Power (*c*) to reverſe or affirm the Sentence of the inferior Court; and this the King, as is ſaid, may do by Virtue of an original Juriſdiction, which was always inherent in the Crown.

Comp. Incumb. 56. But by *Gibſon*'s Codex 1082, they were formerly only Eccleſiaſticks. (*b*) The Commiſſion being drawn by the Clerks in Chancery, who were uſually Civilians; or by the Chancellor, who was uſually a Biſhop; they obtained the Name of Delegates, being a Name peculiar to that Profeſſion. *Comp. Incumb.* 57. (*c*) They have Power only to affirm or reverſe, but have no Juriſdiction in the firſt Inſtance, as to grant Adminiſtration, &c. Latch 85.

And by 25 *H.* 8. *cap.* 19. *for reſtraining Appeals to* Rome, it is enacted,

"That for Lack of Juſtice, at or in any Courts of the Archbiſhops of this "Realm, or in any of the King's Dominions, it ſhall be lawful to the Party grieved to appeal to the King's Majeſty in the King's Court of "Chancery, and that upon every ſuch Appeal a Commiſſion ſhall be "directed under the Great Seal to ſuch Perſons as ſhall be named by "the King's Highneſs, his Heirs or Succeſſors, like as in Caſes of Appeal from the Admiral's Court, to hear and definitely determine ſuch "Appeals and the Cauſes concerning the ſame, which Commiſſioners, "ſo by the King's Highneſs, his Heirs and Succeſſors, to be named or "appointed, ſhall have full Power and Authority to hear and determine "every ſuch Appeal, with the Cauſes and all Circumſtances concerning "the ſame; and that ſuch Judgment and Sentence, as the ſaid Commiſſioners ſhall make and decree in and upon any ſuch Appeal, ſhall "be good and effectual, and alſo definitive, and no further Appeals to "be had or made from the ſaid Commiſſioners for the ſame."

4 Inſt. 340. Moor 782.

No Appeal lies to them from a local Viſitor, nor in any Caſe of a Temporal Nature, nor did it lie from the High Commiſſion Court, when in Being, becauſe they themſelves were only Delegates acting by immediate Commiſſion from the King.

A Suit

A Suit commenced before the Delegates does not abate by the Death of either of the Parties. Vent. 133. & *vide* 2 Lev. 6.

2 Keb. 768, 778. Heatley 107. Cro. Car. 483. Leon. 117, 178.

If the Delegates exceed their Authority or proceed in Matters not properly within their Conuzance, they may be prohibited by the King's Temporal Courts. Moor 460, 463. Latch 85, 86, 229.

10. Of the Court of Commiſſioners of Review.

After a Sentence by the Delegates the King may grant a Commiſſion of Review, and ſuch Commiſſioners may reverſe the Sentence of the Delegates; for the King's Power is not reſtrained by the Statute 25 *H.* 8. *cap.* 19. *ſupra*, which ſays, that ſuch Sentence ſhall be definitive; alſo the Pope after a definitive Sentence by the Canon Law uſed to grant a Commiſſion *ad revidendum*, and ſuch Authority as the Pope had, claiming as ſupreme Head, doth of Right belong to the Crown, and is annexed thereto by the Statutes of 26 *H.* 8. *cap.* 1. 1 *Eliz. cap.* 1. But for this *vide* 4 Inſt. 341. Moor 463 781. Dyer 273. Lit. Rep. 232.

(B) Of appealing from an inferior to a ſuperior Court. *Page 614

EVERY Subject has a Right to appeal, and every ſuperior Court, enabled by Law to hear and determine ſuch Appeal, is obliged to receive the ſame, and after ſuch Appeal duly made, the inferior Court is tied up from proceeding any farther in the Cauſe. 4 Inſt. 342.

"By 24 *H.* 8. *cap.* 12. from the Archdeacon's Court the Appeal is to "the Biſhop of the Dioceſe; but when the Cauſe is commenced before "an Archdeacon, or any Archbiſhop or his Commiſſary, the Appeal muſt "be to the Court of Arches.

"And by the ſaid Statute, from the Biſhop of the Dioceſe, his Chan- "cellor, or Commiſſary, the Appeal is to the Archbiſhop of either Pro- "vince reſpectively.

"By 25 *H.* 8. *cap.* 19. The Appeal from the Prerogative Court is to "the King in Chancery, who appoints Delegates by Commiſſion to hear "and determine the Appeal."

And it ſeems by the ſaid Statute that an Appeal from the Arches is to be to the (*a*) King in Chancery.

(*a*) But by 24 H. 8. c. 12. ſuch Appeal is to be to the Archbiſhop; and ſo is 4 Inſt. 341. But *vide* Carth. 169. That an Appeal does not lie from the Dean of the Arches to the Archbiſhop as Viſitor, becauſe they are one and the ſame; at leaſt it would be but appealing from the Deputy to the Principal.

"Alſo by 25 *H.* 8. *cap.* 19. Appeals from the Court of Peculiars, "or Places exempt, which were before to the See of *Rome*, ſhall be "henceforth into the Chancery, and ſhall be there determined before "Commiſſioners of Delegates under the Great Seal, *&c.*

If the Matter concerns the King, the Appeal muſt be to the higher Houſe of Convocation of that Province. 4 Inſt. 339, 340.

By

4 Inſt. 339. By 24 *H.* 8. *cap.* 12. and 25 *H.* 8. *cap.* 19. all Appeals from a definitive Sentence muſt be within 15 Days.

4 Inſt. 340. *Vide* Title *Præmunire.* "By 25 *H.* 8. *cap.* 19. there ſhall be no Appeal to the See of *Rome*, "under Pain of a *Præmunire*."

(C) Of citing one out of his own Dioceſe, and herein of the Boundaries of their Jurisdiction.

BY 23 *H.* 8. *cap.* 9. it is enacted, "That no Manner of Perſon ſhall "be from henceforth cited, or ſummoned, or otherwiſe called to "appear by himſelf, or herſelf, or by any Procurator, before any Ordi- "nary, Archdeacon, Commiſſary, Official, or any other Judge Spiritual, "out of the Dioceſe or peculiar Juriſdiction, where the Perſon which "ſhall be cited, ſummoned, or otherwiſe (as is aforeſaid) called, ſhall "be inhabiting and dwelling at the Time of awarding or going forth of "the ſame Citation or Summons, except that it ſhall be for, in, or upon "any of the Caſes or Cauſes hereafter written, that is to ſay, for any "Spiritual Offence or Cauſe, committed, or done, or omitted, followed, "or neglected to be done, contrary to Right or Duty by the Biſhop, "Archdeacon, Commiſſary, Official, or other Perſon, having Spiritual
*Page 615 "Juriſdiction, or being a Spiritual * Judge, or by any other Perſon or "Perſons within the Dioceſe, or other Juriſdiction whereunto he or ſhe "ſhall be cited, or otherwiſe lawfully called to appear and anſwer; "and except alſo it ſhall be by or upon Matter or Cauſe of Appeal, or "for other lawful Cauſe, wherein any Party ſhall find himſelf or her- "ſelf grieved or wronged by the Ordinary, Judge, or Judges of the "Dioceſe or Juriſdiction, or by any of his Subſtitutes, Officers, or Mi- "niſters, after the Matter or Cauſe there firſt commenced, or begun to "be ſhewed unto the Archbiſhop or Biſhop, or any other having peculiar "Juriſdiction, within whoſe Province the Dioceſe or Place peculiar is; "or in caſe that the Biſhop, or other immediate Judge or Ordinary, "dare not nor will not convene the Party to be ſued before him; or "in caſe that the Biſhop of the Dioceſe, or the Judge of the Place, "within whoſe Juriſdiction, or before whom, the Suit by this Act ſhall "be commenced and proſecuted, be Party directly or indirectly to the "Matter or Cauſe of the ſame Suit; or in caſe that any Biſhop or any "inferior Judge, having under him Juriſdiction in his own Right and "Title, or by Commiſſion make Requeſt or Inſtance to the Archbiſhop, "Biſhop, or other ſuperior Ordinary or Judge, to take, treat, examine, "or determine the Matter before him or his Subſtitutes? and that to be "done in Caſes only where the Law Civil, or Canon, doth affirm Exe- "cution of ſuch Requeſt or Inſtance of Juriſdiction to be lawful or tole- "rable; upon Pain of Forfeiture to every Perſon, by any Ordinary, "Commiſſary, Official, or Subſtitute, by Virtue of his Office, or at the "Suit of any Perſon, to be cited or otherwiſe ſummoned or called "contrary to this Act, of double Damages and Coſts, for the Vexation "in that Behalf ſuſtained, to be recovered againſt any ſuch Ordinary, "Commiſſary, Archdeacon, Official, or other Judge, as ſhall award or "make Proceſs, or otherwiſe attempt or procure to do any Thing con- "trary to this Act, by Action of Debt or Action upon the Caſe, accord- "ing to the Courſe of the Common Law of this Realm in any of the

"King

" King's High Courts, or in any other competent Temporal Court of Re-
" cord, by original Writ of Debt, Bill or Plaint, in which, &c. and
" upon Pain of Forfeiture for every Perſon ſo ſummoned, cited, or other-
" wiſe called, (as is aboveſaid) to anſwer before any Spiritual Judge
" out of the Dioceſe, or other Juriſdiction, where the ſaid Perſon ſo
" dwelleth, or is reſident, or abiding, 10*l.* the one Half thereof to be
" to the King; and the other Half to any Perſon that will ſue for the
" ſame in any of the King's ſaid Courts.

" Provided that it ſhall be lawful to every Archbiſhop of this Realm
" to call, cite, and ſummon any Perſon or Perſons inhabiting or dwell-
" ing in any Biſhop's Dioceſe within his Province for Cauſes of Hereſy,
" if the Biſhop or other Ordinary immediate thereunto conſent, or if
" that the ſame Biſhop, or other immediate Ordinary, or Judge do not
" his Duty in Puniſhment of the ſame.

" Provided alſo that this Act ſhall not extend in any wiſe to the Pre-
" rogative of the moſt Reverend Father in God the Archbiſhop of *Can-*
" *terbury*, or any of his Succeſſors, of or for calling any Perſon or Per-
" ſons out of the Dioceſe where he or they be inhabiting, dwelling, or
" reſident, for (*a*) Probate of any Teſtament or Teſtaments, any Thing
" in this Act contained to the contrary. (*a*) Godb. 214.

" Provided alſo that this Act be not any way hurtful or prejudicial
" to the Archbiſhop of *York*, nor to his Succeſſors, of, for, or concerning
" the Probate of Teſtaments within his Province and Juriſdiction, by
" Reaſon of any Prerogative; any Thing in this Act to the contrary
" notwithſtanding." Extends only to the Probate of Wills.

* In the Conſtruction of this Statute the following Opinions have been holden, That the Archbiſhop of *Canterbury* cannot cite a Perſon for Subtraction of Tithes living in *Eſſex* into the Court of Arches holden in *London*, although *Eſſex* be within the Dioceſe of *London*, and that this Statute, like all other Acts of Parliament, ſhall be expounded by the Judges of the Common Law, although they relate to Spiritual Perſons and Affairs, and that where-ever an Act of Parliament prohibits the doing a Thing, any Court acting contrary may be reſtrained by Prohibition. 13 Co. 4, 5, &c. Lev. 96. & Godb. 191. 2 Brownl. 12, 27. Hard. 421. Winch. *Page 616

If a Perſon inhabiting within one Dioceſe doth ſubſtract and with-hold his Tithes within another Dioceſe, a Suit may be commenced and proſe-cuted in the Court of the Biſhop, in whoſe Dioceſe the Tithes are ſo ſubſtracted, and the Party ſo ſubſtracting his Tithes may be there cited and ſummoned, although inhabiting within another Dioceſe.

Ent. 570. a. Cro. Car. 97. Rol. Rep. 329. Carth. 476. *Machin* and *Moulton*, S P. adjudged for Dioceſe in this Statute ſignifies Juriſdiction, and it is the Locality of the Lands which gives Juriſdiction, although the Maxim in the Civil Law is *forum ſequitur reum*. 5 Mod. 450. S. C. 2 Salk. 549. pl. 9. S. C.

So a Suit for a Legacy may be in the Dioceſe where the Will is proved, although the Defendant lives in another Dioceſe, and the citing of him out of ſuch Dioceſe is not within the Statute. Vent. 233. 3 Keb. 619. Cro. Car. 97.

So where *A.* and others, who lived in the Dioceſe of *Litchfield* and *Coventry*, but occupied Lands in the Dioceſe of *Peterborough*, were taxed in the Pariſh where they occupied Lands for the new caſting of the Bells of the Church; and, upon Refuſal to pay, a Suit was commenced againſt them in the Dioceſe of *Peterborough*; and it was held that occupying Lands made them Inhabitants, and that the citing of them into the Dioceſe where the Lands lay, and in reſpect to which they were chargeable, was not within the Statute; alſo (*a*) that Bells were more than a mere Orna-ment, which the Inhabitants were bound to repair. Like Point. Salk. 164. pl. 1. (*a*) 3 Mod. 211. S. C. Ld. Raym.

59, 517. 2 Ld. Raym. 1408. Carth. 360. 5 Mod. 389. Pre. Ch. 42. 8 Mod. 338. 10 Mod. 13. 32 Mod. 416. And there ſaid that a Prohibition was granted, becauſe but a Perſonal Charge, and not like the Repairing of the Church, which is a real Charge upon the Land, let the Owner live where he will.

My

13 Co. 4. *Porter* and *Rochester's* Case.

My Lord *Coke* says, that by this Statute the Archbishop is reduced to a proper Diocese, or peculiar Jurisdiction, unless it be in five Cases; as 1*st*, In Default of the Ordinary. 2*dly*, In Case of Appeal. 3*dly*, Or in case the Ordinary dares not, or will not, convene the Party. 4*thly*, Or if the Ordinary be Party to the Suit below. 5*thly*, In Case (*a*) of Instance and Request by the Ordinary.

(*a*) On Suggestion that the Party is sued out of the Diocese, the Court grants a Prohibition; but if it appears upon Proof that it was upon Request to the Archbishop, according to the Exception, the Prohibition will be stayed. 5 Mod. 71. Godb. 214. Latch 180.—The Party in alledging such Request need not shew the Matter specially, that it might appear to have been of a spiritual Nature, nor that the Request was under Seal, Cro. Car. 162.——The Request may be from a Peculiar to the Ordinary of the Diocese. Cro. Car. 162.—But whether from a Peculiar Court, or from the Archdeacon's Court immediately to the Archbishop, *vide* Hob. 16, 186. Syd. 90. 5 Mod. 238, 239.

12 Co. 76. Hetl. 19. Cro. Car. 97. Carth. 34, 35.

The Party who is cited out of his Diocese must move for a Prohibition before Sentence, for by litigating the Matter in that Court he submits to the Jurisdiction.

But if upon the Face of the Libel it appears that the Party is an Inhabitant at a Place out of the Diocese, there the Libel is *Felo de se*, and in such Case the Sentence makes no Alteration.†

† See *supra*, it is not in all Cases, actual Residence, that will determine the Question.

Carth. 34.

Yet in a Case where *A.* in the Libel was named of *D.* in *Hampshire*, which is known to be within the Diocese of *Winchester*, was cited into the Diocese of *London*, and though Affidavits were offered of that Matter, yet being after Sentence, the Court held that they could not take any Notice within what Diocese *D.* in *Hampshire* was, for they could not *ex Officio* take Notice of the Limits of Bishopricks, but they should not take it to be within the proper Diocese.

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2 Rol. Abr. 291. Several Cases to this Purpose.

* The Boundaries of all Jurisdiction shall be determined in the King's Temporal Courts; so if the Question be, Whether in such a Place there be a peculiar Jurisdiction exempt from the Ordinary, this shall be determined by the King's Temporal Courts; for it would be unreasonable that the Archbishop, or Bishop, should be Judge in his own Cause, and if they take upon them to determine any of those Matters, a Prohibition will be granted.

(D) In what Cases the Ecclesiastical Courts are allowed to have Jurisdiction.

THE Statute 13 *E.* 1. called the Statute of *Circumspecte Agatis*, and 9 *E.* 2. called *Articuli Cleri*, are the most antient, as well as the principal Statutes, which declare in what Cases the Ecclesiastical Courts shall have Jurisdiction.

The Words of the first are, "The King to his Judges sendeth Greeting: Use yourselves circumspectly in all Matters concerning the Bishop of (*a*) *Norwich* and his Clergy, not punishing them if they hold Plea in Court Christian, of such Things as be (*b*) merely Spiritual, that is, to

(*a*) The Bishop of *Norwich* is only put for an Example, for it extendeth to all the Bishops within the Realm, 2 Inst. 487.

(*b*) As Heresy, Schism, Holy Orders, and such like. 2 Inst. 488.

"wit

" wit of Penance enjoined by Prelates for deadly Sin, as Fornication, " Adultery, and (*c*) such like, for the which, sometimes Corporal Pe- " nance, and sometimes (*d*) Pecuniary is enjoined, especially if a Free- " man be convict of such Things; also if Prelates do punish for leaving " the Church-yard uncloſed, or for that the Church is (*e*) uncovered, or " not conveniently decked; in which Caſes none other Penance can be " enjoined but Pecuniary. *Item*, If a Parſon demand of his Pariſhioners " Oblations or (*f*) Tithes due or accuſtomed, or if any Parſon do ſue " againſt another Parſon for Tithes greater or ſmaller; ſo that the fourth " Part of the Value of the Benefice be not demanded. *Item*, If a Parſon " demand Mortuaries in places where a Mortuary hath been uſed to be " given. *Item*, If a Prelate of a Church, or Patron, demand of a Parſon " a Penſion due to him; all ſuch Demands are to be made in a Spiritual " Court, and for laying (*g*) violent Hands on a Clerk; and in cauſe of " Defamation it hath been granted already, that it ſhall be tried in the " Spiritual Court when Money is not demanded; but a Thing done for " Puniſhment of Sin, and likewiſe for breaking an Oath, in all Caſes " afore rehearſed, the Spiritual Judge ſhall have power to take Know- " ledge, notwithſtanding the King's Prohibition."

(*c*) As Inceſt, Solicitation of Chaſtity. 2 Inſt. 488.

(*d*) Muſt be intended by way of Commutation of Penance.

(*e*) This doth not extend to a private Chapel which a Man has to his own Uſe, nor to the Chancel, which is to be repaired by the Parſon. 2 Inſt. 489.

(*f* For this *vide* Title *Tithes*.

(*g*) The Suit muſt be *pro ſalute Animæ*; and therefore, if the Clerk ſue in the Court Chriſtian for Damages for the Battery, he incurs a *Præmunire*, for the Eccleſiaſtical Judge ought to proceed only to correct the Sin. 2 Inſt. 492.—If a Clerk be arreſted by Proceſs of Law, he cannot for this ſue in the Eccleſiaſtical Court. 2 Inſt. 492.—If a Clergyman be only aſſaulted, no Remedy is to be had in the Spiritual Court, but in the Common Law Courts. Cro. Eliz. 753. *Pryn's* Caſe.

The Statute *Articuli Cleri*, or 9 *E.* 2. enumerates ſeveral Caſes in which the Spiritual Courts ſhall have Juriſdiction; particularly as to Tithes, Obventions, Oblations, Mortuaries, Redemption of Penance, violent laying of Hands on Clerks, Defamation; in which Caſes the King's Prohibition ſhall be of no Force.

For the Expoſition of this Statute *vide* 2 Inſt. 599 to 639.

* Matters Teſtamentary, as the granting Probate of Wills, granting Adminiſtration, *&c.* are of Eccleſiaſtical (*h*) Conuzance, and in theſe they may proceed according to the Eccleſiaſtical Law, and their Sentences ſhall be preſumed juſt and agreeable to ſuch Law, though (*i*) contrary to the Rule and Reaſon of the Common Law.

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(*h*) Matters Teſtamentary are within the Juriſdiction of the Spiritual Courts by the Cuſtom of *England*, and not by the Eccleſiaſtical Law. Lynwood 174. *Verbo Approbatis*, *vide* Salk. 37.—Antiently the Probate of Teſtaments was in the County Courts. Lamb. Saxon Laws, 111. Where the Biſhop and Sheriff ſat together. Wilkins 78. Lamb. Saxon Laws, 64. *William* the Conquer firſt ſeparated the Eccleſiaſtical from the Civil Juriſdiction; yet his Charter does not mention Matters Teſtamentary, or the Probate of Wills, to be of Eccleſiaſtical Conuſance, but only ſays, that the Crimes that were to be proſecuted *pro ſalute Animæ* were to be of that Conuſance, *Selden Eadm.* 167. But afterwards the Eccleſiaſtical Courts obtained a Juriſdiction herein, the Clergy having perſuaded the People that every Diſpoſition of the Teſtator was Gratuitous and Charitable, and to be diſpoſed of by the Executor, for the Good of the Soul of the Party deceaſed. *Selden Eadm.* 168. 9 Co. 38. (*i*) 4 Co. 29. 7 Co. 47.

Although the Spiritual Court hath Conuſance of the Probate of Teſtaments, yet if (*k*) a Court-Baron hath had Probate of Wills Time out of Mind, and hath always continued that Uſage, every Will within the Precincts thereof muſt be proved there; and if the Spiritual Courts take upon them to grant the Probate of any ſuch Will, a Prohibition lies.

5 Co. 73. b. 2 Rol. Abr. 313.

(*k*) So by the Cuſtom of *London*, the Government of Orphans, and Effects of Perſons dying in *London*, belongs to the Mayor and Aldermen of *London*; and if any Suit be commenced, or Proceedings had in the Eccleſiaſtical Court, for any Matter within ſuch Regulation, a Prohibition lies. 5 Co. 734. 2 Inſt. 249, 660. March 107.—*See Com. Dig. 3. V. 423. (O. 1.)

If

9 Co. 38. *Henslow's* Case.

If the Will is proved in the Eccleſiaſtical Court, that Court has executed its Authority, and the (*d*) Executors muſt ſue in the Temporal Courts to get in the Eſtate of the Deceaſed.

(*d*) An Adminiſtrator muſt ſue for the Goods of the Inteſtate in the Temporal Courts, for the Eccleſiaſtical Courts cannot try the Property of Goods. 2 Rol. Abr. 287. *Say* and *Harwood*; and a Prohibition granted for ſuch a Suit.

As the Eccleſiaſtical Courts have now the Probate of Teſtaments, they, as incident to ſuch Juriſdiction, have Power to determine all thoſe Matters that are neceſſary to the Authenticating every ſuch Teſtament; therefore, (*e*) if the Seal of the Ordinary appears, it cannot be ſuggeſted or given in (*f*) Evidence in the Common Law Courts, that the Will was forged, † or that the Teſtator was *Non compos*, or that another Perſon was Executor; for of theſe they had a proper Juriſdiction, and the Remedy muſt be by Appeal.

(*e*) Raym. 406, 407. 2 Rol. Abr. 299. Hard. 131.

(*f*) But it may be given in Evidence that the Seal was forged, or the Will repealed, or that there were *bona Notabilia*, becauſe that is not in Contradiction to the real Seal of the Courts, but admits the Seal and avoids it. Lev. 235, 236. Vaugh. 207. Show. 293. Salk. 36. pl. 1. Comb. 185. Skin. 299. pl. 2. Holt. 305. pl. 4.

† This is in Caſe of *Perſonal* Eſtate only.—In any Queſtion as to a Real Eſtate, where Title is made under a Will, the Original muſt be produced, and conſequently its Authenticity, and the Ability of the Teſtator to make it, may be controverted

2 Rol. Abr. 291, 299. Hob. 12. 12 Co. 65. Hetley 87. 2 Inſt. 608. Lynw. 174. Sid. 161.

Although regularly, where the Spiritual Courts have Conuſance of the Principal, they ſhall have Conuſance of the Incidents and Acceſſaries; yet if the Incident is a Matter merely Temporal, or if a Temporal Matter be pleaded in Bar of an Eccleſiaſtical Demand, they muſt proceed in the Eccleſiaſtical Court according to the Temporal Law; otherwiſe they will be prohibited.

Cro. Eliz. 88, 666. Show. 158, 173. Comb. 160.

As if Payment be pleaded in Bar of a Legacy, and there is but one Witneſs, which the Eccleſiaſtical Court will not admit, becauſe their Law requires two Witneſſes; there the Temporal Courts will prohibit them, becauſe it is a Matter Temporal, that bars the Eccleſiaſtical Demand.

Holt 752. pl. 1. Vent. 291. *Richardſon* and *Deſborow* adjudged. 3 Mod. 283. Show. 158. Ld. Raym. 220, 346. 2 Ld. Raym. 1161, 1172, 1211. 2 Salk. 547. pl. 1. *Shotter* and *Friend* adjudged. Carth. 142. S. C. adjudged.—But it is not ſufficient Ground for a Prohibition, to ſuggeſt that the Spiritual Court objected to the Credibility of a Witneſs, nor to ſuggeſt that the Plaintiff had only one Witneſs to prove the Fact, unleſs that he alledge that he offered ſuch Proof, and it was refuſed for Inſufficiency. Carth. 143, 144.

*Page 619

* But if there be only one Witneſs to prove a Nuncupative Will, and the Eccleſiaſtical Court refuſe the (*a*) Probate thereof, becauſe to every ſuch Will their Law requires two Witneſſes, no Prohibition lies; becauſe there is no other Way of authenticating ſuch Will but in the Spiritual Court, and this being the principal Matter, they had Conuſance thereof.

Carth. 143. *per Cur'*.

(*a*) Yet if a Revocation of ſuch a Will is pleaded, and proved by one Witneſs, and they refuſe the Plea for want of ſufficient Proof, a Prohibition will go, becauſe the Revocation is a Temporal Matter. Yelv. 92. by three Judges againſt two, & *vide* 2 Rol. Abr. 299. Carth. 143. S. C. cited.

If the Spiritual Court do admit a Will, but yet will not give the Probate to the Executor becauſe he cannot give Security for a juſt Adminiſtration, the

the Temporal Courts will grant a *Mandamus*; for though they are to determine whether there be a Will or not, yet if there be a Will, the Executor has a Temporal Right, and they cannot put any Terms upon him but what are mentioned in the Will.

For this *vide* Tit. *Executors* and *Administrators*, and there that in certain Cases the Court of Chancery will compel Executors to give Security†.

† In Case of an Orphan, the Chamberlain of *London* may compel the Executor or Administrator, of a Freeman, to give Security. See Hob. 247. 3 Com. Dig. 424.

If an Executor, after Probate, becomes (*b*) a Bankrupt, yet the Spiritual Court cannot revoke the Administration; for he is intrusted by the Testator who was the proper Judge of his Fitness and Sufficiency.

Skin. 290. pl. 2. Salk. 36. pl. 1.

(*b*) But if an Executor becomes *Non compos*, the Spiritual Court may commit Administration to another, because that is a natural Disability. Salk. 36. pl. 1.

But the Jurisdiction of the Ecclesiastical Courts is confined to Wills relating to Goods and Chattels only; and therefore (*c*) if a Man gives Lands to be sold for the Payment of Debts, and disposes of the Money to several Persons, that cannot be sued for in the Ecclesiastical Courts, but only in a Court of Equity; because that is not a Legacy merely of Goods and Chattels, but it arises originally out of Lands and Tenements.

(*c*) Hob. 265. Cro. Jac. 279. 364. Cro. Car. 16. 2 Rol. Abr. 285.

But if a Rent be devised out of a Term for Years, the Ecclesiastical Courts may hold Plea thereof; for the Term for Years being only a Chattel is Testamentary, and consequently the Rent devised thereout.

Lev 179. Sid 279. 2 Keb. 8. S. C.

If a Man makes a Will, and appoints *A.* and *B.* his Executors, to each of whom he gives five Pounds, but makes no Disposition of the Residue of his Estate, the Ecclesiastical Courts cannot compel a Distribution of (*d*) such Residue, for they have only a Jurisdiction to order a Distribution where the Party dies Intestate.

Ld. Raym. 86. Wil. Rep. pl. 2. Comb. 378. Comyns. 3. pl. 3. 5 Mod. 247.

Pitt and *Smith*, and a Prohibition granted accordingly. (*d*) Where the Courts of Equity in such Case consider the Executors as Trustees only, and compel a Distribution, *vide* Tit. *Executors* and *Administrators*, and where they have a concurrent Jurisdiction with the Ecclesiastical Courts, *vide* Chan. Ca. 200. 2 Chan. Ca. 85, 95. 2 Vent. 362. 2 Vern. 47, 76. Preced. Chan. 546.

Matrimonial Causes, as Marriage Contracts, Consanguinity, Divorces, Alimony, &c. are within the Jurisdiction of the Spiritual Court.

But for this *vide* Tit. *Marriage*.

Tithes, Oblations, Mortuaries and Pensions, are of Ecclesiastical Conusance; but if to a Demand of Tithes the Party pleads a *Modus Decimandi*, such Custom, like all (*e*) others, must be determined in the Temporal Courts; and if the Ecclesiastical Courts take upon them to determine it, a Prohibition will lie.

Vide Head of *Tithes*.

(*e*) As if the Churchwardens libel against *J. S.* for not repairing Part of the Church Wall: wherein he sets forth, That *J. S.* was seised of such a Manor, &c. and that the Lords thereof, for the Time being, were by Custom immemorial bound to repair Part of the Wall *ratione tenuræ*; if this Custom be denied, a Prohibition will be granted, although after Sentence, for on the Face of it, it appears that the Spiritual Court had not Jurisdiction. Carth. 33. *Vide* Carth. 151.

* But if *A.* sues for Subtraction of Tithes in the Spiritual Court, and the Defendant pleads a verbal Composition for two Years, no Prohibition will be granted; and where the Ecclesiastical Courts refuse a Plea of Composition for Life or Years, there is no Remedy but by Appeal to the Arches.

* Page 620.

Carth. 70. *Bradshaw* and *Swanton* adjudged.

The

2 Rol. Abr. 307. The Eccleſiaſtical Courts have no Juriſdiction to hold Plea of a Matter of Record; therefore if the Parſon of a Church be outlawed, and the Benefit of the Outlawry be granted to *J. S.* who receives the Tithes from the Pariſhioners, and afterwards the Parſon ſues the Pariſhioners for Tithes, who plead the Outlawry and the Grant to *J. S.* a Prohibition lies; for the Outlawry is a Matter of Record, of which they have not Conuzance.

Lev. 138. Sid. 217. Keb. 721. The Spiritual Courts cannot hold Plea *pro reformatione Morum*, in a Cauſe that is criminal and (*a*) triable at our Law; and therefore they cannot hold Plea *pro reformatione Morum* for a legal Perjury, but for Perjury in their own Courts they may puniſh.

(*a*) But they may deprive for a Temporal Crime. Dyer 293. But not after the Crime is pardoned. *Hob. Searl's* Caſe. Comp. Incumb. 53.

Comb. 71. So if the Spiritual Court proceed againſt a Man for writing a Libel, a Prohibition lies; for this is an Offence indictable at Common Law.

If the Goods of a Church be ſtolen, it is Sacrilege and Robbery, and the Churchwardens ſhall have an (*b*) Appeal of Robbery? alſo (*c*) the Offender may be libelled againſt in the Spiritual Court *pro ſalute Animæ & reformatione Morum*, but not to recover Damages.

(*b*) Bro. Appeal 31, 45. 37 H. 6. 39.

(*c*) Sid. 281. 2 Keb. 23. 2 Inſt. 492. 4 Keb. 743. An Action at Law lies for a Battery on a Spiritual Perſon, as alſo a Suit in the Spiritual Court for Irreverence to his Character. 6 Mod. 156. *Vide* Cro. Eliz. 655.

(E) How they are to proceed, as to thoſe Matters in which they have a Juriſdiction, otherwiſe will be controuled by the Temporal Courts.

4 Co. 29. a. 7 Co. 42. b. Rol. Abr. 530 THE Eccleſiaſtical Juriſdiction is derived from the Common Law, but the Form of the Proceedings, and the coercive Power exerciſed in the Eccleſiaſtical Courts, is after the Form of the Canon or Civil Law; and therefore the Judges of the Common Law will give Credit to their

2 Rol. Abr. 298, 299. Proceedings and Sentences, in Matters in which they have a Juriſdiction, and believe them conſonant to the Law of the Holy Church, although againſt the Reaſon of the Common Law; and if there be a *Gravamen* it muſt be redreſſed by Appeal.

Skin. 27. pl. 3, 28. They may cite the Members of a Corporation by their Chriſtian Names and Names of Baptiſm, for a Duty due from them in their Corporate Capacity, as a Rate for not repairing a Church; for they have no *Diſtringas* as at Common Law, by which they may take their Lands or Goods, and therefore muſt proceed againſt them in their Natural Capacity.

5 Mod. 449. Carth. 504. Ld. Raym. 706. arg. 12 Mod. 275. A Citation may be ſerved on a *Sunday*, or, according to the Cuſtom of the Eccleſiaſtical Court, it may be fixed to the Church Door on a *Sunday*; and this ſhall not be ſaid to be reſtrained by the 29 *Car.* 2 *cap.* 7. which prohibits the Serving of any Proceſs whatſoever upon a *Sunday*, except in Caſes of Treaſon, Felony or Breach of the Peace.

By

* By the 13 *Car.* 2. *cap.* 12. it is enacted, "That it shall not be lawful "for any Archbishop, Bishop, Vicar General, Chancellor, Commissary, "or any other Spiritual or Ecclesiastical Judge, Officer or Minister, or "any other Person, having or exercising Spiritual or Ecclesiastical Juris- "diction, to tender or administer, unto any Person whatsoever, the Oath "usually called the Oath *ex Officio*, or any other Oath, whereby such "Person, to whom the same is tendered or administered, may be charged "or compelled to confess, or accuse, or to purge him or herself, of any "Criminal Matter or Thing, whereby he or she may be liable to any "Censure or Punishment." *Page 621 For the Proceedings *ex Officio* before this Statute, *vide* Cro. Eliz. 201. Cro. Car. 291. Moor 755. pl. 1342. Cro. Jac. 37.

Jones 257. And for the Construction of this Statute *vide* Sid. 232. Mod. 185. 10 Mod. 349. Ld. Raym. 263, 468. 2 Ld. Raym. 767. 2 Mod. 118. Vent. 41. 5 Com. Dig. 480.

If a Man is proceeded against in the Spiritual Court for Defamation, and the Libel charges that he spoke such and such Words, *aut in effectu consimilia*, although a Declaration at Law, in this Form, would be naught for Incertainty; yet the Libel is good, being according to the Course of the Ecclesiastical Court. 2 Rol. Abr. 298. *Palmer's* Case.

If one sues in the Spiritual Court for a Legacy, and the Executor (*a*) pleads that he hath not Assets beyond the Debts due from the Testator, and the Plea (*b*) is refused, a Prohibition lies. 2 Rol. Abr. 292.

(*a*) But where an Executor pleaded *Plenement administer*, and the Plea being refused, a Prohibition was moved for, but denied, being a Matter of Ecclesiastical Conuzance. Sid. 274. Keb. 939. *Saunderson's* Case, & *vide* Noy 77. Latch 114. Golsb. 4. (*b*) That there must be an Affidavit of such Refusal. Skin. 20. pl. 20.

If the Spiritual Court refuses to give a Copy of the Libel, a Prohibition will be granted *quousque*; But there must be an Affidavit that such Copy was demanded and refused. Vent. 252. 6 Mod. 308.

The Ecclesiastical Court can (*c*) neither Fine, Imprison, nor Amerce; for their Jurisdiction being founded on the Canon or Civil Law, their Proceedings are only by Ecclesiastical Censures. 11 Co. 44. a. 4 Inst. 324. Noy 17.

(*c*) They have but two Sorts of Punishment, Penance in Costs, which first may be commuted or dispensed with for Money. 5 Mod. 70.

If a Man be sued in the Ecclesiastical Court, and the Judge take an Obligation from him that he will perform the Sentence, a Prohibition lies; for if it be in a Matter within his Jurisdiction, there are lawful Means of compelling him to perform the Sentence. 2 Rol. Abr. 302.

*Page622 * Of the Court of Admiralty.

4 Inſt. 142. (a) Inſt. 167. (b) Molloy 66. *Selden's Mare Clauſum.*

THE Court of Admiralty is a Court for all Maritime Cauſes or Matters ariſing upon the High Sea, and its Juriſdiction is derived from the King, who (*a*) protects his Subjects from Pirates, &c. and who has (*b*) a Dominion over all the *Britiſh* Seas; this Juriſdiction he exerciſes by the (*c*) Lord High Admiral, or thoſe lawfully deputed for that Purpoſe.

(*c*) For the Antiquity of this high Officer, *vide* Co. Lit. 260. 12 Co. 80. And for antient Records relating to his Juriſdiction, *vide* 4 Inſt. 142.—By the 2 *W.* & *M.* ſeſſ. 2. c. 2. Commiſſioners of the Admiralty have the like Authority and Juriſdiction as the Lord High Admiral.——By the 2 H. 5. Stat. 1. c. 6. the King by Letters Patent may appoint in every Port a Conſervator of a Truce, worth 40*l. per Ann.* in Land: who by the King's Patent, and the Admiral's Commiſſion, ſhall inquire of Offences againſt Truce and Safe Conduct, &c. as the Admirals have done, &c. ſaving the Determination of the Death of a Man, and the Execution thereupon, to the Admiral. The Lord Warden of the *Cinque Ports* is alſo Admiral there, and hath the Juriſdiction of the Admiralty exempt from the Admiralty of *England*. 4 Inſt. 223. 2 Jones 66, 67.—Which Juriſdiction is ſaved to him by ſeveral Acts of Parliament, as 2 H. 5. Stat. 1. c. 6. 27 H. 8. c. 4. 28 H. 8. c. 15. 5 Eliz. c. 5. 11 & 12 *W.* 3. c. 7. *Vide*, &c.

For the better bringing together the ſeveral Caſes and Reſolutions that have been in the Temporal Courts, relating to the Juriſdiction of the Court of Admiralty, I ſhall conſider,

(A) To what Places the Juriſdiction of the Admiralty is confined. 623.

(B) To what Things its Juriſdiction extends; and herein of ſuch Matters as ariſe, partly on Sea, and partly on Land. 624.

(C) To what Contracts its Juriſdiction extends? And herein of Contracts made on the Sea. 626.

(D) To what Crimes and Offences its Juriſdiction extends. 628.

(E) By what Law it proceeds, and the Form of ſuch Proceedings. 629.

(A) To

(A) To what Places the Jurisdiction of the Admiralty is confined.

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IT is laid down as a general Rule in our Common Law Books, That the Admiral's Jurisdiction is confined to Matters arising on the *(a)* High Seas only, and that he cannot take Conuzance of Contracts, *&c.* made or done in any River, Haven or Creek within any County; and that all Matters arising within these are triable by the Common Law.

(a) As 4 Inst. 137, 138, 139, 140. 12 Co. 129. Moor 122, 892. Godb 261. 2 Sid. 81. Hob. 79, 212. 13 Co. 52. 2 Brownl. 10, 37. 2 Bulst. 322. Rol. Rep. 133. But our Books seem not to be agreed what shall be counted *Altum Mare*, or the High Sea; by some, it is no Part of the Sea where one may see what is done on the other Side of the Water. 4 Inst. 140. 141. 12 Co. 80. Moor 892.—That what is within the Body of the County is no Part of the Sea. 4 Inst. 140.—That the Admiralty Court cannot hold Plea of a Thing done upon the River *Thames*, because within the Body of the County. Rol. Abr. 531. Owen 122. 2 Brownl. 37. S. C. adjudged. Leon 106. Moor 916. 2 Rol. Rep. 413. S. P. adjudged.—Nor of a Matter arising at *Limehouse*. Cro Jac. 514. 2 Rol. Rep. 49. Moor 891. S. P. adjudged.—But by Owen 123. Such Place as is covered with Salt Water is *altum Mare*.—And Rol. Rep. 250. By *Coke*, the Admiralty Court hath Conuzance of a Matter done in a Ship, riding in a Port that is not within the Body of a County.—But it seems agreed, that though in a Libel in the Court of Admiralty the Fact is laid to be done *super altum Mare*; yet it may be surmized that it was done *in Corpore Com' &c.* and thereupon a Prohibition will be granted, for the Surmise is traversable. Moor 891. pl. 1255. Latch. 11.

But it hath been resolved, That between the High and Low Water Mark, the Common Law and Admiralty have *Imperium divisum, scilicet*, the one when it is not, and the other when it is covered with Water; and that *(b)* the Soil upon which the Sea flows and reflows, may be Parcel of a Manor. *

5 Co. 107. Sir *Henry Constable's* Case. And. 89. S. C.

(b) If a Man's Lands lie to the Sea, if they are increased by insensible Degrees, they belong to the Soil adjoining; but if the Sea leaves any Shore by a sudden Falling off of the Water, then such derelict Lands belong to the King. Dyer 326. 2 Rol. Abr. 170†. If a River, as far as there is a Flux of the Sea, leaves its Channel, it belongs to the King; for the *Englisb* Sea and Channels belong to the King, and he hath the Property in the Soil, having never distributed them out to his Subjects.—2 Rol. Abr. 170.—But if a River, in which there is no Tide, should leave its Bed, it belongs to the Owners on both Sides; for they have, in that Case, the Property in the Soil, being no original Part or Appendix to the Sea, but distributed out as other Lands. 2 Rol. Abr. 170.—If the Sea overflow my Lands for forty Years, and after re-flow, yet I shall have my Land again; for the Act of Nature cannot alter the Property. 2 Rol. Abr. 1168.

* And Parcel of a Parish, and Oyster Layings, *&c.* rated to the Poor.——Many Instances in *Essex*, *Kent*, and other Parts.

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† Or, to the Lord of the adjoining Manor, if derelict Lands are included in the Grant.

By the 13 *R.* 2. *cap.* 5. Upon Complaint of Incroachments made by the Admirals and their Deputies, it is enacted, "That the Admirals and their Deputies shall *(c)* meddle with nothing done within the Realm, but only with Things done upon the Sea.

2 Stra. 1045. For the Construction of this Statute,

(c) 3 Bulst. 205. This must be intended of holding Pleas, and not of awarding Execution; for, notwithstanding this Statute, the Judge of the Admiralty may do Execution in the Body of the County. 13 Co. 52.

By the 15 *R.* 2. *cap.* 3. upon the like Complaint, it is declared, "That all Contracts, Pleas and Quarrels, and other Things done within the Bodies of Counties by Land or Water, and of Wreck, the Admiral shall have no Conuzance, but they shall be tried, *&c.* by the Law of

2 Stra. 1045.

(d) By the Resolution of the Judges in Cro. Car. 297. by the Equity of this Statute he may redress all Annoyances and Obstructions in those Rivers, which are an Impediment to Navigation, and may try Contracts and Injuries done there which concern Navigation at Sea; but Q. (e) In Owen 122. it is said *per Cur'*, That the Translator mistook *Bridges* for *Points*, as the Land's End.

"the Land; but (d) of the Death of a Man, and of Mayhem done in "great Ships, being in the main Stream of great Rivers beneath the (e) "Bridges near the Sea, and in no other Place of the same River, the Ad- "miral shall have Conuzance; and also to arrest Ships in great Flotes, "for the great Voyages of the King and the Realm, saving to the King "his Forfeitures; and he shall have Jurisdiction in such Fleets during "such Voyages only, saving to Lords, &c. their Liberties."

*Page624 (f) The Action may be brought by one Part-Owner, for it is grounded merely on a Tort. Carth. 295. (g) If upon Petition to the Judge of the Admiralty, a Ship is stopped in the Harbour till Caution given not to trade within the Limits of the *East-India* Company this is a Prosecution within the Statute, though there is no formal Plaintiff or Defendant; and in many Cases the Suits there are against the Ship itself. Carth. 294. Skin. 361. pl. 3. 4 Mod. 176. Salk. 31. pl. 1. 3 Lev. 353. S. C. between *Child* and *Sands*. (h) Though the Prosecution be by the Command of the King, and in the Name of his Proctor, yet if it was upon the Solicitation and by the Procuration of the Parties, and they pay the Fees, they pursue within the Intention of the Act. 3 Lev. 353.

"* By the 2 *H.* 4. *cap.* 11. reciting the 13 *R.* 2. *cap.* 13. it is enacted, "That he that (f) finds himself aggrieved (g) against the Form of the "Statute, shall have his Action by Writ grounded upon the Case against "(h) him that so pursues in the Admiralty, and recover his double "Damages against him, and he shall incur the Pain of 10*l.* if he be "attainted."

(B) To what Things its Jurisdiction extends. And herein of such Matters as arise partly on Sea, and partly on Land.

5 Co. 107. 2 Inst. 167. 4 Inst. 154. Palm. 96. Sid. 178.

THE Admiralty Court has Jurisdiction, where a Ship founders, or is split at Sea, over the Goods which become (i) *Flotsam*, *Jetsam*, *Ligham*; and a Suit for these must be in that Court; but for Goods wrecked they (k) must be claimed by Action at Common Law.

Rol. Abr. 531. (i) There are four Sorts of shipwrecked Goods, *viz.* *Flotsam*, *Jetsam*, *Ligan* and *Wreck*. *Flotsam* is when the Ship is split, and the Goods float upon the Water between High and Low Water Mark; *Jetsam* is when the Ship is in Danger to be drowned, and for lightening the Ship the Goods are cast into the Sea; *Ligam*, *Lagan*, or *Ligan*, is when the heavy Goods are cast into the Sea with a Buoy, that the Mariners may know where to retake them. *Wreck* is, where Goods Shipwrecked are cast upon the Land; these, when all the Crew are drowned, belong to the King, or the Lord of the Manor, to whom it is presumed, the King has granted them; But by Westm. 1. c. 4. if a Dog or a Cat (which are put for Instance) escape alive, the right Owner shall have them again, if he claim them within a Year and a Day after the Seizure. 2 Inst. 167. 5 Co. 106. Bract. Lib. 3. f. 120. Molloy 23. (k) By the express Words of 15 R. 2. they have no Conuzance of Goods wrecked.

† See the Stat. 12 Ann. Stat. 2. c. 18. & 26 Geo. 2. c. 19.

Sid. 178. Keb. 657.

And although the Admiralty Court has Jurisdiction of *Flotsam*, and shall determine what it is by the Rules of the Civil Law, yet it must be understood where the Thing is *super altum mare*; and therefore if a Ship, which becomes *Flotsam* and derelict, comes into the Body of a County they have no Jurisdiction.

So if *Flotſam* comes to Land, and is taken by one that hath no Title, an Action lies at Common Law, but there ſhall be no Proceedings thereon in the Admiralty; for it need not be condemned as a Prize. 2 Mod 294. Ld. Raym. 388, 446, 473, 501.

At (*e*) Common-Law, none but the King only could erect Beacons, Light-Houſes, and Sea-Marks, but of later Times, by Letters Patents granted to the Lord Admiral, he hath Power to erect (*f*) Beacons, Sea-Marks, and Signs for the Sea. 4 Inſt. 148. (*e*) But by 8 Eliz. c. 13. the Maſter, Wardens, Aſſiſtants of the *Trinity Houſe* at *Deptford Strond*, had Power given them to erect Beacons, Marks and Signs for the Sea, &c. *vide* 4 Inſt. 149. (*f*) A Suit for the Profits of the Beaconage of a Rock in the Sea, near —— in *Cornwall*, may be in the Court of Admiralty. *Croſs* and *Diggs*, Sid. 158. adjudged; and it was ſaid, as the Profits of the Beacons belong to the Admiral, ſo the Suit for them ought to be in his Court, though the Rock be the Freehold of another, and Part of his Inheritance.

If the Original Cauſe ariſes upon the Sea, and other Matters happen upon the Land depending thereupon, yet the Trial ſhall be in the Court of Admiralty. Vent. 173. 2 Lev. 25. Sid. 320.

* As if a Man takes a Thing upon the Sea and brings it to the Land, and afterwards carries it away, the Suit for this ſhall be in the Admiralty Court, for this is a continued Act. *Page 625 Rol. Abr. 533.

4 Inſt. 130. 12 Co. 97. 12 Mod. 135. Like Point.

So if Goods are taken piratically out of a Ship, and afterwards ſold upon Land, a Suit may be commenced in this Caſe in the Admiralty Court, againſt the Vendee. March 110. Cro. Eliz. 685. S. P. adjudged; unleſs the Sale had been in a Market Overt: But *vide* Hob. 78. Rol. Abr. 531, 532. And that in ſuch Caſe the Party may have an Action of Trover and Converſion at Common Law†.

† But if the Felon ſhould not be proſecuted and convicted? *Vide* Com. Dig. 4. v. 182, 3.

So if a Ship be taken by Pirates and carried to *Tunis*, and there ſold, it being originally within the Juriſdiction of the Admiral it ſo continues, notwithſtanding the Sale afterwards upon the Land. Vent. 308.

But if the Owner of a Ship ſends her to the *Indies* to merchandiſe, and the Crew commit Piracy, by which, according to the Admiral Law, the Ship becomes forfeited, and the Admiral ſeizes her accordingly, if afterwards the Owner takes the Sails and Tackling out of the Ship, lying *infra corpus com'*, no Suit for this can be in the Admiralty Court; for the Admiral hath his Remedy by Action at Common Law. Rol. Abr. 533. Rol. Rep. 285. S. C. adjudged. 3 Bulſt. 148.

If a Suit be in the Admiralty Court for making a Lighter for the Carriage of Mud, or the like, within the Body of the County upon the *Thames*, and not for Navigation, a Prohibition lies. Rol. Abr. 533.

If a Ship is taken by Pirates upon the Sea, and the Maſter to redeem the Ship contracts with the Pirates to pay them 50*l.* and pawns his Perſon for it, and the Pirates carry him to the Iſle of *S.* and there he pays it with Money borrowed, and gives Bond for the Money, he may ſue in the Admiralty for the 50*l.* becauſe the original Cauſe aroſe upon the Sea, and what followed was but acceſſary and conſequential. Hard. 183. *Spark* and *Staſford*, adjudged.

If there be wars with the *Dutch*, and one having Letters of Marque takes an *Offender* for a *Dutch* Ship, and brings it into an Haven, and libels againſt it to have it condemned as a Prize, but Sentence is given that it was no Prize; the *Offender* may libel in the Admiralty againſt the Captain, for the Damage the Ship received while it lay in the Port; for the original Taking being at Sea, the bringing it into the Port, in order to have it condemned, is but a Conſequence thereof. Lev. 243, *Turner* and *Neal*. Sid. 367. S. C. adjudged.

If

Carth. 499. *Rex.* v. *Broom*, Ld. Raym. 271. adjudged; being fully debated; and that the ſecond Libel was but a Continuance of the firſt Suit, and a Charge grounded upon the firſt Sentence by way of Execution thereof. Salk. 32. pl. 3. S. C. & *vide* Carth. 423.

If an *Engliſh* Ship takes a *French* Ship richly laden, the *French* being in Enmity with us, and ſuch Ship is libelled againſt, and after due Notice on the *Exchange*, &c. declared a (*a*) lawful Prize, the King's Proctor may exhibit a Libel in the Admiralty Court, to compel the Taker (who ſent the Ship to *Barbadoes*, and converted the Lading to his own Uſe) to anſwer the Value of the Prize to the King; although it was objected, that by the firſt Sentence the Property was veſted in the King, and that this ſecond Libel was in Nature of an Action of Trover, of which the Court of Admiralty cannot hold Plea.

(*a*) That Prize or no Prize is a Matter altogether appropriated to the Juriſdiction of the Admiralty, and not triable at Common Law, *vide* Carth. 475, 476.

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*Page626 * (C) To what Contracts its Juriſdiction extends; and herein of Contracts made on Sea.

4 Inſt. 134, 139. 12 Co. 103. Hob. 79, 212.

THE Court of Admiralty hath no Juriſdiction as to Contracts made at (*b*) Land, whether ſuch Contract be made here or in Foreign Parts.

(*b*) If a Contract be made upon the Sea, which is afterwards ſealed upon the Land the Court of Admiralty cannot hold Plea thereof. Hob. 79, 212.

Latch 11. *per Dod.*

If a Ship lying at Anchor wants Victuals, and ſends to Land to *J. S.* to bring Victuals, and ſo the Contract is made in the Ship, the Admiralty ſhall have Conuzance; *ſecus* if the Contract is made intirely at Land and the Victuals after ſent to the Ship.

Hob. 12. *Bridgman's* Caſe Rol. Abr. 532. S. C.

If a Contract or Obligation be made upon the Sea, yet if it be not for a Marine Cauſe, the Suit upon this Contract or Obligation ſhall be at Common Law, and not in the Admiralty Court; for if a Man makes an Obligation for the Security of a Debt growing before upon the Land, or if he makes a Promiſe to pay it, this cannot be ſued in the Court of Admiralty, but at Common Law.

Rol. Abr. 325. 4 Inſt. 139.

If a Man contracts with me in *London*, in Conſideration of 100*l.* to tranſport certain Commodities into *Turkey*, if he does not perform it, I cannot ſue him in the Court of Admiralty, becauſe the Contract was here, and nothing done upon the Sea.

Rol. Abr. 532, 533. Rol. Rep. 486. S. C. 4 Inſt. 135, 139, 142. Moor 450.

If a Charter-Party be made in *England*, to do certain Things in ſeveral Places upon the Sea, though no Act is to be done in *England*, but all upon the Sea, yet no Suit can be in the Admiralty Court for the Non-performance of the Agreement; for the Contract is the Original, (*c*) without which no Cauſe of Suit can be, and this Contract is out of their Juriſdiction; and where Part is triable by the Common Law, and Part by the Admiral Law, the Common Law ſhall be preferred.

(*c*) Both the Contract and Breach muſt concur to make the Cauſe of Suit, which is intire; therefore, &c. Hob. 21

In Caſes of Neceſſity, the Maſter may hipothecate or pledge the Ship or Goods, and (*c*) ſuch Contract is cognizable in the Admiralty Court. Rol. Abr. 530. Hob. 11.

Moor 918. (*c*) That ſuch Hipothecation is allowed, becauſe no other Remedy at Common Law; but where *A.* contracted with *B.* for a Cable, which he delivered at *Ratcliff upon Thames*, and *B.* ſued in the Admiralty, a Prohibition was granted; though it was inſiſted, that the Want of the Cable was occaſioned by the Streſs of Weather at Sea; for here the Contract was at Land, and a Remedy for the Breach at Common Law; but had the Hipothecation been at *Rotterdam*, or in any other Foreign Part, the Remedy had been proper in the Admiralty Court. Salk. 34. 3 Mod. 244. 6 Mod. 12, 25. Ld. Raym. 934. 3 Salk. 227. pl. 2. Com. 137. pl. 91.

The Mariners may ſue in the Admiralty Court for their Wages, although the Hiring was by the Maſter on Land: and this is allowed of in Favour of Navigation, for here they may all join in the ſame Libel; alſo by the Admiral Law they have Remedy againſt the Ship and Owners, as well as againſt the Maſter; and it would be a great Diſcouragement to Seafaring Men, to oblige them to bring ſeparate Actions, and thoſe againſt a Maſter, who may happen to be inſolvent. Winch. 8. 4 Inſt. 141. Vent. 146, 343. 3 Mod. 244, 245. Salk. 33. pl. 4, 31. Ld. Raym. 576, 632. Carth. 518. 2 Ld. Raym. 1044. 12 Mod. 405. & *vide* 4 Ann. c. 16.

So of the other Officers under the Maſter, as the (*d*) Mate, (*e*) Purſer, Boatſwain, *&c.* for though they contract with the Maſter, yet it is on the Credit of the Ship, *&c.* (*d*) Salk. 33. pl. 5. 2 Stra. 937. 2 Barnard. K. B. 160. 12 Mod. 440. (*e*) Raym 3. 2 Stra. 858. 2 Barnard. K. B. 297. So a Carpenter, Stra. 707. 2 Vent. 181. Salk. 33. pl. 5. Mod. 93.

*So a Shipwright may ſue in the Admiralty Court for the (*e*) building a Ship (*f*) for Navigation upon the Sea. *Page 627 (*e*) Rol. Abr. 533.

For amending a Ship. Cro Car. 296. (*f*) If a Contract be with Seamen to go on a Voyage, and they, in order thereunto, work in a Harbour, and after the Voyage is intercepted, through the Owner's Fault; as if the Ship be arreſted for his Debt, *&c.* the Seamen ſhall ſue for their Wages for the Work done in the Harbour, in Purſuance of the Contract to go on a Voyage, in the Admiralty, as much as if they had gone the Voyage; *ſecus*, if the Retainer of them had been only to do the Work in the Harbour. 6 Mod. 238. 2 Ld. Raym. 1044.

But if there be any ſpecial Agreement, by which the Mariners are to receive their Wages in any other Manner than is uſual; or if the Agreement is under Seal, the Mariners cannot ſue in the Admiralty Court. Salk. 31. pl. 1. *Opy* and *Addiſon*. Stra. 405.

Nor can the Maſter ſue in the Admiralty Court; for his Contract is on the Credit of the Owners, and not like that of the Mariners, which is on the Credit of the Ship. 2 Stra. 968. 4 Inſt. 141. Raym. 3. Salk. 33. pl. 4.

Lord Raym. 576. Carth. 518. S. P. although the Owner was beyond Sea, and the Ship lay here, & *vide* 2 Salk. 548. pl. 3.

If a Contract is made at *Malaga*, concerning the Lading of a Ship, and the Breach thereof upon the Sea, *viz.* That he would not receive forty Butts of Wine into the Ship, according to Agreement, there is a Libel in a Foreign Admiralty, and Sentence that the Wine ſhall be received into the Ship, which is refuſed; yet there can be no Suit in the Admiralty here, reciting the former Sentence, and charging the Defendant with a Breach thereof; for though one may libel here upon a Sentence in a Foreign Admiralty, for the Execution of it, yet there being no complete Sentence in the Foreign Admiralty, but an Award only, that the Wine ſhould be received; this Suit for Breach thereof is in Nature of an original Suit, which Vent. 32. *Jurado* and *Gregory*. Sid. 418. Lev. 267, S. C.

which ought not to be, though the Breach was at Sea, becauſe upon a Contract made at Land.

Carth. 26. *Knight* and *Berry*, adjudged, and Prohibition to ſuch a Suit granted, tho' after Sentence and Appeal to the Delegates; & *per Holt.* The Part-Owners, who are the major Part, are not without Remedy in ſuch Caſe; for a Special Action on the Caſe may be framed at the Common Law. Hard. 473. S. P. but no Reſolution 6 Mod. 162. S. P. but no Reſolution.

If there are ſeveral Partners of a Ship, and the major Part of them are for ſending her a Voyage to Sea, to which the reſt diſagree; whereupon, according to the (*a*) common Uſage in ſuch Caſes, the greater Number ſuggeſt in the Admiralty Court, the Diſagreement of their Partners; and then, according to their Uſage there, they order certain Perſons to appraiſe the Ship, who accordingly ſet a Value thereon; and then the major Part, who agreed to the Voyage, enter into a Recognizance, wherein they bind themſelves jointly and ſeverally to the diſagreeing Parties, in a Sum proportionable to their Shares, according to the Value ſet by the Appraiſers, to ſecure the Shares in the Ship of thoſe who diſagree to the Voyage, againſt all Adventures; there can be no Suit on this Agreement or Stipulation in the Admiralty Court; for the Contract was made on Land, and therefore the Temporal Court muſt have Conuzance of it.

(*a*) For this *vide* Skin. 230. pl. 9. 2 Chan. Ca. 36. 2 Stra. 890. Fitzgib. 197.

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*Page 628 * (D) To what Crimes and Offences its Juriſdiction extends.

See 2 H. H. P. C. 12 & c. 2 Hawk. P. C. 222. How Piracy and Offences committed on the Sea were puniſhed before this Statute, *vide* 4. Aſſ. 25. 3 Inſt. 115. S. P. C. 10. b. H. P. C. 77. 3 Inſt. 112. (*b*) This muſt be intended between the High Water and Low Water Mark, where there is *diviſum Imperium* at ſeveral Times.

BY the 28 *H.* 8. *cap.* 15. it is enacted, "That all Felonies and Robberies, &c. upon the Sea, or in any Haven, River, Creek, or Place, where the Admiral or Admirals have, or (*b*) pretend to have Power, Authority or Juriſdiction, ſhall be inquired, tried, heard, determined, and judged in ſuch Shires and Places in the Realm as ſhall be limited by the King's Commiſſion or Commiſſions to be directed for the ſame, in like Form and Condition as if any ſuch Offence or Offences had been committed or done in or upon the Land; and ſuch Commiſſions ſhall be had under the King's Great Seal, directed to the Admiral or Admirals, or to his or their Lieutenant, Deputy or Deputies, and to three or four ſuch other ſubſtantial Perſons as ſhall be named or appointed by the Lord (*c*) Chancellor of *England*, for the Time being, from Time to Time and as oft as Need ſhall require, to hear and determine ſuch Offences after the (*d*) common Courſe of the Laws of this Land, uſed for Felonies and Robberies, &c. done and committed upon the Land within this Realm: *And it is further enacted*, That if any Perſon or Perſons happen to be indicted for any ſuch Offence done, or hereafter to be done upon the Seas, or in any other Place above limited, that then ſuch Order, Proceſs, Judgment and Execution ſhall be uſed, had, done and made to and againſt every ſuch Perſon and Perſons ſo being indicted, as againſt Felons, &c. for any Felony, &c. upon the Land, by the Laws of the Land is accuſtomed; and ſuch as ſhall be convict of any ſuch Offence, by Verdict, Confeſſion or Proceſs, by Authority of any ſuch Commiſſion, ſhall have and ſuffer ſuch Pains of Death, Loſſes of Lands, Goods and Chattels, as if they had been attainted and convicted of ſuch Offence done upon the Land; and alſo, that they ſhall be excluded from the Benefit of the Clergy.

3 Inſt 113. But if done in ſuch Creek or Haven where the Admiral hath no Juriſdiction, the Commiſſioners cannot meddle with it. Owen 122. Moor 756. Rol. Rep. 175. H. P. C. 77. (*c*) Hob. 146. (*d*) Yet it ſtill remains an Offence

It was (a) held, that by Force of this Statute Acceſſories to this Offence could not be tried; but this is remedied by 11 & 12 *W.* 3. *cap.* 5. by which their Aiders, and Comforters, and the Receivers of their Goods, are made Acceſſories, and to be tried as Pirates, by 28 *H.* 8. *cap.* 15. alſo the ſaid Statute 11 & 12 *W.* 3. directs how Pirates may be tried beyond Sea, according to the Civil Law, by Commiſſion under the Great Seal of *England*. *(a) Vide* Yelv. 134.

By the 5 *Eliz.* *cap.* 5. *ſect.* 30. ſeveral Offences in the Act mentioned, if done on the main Sea, or Coaſts of the Sea, being no Part of the Body of any County, and out of any Haven and Pier, ſhall be tried before the Admiral or his Deputy, and other Juſtices of *Oyer* and *Terminer*, according to the Statute of 28 *H.* 8. *cap.* 15.

*By 1 *Ann. ſeſſ.* 2. *cap.* 9. *ſect.* 4. Captains and Mariners belonging to Ships, and deſtroying the ſame at Sea, ſhall be tried in ſuch Places as ſhall be limited by the King's Commiſſion, and according to 28 *H.* 8. *cap.* 15. *Page 629

The 10 *Ann.* *cap.* 19. directs how the Trials of Officers and Soldiers, that either upon Land out of *Great Britain*, or at Sea, hold Correſpondence with a Rebel Enemy.

And by 4 *Geo.* 1. *cap.* 11. *ſect.* 7. All Perſons, who ſhall commit any Offence for which they ought to be adjudged Pirates, Felons or Robbers, by 11 & 12 *W.* 3. *cap.* 5. may be tried and adjudged for every ſuch Offence according to the Form of 28 *H.* 8. *cap.* 15. and ſhall be excluded from their Clergy. See 4 Geo. 1. c. 12. ſ. 3. & 8 Geo. 1. c. 24. made perpetual by 2 Geo. 2. c. 28. ſ. 7. and 11 Geo. 1. c. 29. ſ. 6. 18 Geo. 2. c. 30.

(E) By what Law it proceeds, and the Form of ſuch Proceedings.

ALL Maritime Affairs are regulated chiefly by the Civil Law, the *Rhodian* Laws, the Laws of (b) *Oleran*, or by certain Peculiar and Municipal Laws and Conſtitutions appropriated to certain Cities, Towns, and Countries bordering on the Sea. Godolp. Adm. Juris, 40. (b) So called for that they were made by King *Richard* 1. when he was there. Co. Lit. 11. b. 260. b.

If the Owner of a Ship victuals it, and furniſhes it to Sea with Letters of Repriſal, and the Maſter and Mariners when they are at Sea commit Piracy upon a Friend of the King, without the Notice or Aſſent of the Owner, yet by this the Owner ſhall loſe his Ship by the Admiral Law, and our Law ought to take Notice thereof. Rol. Abr. 530. but *vide* Rol. Rep. 285.

Offence of a ſpecial Nature; and therefore the Indictment muſt alledge the Fact to be done upon the Sea, and muſt have both the Words *Felonice* and *Piratice*; and no Offence is puniſhable by Virtue of this Act as Piracy which would not have been Felony if done on Land; conſequently the taking of an Enemy's Ship by an Enemy is not within the Statute. 3 Inſt. 112. S. P. C 114. Rol. Rep. 175.———And although the Statute ordains, that it ſhall have the like Trial and Puniſhment as are uſed for Felony at Common Law, yet this ſhall not be carried ſo far as to make it alſo agree with it in other Particulars which are not mentioned; and therefore it ſhall not be included in a general Pardon of all Felonies. Moor 756. 3 Inſt. 112. Co. Lit. 391. H. P. C. 77. 2 Hal. Hiſt. Plac. Cor. 370.—Nor ſhall an Attainder for this Offence work any Corruption of Blood. 3 Inſt. 112. H. P. C. 77.—But it hath been reſolved, that an Offender ſtanding mute on an Arraignment, by Force of this Statute, ſhall have Judgment of *Pain fort & dure*. 3 Inſt. 114. Dyer 241.

By

By the Civil Law and Custom of Merchants, if the Ship be (*b*) cast away, or perish through the Mariners Default, they lose their Wages; so (*c*) if taken by Pirates, or if they run away; for if it were not for this Policy they would forsake the Ship in a Storm, and yield her up to Enemies in any Danger.

Sid. 179. Mod. 93. Vent. 146.

12 Mod. 408, 409, 442. (*b*) But whether the Executors of those Mariners who died before the Casting away of the Ship may recover the Wages due to their Testators, Q. & *vide* Sid. 179. Keb. 684 (*c*) For refusing to Fight when commanded by the Master, *vide* 22 & 23 Car. 2. c 11.

If a Man of *Friezland* sues an *Englishman* in *Friezland* before the Governor there, and there recovers against him a certain Sum, upon which the *Englishman*, not having sufficient to satisfy it, comes into *England*, (*d*) upon which the Governor sends his Letters missive into *England*, *omnes Magistratus infra Regnum Angliæ rogans* to make Execution of the said Judgment, the Judge of the Admiralty may execute this Judgment by Imprisonment of the Party, and he shall not be delivered by the Common Law; † for this is by the Law of Nations, that the Justice of one Nation shall be aiding to the Justice of another Nation, and for one to execute the Judgment of the other; and the Law of *England* (*e*) takes Notice of this Law, and the* Judge of the Admiralty is the proper Magistrate for this Purpose, for he only hath the Execution of the Civil Law within this Realm.

Rol. Abr. 530. *Wier's* Case.

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(*d*) So upon a Judgment given in a Court of Admiralty, Execution may be sued in foreign Parts. Godb. 260. *arguendo*.—If a Ship is condemned as the King's Prize in a foreign Admiralty, such Sentence may be executed here. Salk. 32. pl. 3. 33. (*e*) If a Ship is sold by Virtue of a Sentence in the Court of Admiralty of *France*, (being then in Amity with *England*) the Sentence shall not be examined in an Action at Common Law; for we ought to give Credit to their Sentences, else they will not give Credit to the Sentences of our Court of Admiralty. 2 Ld. Raym. 893, 936. but the Way to be relieved is to petition the King, who will examine the Case, and, if he finds Cause of Complaint, send to his Ambassador residing there, and upon Failure of Redress, will grant Letters of Marque and Reprisal. Raym. 473. Skin. 59. pl. 2. & *vide* Vent. 32.——But where the Court said they would give no Regard to a Sentence in the Court of Admiralty of *Scotland*, *vide Rudly* and *Egglesfield*, 2 Sand. 259, 260. Vent. 174.——But it was agreed the Sentence in *Scotland* was pleadable in the Court of Admiralty here. Vent. 274. 2 Lev. 25. and 2 Sand. 260. The Validity of the Sentence of the Admiralty in *Scotland* is determinable by the Law of the Admiralty here.

† If this is Law, there would be Judgment and Execution without Appeal, therefore *q.* except in Admiralty Causes? The Case in the Text is taken from *Roll's* Abr. and is under Title, *Court of the Admiralty*.

The (*f*) Master of a Ship may hypothecate or pledge the Ship without the Consent of the Owner for Tackling and Victuals, or he (*g*) may borrow Money for the Necessaries of the Ship, and in such Cases the Party may in the Admiralty Court (of which our Law will take Notice) (*h*) either proceed against the Owner or against the Ship.

Hob. 11. Moor 918. Rol. Abr. 530.

(*f*) Or he that is reputed Master. Noy 95. But not before the Voyage begins. Stra. 695. See 12 Mod. 406. (*g*) Though in Fact it be not employed accordingly, and the Owner must take his Remedy against the Master. Noy 95. (*h*) 2 Sid. 161. said to have been so lately agreed.——But *vide* Salk. 35. pl. 9. Ld. Raym. 982. 6 Mod. 79. 11 Mod. 30. pl. 1. That the Master cannot by his Contract make the Owners personally liable, although he may bind the Ship, without which the Master can have no Credit abroad without such Security by Hypothecation.

But the Master cannot sell the Ship and broken Tackle, though there is no Probability of its being saved, partly in respect of the Tempest, and partly in respect of the Barbarity of the Inhabitants, who took away every Thing that was cast upon the Shore.

Sid. 453. *per Hale* Ch. Baron.

If a Merchant's Ship is taken by an (*i*) Enemy, and a Month after is retaken by an *English* Ship, (*k*) the first Owner (*l*) shall not have Restitution, for the Ship was gained by Battle with an Enemy.

2 Brownl. 11. *Weston's* Case.

(*i*) Otherwise if by a Pirate. Vent. 174. (*k*) Where the Property is not altered until the Prize is brought *infra præsidia* of that King, by whose Subject it is taken. March 110, 111. (*l*) Where they shall be restored to the Owner, paying Salvage, and what shall be paid for Salvage *per* 4 & 5 *W.* & *M.* c. 25.

If

If two Ships meet at Sea together, though they went not forth Conſorts, and one of the Ships in the Preſence of the other takes a Prize, the other Ship which was preſent ſhall have the Moiety, for the Preſence of this Ship was a Terror to the Ship taken. 2 Leon. 182. *per Curiam.*

If an Infant, being Maſter of a Ship at St. *Chriſtopher*'s, beyond Sea, by Contract with another, undertakes to carry certain Goods from St. *Chriſtopher*'s to *England*, and there to deliver them according to the Agreement, but waſtes and conſumes them, he may be ſued for the Goods in the Court of Admiralty, though he be an Infant; for this Suit is but in Nature of a Detinue or Trover and Converſion at the Common Law. Rol. Abr. 530. *Furnes* and *Smith* adjudged.

If Goods are thrown over-board in Streſs of Weather, in Danger or juſt Fear of Enemies, in order to ſave the Ship and the Reſt of the Cargo, that which is ſaved ſhall contribute to a Proportion of that which is loſt; and this Average, which by the Civil Law and Cuſtom of Merchants binds the Owners, may be (*a*) pleaded to an Action at Common Law. Molloy 246. (*a*) 2 Bulſt. 290.

But Average is not due, unleſs the Goods are loſt in ſuch a Manner that thereby the Reſidue in the Ship are ſaved; as if Goods are thrown Over-board to lighten the Ship, or by Compoſition Part is given to a Pirate to ſave the Reſt; but if a Pirate takes Part by Violence, Average ſhall not be paid for them. Moor 297.

So where *A.* being one of the Owners of a Ship loaded on Board her 210 Tuns of Oil, and *B.* loaded on Board her 80 Bales of Silk upon a Freight, by Contract both to be delivered at *London*; the Ship was purſued by Enemies, and forced into an Harbour, *&c.* and the Maſter ordered the Silk on Shore, being the moſt valuable Commodity, (though they lay under the Oils, and took up a great deal of Time to get at them) the Ship and Oils were afterwards taken, and the Owner of the Oils brought his Bill in Equity to have Contribution from the Owner of the Silk; but in this Caſe, * as the Loſs of the Oils did not ſave the Silks, nor the ſaving of the Silks loſe the Oils, the Bill was diſmiſſed. Show. Parl. Ca. 18, 19. *Page 631

By the Civil Law the Admiralty Court may take a Recognizance in (*a*) Nature of a Stipulation from the Defendant to anſwer the Action; and if he does not obey, they may take his Body; for it is neceſſary that every Court ſhould have a compulſory Power of enforcing Obedience to its Decrees, and this Courſe, having prevailed there Time out of Mind, cannot be altered without an Act of Parliament. Rol. Abr. 531. Cro. Eliz. 685. Noy 24. Hard. 473. 13 Co. 52. 2 Brownl.

16. 2 Inſt. 51. Yelv. 135. Godb. 193, 260. (*a*) But being no Court of Record they cannot take a Recognizance. 4 Inſt. 135, 137.——Yet ſuch a Stipulation is good. Raym. 78. adjudged.

So they may require *Fidejuſſores* to enter into ſuch Stipulation, and ſuch Stipulation, if the Practice has been ſo, may be good, though entered into (*b*) for a Sum certain, and the Bail taken in Execution thereupon; and if they had not this Power, the Party might be obliged to lie in Gaol during the whole Suit. Rol. Abr. 531. (*b*) Raym. 78. Keb. 489.

Though the Court of Admiralty is no Court of Record, becauſe they proceed there according to the Civil Law, yet by the Cuſtom of the Court they may (*c*) amerce the Defendant for his (*d*) Default by their Diſcretion, and may make Execution for the ſame of the (*e*) Goods of the Defendant *in corpore com.* and if he hath no Goods take his Body. 13 Co. 53. adjudged. (*c*) But not fine as Judges of a Court of Record may do 12 Co. 104.—But they may fine and impriſon for a Contempt in the Face of the Court. Vent. 1. (*d*) They may puniſh one that reſiſts the Execution of the Proceſs of the Court, but not give Damages to the Party. Vent. 1. But becauſe they had no Cognizance of the Original Matter, upon which the Proceſs was grounded, a Prohibition was granted, *&c.* Style 171, 340. (*e*) But they can in no Caſe take Land, in Execution. Godb. 193, 260. Said by *Coke* that the Proceſs of the Admiralty Court is to impriſon according to 19 H. 6. *vide* Hard. 474. Noy 24. Godb. 260. Sid. 148.

When

When a (f) Provisionate Decree, as they call it, or *primum Decretum*, is given for the Possession of a Ship, and she is seised, upon Security given by the Course of the Admiralty she may be hired out.

Vent. 174. (f) That upon such Interlocutory Degree no Appeal lies to the Delegates. Vent. 174. yet *vide* Moor 814. *cont'*.

By 8 *Eliz. cap.* 5. A definitive Sentence in a Civil or Marine Cause, "by Delegates by Commission upon an (g) Appeal in Chancery, shall be "final."

(g) For in such Case no Writ of Error lies. 4 Inst. 135, 339, 341.

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Of the Marshalsea and Palace Court.

Fleta, lib. 2. c. 3. Spelm. Tit. *Justic. Gren.*

AT the Time of the Justiciar, the Disputes between the King's Servants were determined before the Steward and Marshal, and for that Purpose the Court was held within the King's Verge, that his Servants might not be drawn away from their Attendance on him; the Proceedings were by Plaint without any original Writ.

Cromp. Juris. 102. 2 Inst. 548. 4 Inst. 130, 13 R. 2. st. 1. c. 3. 15 H. 6. c. 1. 33 H. 8. c. 12.

This Court hath still a Continuance, being holden in *Southwark*, and is a Court of Record, exercising a Jurisdiction within twelve Miles of the King's Palace, or where his (g) ordinary Residence is.

(g) The King's going out of the Household for his Recreation is not such a Removing as changes his ordinary Residence. 10 Co. 74.

For the Construction hereof *vide* 2 Inst. 548. 10 Co. 71. The Marshallers Case 6 Co. 20, 21. 4 Co. 46.

"By 28 *E.* 1. *cap.* 3. called *Articuli super Chart*, the Steward and Mar-
"shall of the King's House shall not hold Plea of Freehold, neither of
"Debt nor of Covenant, nor of any Contract, but only of Debts and
"other Things of the People of the same House, of Contracts and Co-
"venants that one of the King's House shall have made with another of
"the same House, and in the same House, and of other (h) Trespasses
"done within the Verge."

(h) Does not extend to Trespass *Quare clausum fregit*, Ejectment, for they cannot hold Plea of any real or mixed Action. 10 Co. 75.

6 Co. 20. *Michelborn's* Case. (i) Sid. 105.

In every Action of Debt or Covenant, both the Parties must be within the Jurisdiction of the Court; (i) also the Contract and Consideration must be laid to have arisen within the Jurisdiction; but in Trespass it is said to be sufficient if one of the Parties be within the Precincts or Jurisdiction of the Court.

King

King *Charles* the First, by Letters Patent, granted to the Marſhalſea or Palace-Court, Juriſdiction of holding Plea of all Manner of Perſonal Actions whatſoever, as Debt, Treſpaſs, Battery, Slander, Trover, Actions on the Caſe, which ſhall ariſe within twelve Miles of the Palace of *Whitehall*.

Vide Sid. 108. where by *Keeling* it is ſaid that ſuch Letters Patent were void.

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* Courts Palatinate.

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THE Palatinate Courts are ſuperior Courts of Record, which exerciſe a Juriſdiction within their own Precincts in as (*a*) ample a Manner as the Courts of *Weſtminſter*, into which the King's ordinary Writs do not run; and altho' they have (*b*) *Jura Regalia*, yet they derive their Authority (*c*) from the Crown; but (*d*) at this Day no Palatinate Juriſdiction can be erected without an Act of Parliament.

Cromp. Juris. 137. 2 Inſt. 557. (*a*) 4 Inſt. 204, 213. —Is a General Court for all the Subjects of the Palatinate, and not merely for Cauſes ariſing within the Palatinate; and therefore if a Debtor goes from a foreign into a Palatinate Juriſdiction, his Obligations go along with him as much as if he removed from one Kingdom into another, and he may be ſued there, though the Cauſe of Action aroſe not within ſuch Palatinate Juriſdiction. Sand. 74. *Peacock* and *Beſt* reſolved. (*b*) Might formerly pardon Treaſons, Murder, Felonies, &c. but their Power as to many Things is now reſtrained, for which *vide* 4 Inſt. 205. 27 H. 8. c. 24. (*c*) And were probably erected at firſt as being adjacent to thoſe Countries, which were generally in Enmity with *England*, *viz.* That the People of *Lancaſter* and *Durham*, which lie towards *Scotland*, and *Cheſter* that lies towards *Wales*, might have Juſtice adminiſtered to them at Home, and not be obliged to any Attendance elſewhere, which might render them leſs able to defend themſelves againſt their Neighbours Incurſions. Vent. 155. *Arguendo*. (*d*) *Vide* 4 Inſt. 204. Cromp. Juris. 139.

By 27 H. 8. *cap.* 24. *ſect.* 3. it is enacted, "That all Original Writs "and Judicial Writs, and all Manner of Indictments of Treaſon, Felony "and Treſpaſs, and all Manner of Proceſs to be made upon the ſame in "every County Palatine, and other Liberty within this Realm of *England* "and *Wales*, ſhall be made only in the Name of our Sovereign Lord the "King and his Heirs, Kings of *England*; and that every Perſon or Per"ſons having ſuch County Palatine, or any other ſuch Liberty to make "ſuch Originals, Judicials, or other Proceſs of Juſtice, ſhall make the "*Teſte* in the ſaid Original Writs and Judicial in the Name of that ſame "Perſon or Perſons that have ſuch County Palatine or Liberty. 4 Inſt. 205.

By 11 & 12 *W.* 3. *cap.* 9. reciting 22 and 23 *Car.* 2. *cap.* 9. *ſect.* 136. and its Reference to 43 *Eliz. cap.* 6. and that the Clauſe, *That in Actions of Treſpaſs, Aſſault, and Battery, and other Perſonal Actions, the Plaintiff in ſuch Actions, in caſe the Jury ſhall find the Damages to be under the Value of* 40 *Shillings, ſhall not recover or obtain more Coſts of Suit than the Damage ſo found ſhall amount unto*, relates only to the Courts at *Weſtminſter*, it is enacted, "That as well the ſaid Clauſe and all the Powers and "Proviſions thereby, or by any other Law now in Force, made for Pre"vention of frivolous and vexatious Suits, commenced in the Courts of "*Weſtminſter*,

" *Weſtminſter*, ſhall be extended to, and be of the ſame Force and Effi-
" cacy in all ſuch Suits, to be commenced or proſecuted in the Court of
" Great Seſſions for the Principality of *Wales*, the Court of Great Seſſi-
" ons for the County Palatine of *Cheſter*, the Court of Common Pleas for
" the County Palatine of *Lancaſter*, and the Court of Pleas for the County
" Palatine of *Durham*, as fully and amply as if the ſaid Courts had been
" mentioned therein."

And it is further enacted by the ſaid laſt mentioned Statute, " That no
" Sheriff, or other Officers within the ſaid Principality or Counties Pa-
" latine, upon any Writ or Proceſs iſſuing out of any of his Majeſty's
" Courts of Record at *Weſtminſter*, ſhall hold any Perſon to ſpecial Bail
" unleſs † an Affidavit be firſt made in Writing, and filed in that Court,
" out of which ſuch Writ or Proceſs is to iſſue, ſignifying the Cauſe of
" Action, and that the ſame is 20 *l.* or upwards, and where the Cauſe of
*Page 634 * " Action is 20 *l.* and upwards, Bail ſhall not be taken for more than
" the Sum expreſſed in ſuch Affidavit."

† Which I conceive ſhews clearly that the Legiſlature conſidered it as a Point granted, that the King's Writ, in Civil Suits, ran there.—At leaſt, now, Bailable Writs, indorſed for Bail for 20*l.* or upwards, muſt now run there, *i. e.* in tranſitory Actions. See *poſt* 635. the End of Div. 2.

The Palatinate Courts are at this Day three, *viz. Cheſter*, *Durham*, and *Lancaſter*.

1. Of the County Palatine of *Cheſter*.

4 Inſt. 211. Cromp. Juris. 137. This is a County Palatine by Preſcription, and according to my Lord *Coke* is the moſt Ancient and Honourable remaining at this Day.

4 Inſt. 211. Within this County Palatine, and the County of the City of *Cheſter*, there is and antiently hath been a principal Officer called the Chamberlain of *Cheſter*, who hath, and Time out of Mind hath had, the Juriſdiction of a Chancellor; and that the Court of Exchequer at *Cheſter* is, and Time out of Mind hath been, the Chancery Court for the ſaid County Palatine, whereof the Chamberlain of *Cheſter* is Judge in Equity; he is alſo Judge of Matters at the Common Law within the ſaid County, as in the Court of Chancery at *Weſtminſter*, for this Court of Chancery is a mixt Court.

4 Inſt. 212. There is alſo, within the ſaid County Palatine, a Juſtice for Matters of the Common Pleas and Pleas of the Crown, to be heard and determined within the ſaid County Palatine, commonly called the Chief Juſtice of *Cheſter*.

4 Inſt. 212. All Pleas of Lands or Tenements, and all other Contracts, Cauſes and Matters riſing and growing within this County Palatine are pleadable, and ought to be pleaded, heard, and judicially determined within the ſaid County Palatine, and not elſewhere; and if any be pleaded, heard or judged out of the ſaid County Palatine, the ſame is (*a*) void, and *coram non Judice*, except it be in Caſe of Treaſon, Error, Foreign Plea, or Foreign Voucher.

(*a*) That this muſt be underſtood where the Plaintiff by his Declaration ſhews that the Matter aroſe within a County Palatine; for as to a tranſitory Action, the Plaintiff may alledge that the Cauſe of Action accrued at any Place. *Vide* Sid. 103, and *ſupra* of Courts in General.

Rol. Abr. 374. Rol. Rep. 246. 3 Bulſt. 117. 12 Co. 113. A Man cannot ſue in the Chancery of *Cheſter* for a Thing which in Intereſt concerns the Chancellor there, becauſe he cannot be his own Judge; and therefore he may in this Caſe ſue in the Chancery of *England*; for (*b*) otherwiſe there would be a Failure of Right.

4 Inſt. 213. S. P. (*b*) If a Man hath Cauſe to complain in Equity of a Matter ariſing within the County Palatine of *Cheſter*; if the Defendant lives out of the County Palatine, he may be

Out-

Outlawry in a County Palatine cannot be pleaded in any of the Courts at *Weſtminſter*, for the Party outlawed is only ouſted of his Law within that Juriſdiction, and it ſhall not extend to diſable a Man in another County, where they have no Power; for the County Palatine being a Royal Juriſdiction within Bounds, the loſing the Privileges of the Law within that Juriſdiction can be no Diſadvantage to him in another County; and if he does not live within the Palatine Juriſdiction, he is not obliged to attend there; but it ſeems that Outlawry in the County Palatine of *Lancaſter* † may be pleaded in the Courts of *Weſtminſter*, becauſe that County was erected by Act of Parliament in *E.* 3d's Time, but *Durham* and *Cheſter* are by Preſcription. Fitz. Cora. 233. 12 E. 4. 16. D. Plit. 396. Vent. 157. 2 Sid. 146.

† *Sed qu.* For it is only a limited Juriſdiction.——The Power by which it was created, we ſhould conceive, cannot alter the Caſe; and the Reaſoning, reſpecting the other limited Juriſdictions, applies equally to this of *Lancaſter*.

* 2. Of the County Palatine of *Durham*. *Page 635

This is alſo a County Palatine by Preſcription, and ſaid to have been erected ſoon after the Conqueſt, and is Parcel of the Biſhoprick of *Durham*. 4 Inſt. 216. Cromp. Juris. 138. See 12 Mod. 181.

The Juriſdiction of the Biſhop of *Durham* (*a*) extends to all Places between *Tine* and *Teſe*. Rol. Abr. 540. Rol. Rep. 397. 3 Bulſt. 156, S. P.

(*a*) His Juriſdiction extends as well to the Manors of other Men as to the Demeſnes of the Biſhop. Rol. Rep. 397. 3 Bulſt. 156.

In this County Palatine there is a Court of Chancery, which is a mixed Court both of Law and Equity, as the Chancery at *Weſtminſter*. 4 Inſt 218.

If an erroneous Judgment be given, either in the Chancery upon a Judgment there, according to the Common Law, or before the Juſtices of the Biſhop, a Writ of Error ſhall be brought before the Biſhop himſelf; and if he give an erroneous Judgment thereupon, a Writ of Error ſhall be ſued returnable in the King's Bench. 4 Inſt. 218.

If a Man be Surety for another to keep the Peace, and after he breaketh the Peace, and the Surety hath Lands in the County Palatine of *Durham*, the King ſhall command the Biſhop of *Durham*, or his Chancellor, to do Execution; and ſo it is in the other Counties Palatine, and in the ſame Manner it is of a Statute Staple, *&c.* Recognizances, *&c.* 2 Inſt. 219. 220.

The Court of King's Bench will expect a Return of a *Latitat* to the County Palatinate of *Durham*. 2 Stra. 189. Andr. 191.

3. Of the County Palatine of *Lancaſter*, and the Duchy Court.

The County Palatine and Duchy of *Lancaſter* were erected by Act of Parliament in the Reign of *E.* [redacted] 4 Inſt. 204. Plow. 215. It does not appear that this County Palatine was erected by any Statute in this Reign; *Edmund* Son of *Henry* III. was Duke of *Lancaſter*. It hath been a County Palatine Time out of Mind. Cromp. Juris. 137.

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be ſued in the Chancery here; otherwiſe there would be a Failure of Juſtice; for Proceeding in Equity binding the Perſon only, if the Perſon lives out of the Juriſdiction of the Chamberlain of *Cheſter*, there can be no Relief there. 4 Inſt. 213, *& vide* Chan. Ca. 40.

If

Vent. 157. See 9 Mod. 95. Rol. Abr. 539. 7. 4 Inſt. 205. Vent. 155.

If Lands, (*b*) Parcel of the Duchy lie within the County Palatine, a Suit in Equity may be for this in the Duchy Court.

(*b*) How the County Palatine became Parcel of the Duchy, *vide* 1 E. 4. c. 1. 1 H.

Rol. Abr. 539. *Holt*'s Caſe. Hob. 77. S. C.

But if a Man enters into an Obligation concerning Lands lying in the County Palatine, and he is ſued upon this at Common Law, he cannot ſue in Equity in the Duchy Court to be relieved againſt this Bond, for the Juriſdiction being Local, it cannot be extended to this collateral Matter.

adjudged; and a Prohibition awarded, becauſe the Duchy hath no Juriſdiction in reſpect of the Perſon, as becauſe the Suitors dwell within the County Palatine, nor upon the Lands of the Subject any where but upon the King's own Land, and his own Revenue, and perhaps upon Bonds and Aſſurances given for his Revenue of the Duchy.

Vent. 155. *Fiſher* and *Batten*. 2 Lev. 24. 2 Keb. 826. S. C.

But it hath been ſince holden that a Bill may be exhibited in the Duchy Court, to be relieved againſt the Forfeiture of a Mortgage of Lands lying within the County of *Lancaſter*.

*Page 636 4 Inſt. 206.

The Proceedings of the Duchy Court at *Weſtminſter* are as in a Court of (*c*) Chancery for Lands, &c. within the (*d*) Survey of the Court by * *Engliſh* Bill, &c. and Decree, and the Proceſs the ſame as in Chancery; but it is not a mixed Court, as the Chancery of *England* is, (*e*) partly of the Common Law, and partly of Equity.

(*c*) It doth not appear how this Court of Equity began, but it would be inconvenient now to examine the Power thereof after ſo long Continuance, &c. 2 Lev. 24. (*d*) Whatever belongs to the Juriſdiction of the Duchy may be determined in the Exchequer. Hard. 171. (*e*) They cannot try the Validity of Letters Patent, or other Matter properly triable at Law. Rol. Rep. 42, 252. 3 Bulſt. 119. 12 Co. 114.

Rol. Rep. 42. Sir *Tho. Beaumont* and the Hoſpital of *Wigſton*.

It was granted by Patent that this Court might make Ordinances for the Hoſpital of *W.* how they *ſe gererent*, *converſabantur & eligerentur*, and this Patent was confirmed by the Statute of the 14 *Eliz.* yet it was reſolved that the Court hereby hath no Power to determine the Right of the Poſſeſſions; and the Hoſpital having exhibited a Bill in this Court to avoid a Leaſe by them made, of Lands lying out of the Duchy, a Prohibition was granted.

" By the Statute of 16 *Car.* 1. *cap.* 10. reciting that the Proceedings, " Cenſures, and Decrees of the Court of *Star-Chamber* were found an in- " tolerable Burden to the Subject, &c. it is enacted, That the Court of " *Star-Chamber* and all its Power, Juriſdiction and Authority, ſhall be " diſſolved, and the like Juriſdiction then uſed and exerciſed in the Court " of the Duchy of *Lancaſter*, &c. is repealed, revoked, and made void."

[By 4 *Geo.* 3. *cap.* 16. Infants in Counties Palatine are enabled to convey by Order of the reſpective Courts belonging to the Counties Palatine.]

Of the Royal Franchiſe of Ely.

ELY is (*a*) not a County Palatine, but a Royal Franchiſe, granted by *H.* 1. to the Biſhop of *Ely* and his Succeſſors. (*b*) of hearing and determining as well Civil as Criminal Pleas. 4 Inſt. 220. (*a*) 2 Inſt. 223. Carth. 109.

So reſolved. (*b*) This Juriſdiction the Biſhop now exerciſes by his Juſtices, by Preſcription grounded on the ſaid Grant. 4 Inſt. 220.

And therefore the Party, who is ſued in the Courts of *Weſtminſter*, cannot plead that the Lands lie, or that the Cauſe of Action aroſe within *Ely*, but (*c*) Conuzance muſt be demanded, which is all the Juriſdiction a Franchiſe hath. Carth. 109. *Cotton* and *Johnſon*. Salk. 183. pl. 1. S. C.

adjudged. (*c*) Of the Manner of demanding Conuzance, *vide* Sid 283. Keb. 946. 948. Lev. 89. Keb. 435. Sid. 303.

If one be Bailiff of Lands in *A.* and *B.* and *B.* is within the Franchiſe of *Ely*, and *A.* not, the Bailiff cannot be charged in (*d*) a joint Action, for this would ouſt the Franchiſe of its Juriſdiction. 4 Inſt. 221. (*d*) But if an Action, that in its Nature is joint, riſe partly within and partly without the Franchiſe, the Franchiſe cannot claim Conuzance. 4 Inſt. 220.

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* Courts of the Foreſt.

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A Foreſt, as deſcribed by *Manwood*, is a certain Territory of woody Grounds and fruitful Paſtures, privileged for wild Beaſts and Fowls of Foreſt, Chaſe and Warren, to reſt and abide there in the ſafe Protection of the (*e*) King for his Delight and Pleaſure, which Territory of Ground ſo privileged is meeted and bounded with (*f*) unremoveable Marks, Manwood 143.

(*e*) The King only can make a Foreſt, and therefore every Foreſt muſt appear to be ſuch by Matter of Record, or by Preſcription, which ſuppoſes a Grant from the Crown for that Purpoſe. Plow. 318. Bract. lib. 2. c. 1. 4 Inſt. 300. Bro. *Quo Warranto* 7.——But a Subj & may have a Foreſt by Grant from the Crown. Dyer 169. Manwood 155.——Before the Statute of *Charta de Foreſta*, the King uſed to convert the open and woody Grounds of his Subjects into Foreſts; but though at this Day he may make a Foreſt, yet he cannot afforeſt any of his Subjects Lands. 4 Inſt. 300. (*f*) But need not be actually incloſed with Hedge, Ditch, &c. *Manwood* 145.

Meets and Boundaries, either known by Matter of Record, or by Preſcription, and alſo repleniſhed (*t*) with wild Beaſts of Venary or Chaſe, and with great Coverts of (*d*) Vert for the Succour of the ſaid Beaſts there to abide; for the Preſervation and Continuance of which ſaid Place, together with the Vert and Veniſon, there are particular (*e*) Officers, (*f*) Laws and Privileges belonging to the ſame, requiſite for that Purpoſe, and proper only to a Foreſt, and to no (*g*) other Place.

(*t*) Of the ſeveral Beaſts of the Foreſt, *vide* 4 Inſt. 316.

(*d*) This Word comprehends every Thing bearing green Leaves in the Foreſt. Manwood 146. (*e*) The Chief of whom is the Chief Juſtice in *Eyre*, and who was formerly created by Writ, as other Juſtices in *Eyre*; but by the Statute 27 H. 8. c. 24. he is made by Letters Patent, and may execute his Office by Deputy. 4 Inſt. 291. 314.——The other Officers are the Rangers, Stewards, Verderors, Foreſters, Regarders, Agiſtors and Woodwards; theſe muſt duly attend their reſpective Offices, and therefore are privileged from attending on Juries in the County, &c. F. N. B. 164. 2 Inſt. 291. 1 Jon. 266. (*f*) Which differ in many Caſes from the Common Law of *England*, for which *vide* 4 Inſt. 315. (*g*) For although Warrens and Parks are Civil Incloſures, and a Chaſe is a Franchiſe differing only from a Park, in that it is not incloſed; and though theſe enjoy Privileges by Grant from the Crown diſtinct from other Lands, yet are they not to be conſidered as Foreſt, having neither particular Laws, nor particular Officers; and therefore Offences committed in theſe muſt be puniſhed by the Common Law. 4 Inſt. 308. Manwood 49. Co. Lit. 233.

There are three Courts (*h*) incident to a Foreſt.

(*b*) Poph. 150. Rol. Rep. 191.

1. The Juſtice Seat. 637.
2. The Swainmote Court. 639.
3. The Court of Attachment. 640.

1. Of the Juſtice Seat.

(*i*) 2 Bulſt. 298. (*k*) 4 Inſt. 290.

This Court is ſo (*i*) incident to a Foreſt, that there cannot be a Foreſt without it, but it (*k*) cannot be holden oftner than every third Year.

4 Inſt. 291.

It muſt be ſummoned at leaſt 40 Days before Sitting, and one Writ of Summons ſhall be directed to the Sheriff, &c. the other *Cuſtodi Foreſtæ vel ejus Locum tenenti*, to ſummon all Officers, &c. and all Perſons that claim Liberties within the Foreſt, to ſhew how they claim them.

4 Inſt. 291. (*l*) Whether a Man may be impriſoned for Non-payment of a Fine ſet there, *Web*'s Caſe, Rol. Rep. 411. 2 Bulſt. 213. *dubitatur.*

This Court may inquire, hear and determine all Treſpaſſes within the Foreſt, (*l*) according to the Law of the Foreſt, and all Claims of Franchiſes, &c. within the Foreſt.

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* By the 7 *R.* 3. *cap.* 3. it is enacted, "That (*m*) no Jury ſhall be compelled by any Officer of the Foreſt, or other Perſon, to travel from "Place to Place, out of the Place where the Charge is given, but ſhall "give their Verdict in the Place where their Charge is given."

(*m*) But for this *vide* Rol. Abr. 534. Cro. Car. 409.

Jones 168. (*n*) Where the Indictment was removed *in B. R.* and the Defendant there put to anſwer. 4 Inſt. 295.

The Proceedings in this Court are *de hora in horam*, and therefore the Defendant muſt plead to an Indictment there (*n*) preſently.

By

By 9 *H.* 3. *cap.* 2. "Dwellers out of Foreſts ſhall not come before Juſ-
" tices of the Foreſt by common Summons, unleſs impleaded there, or
" Sureties for others attached for the Foreſt."

By 34 *E.* 1. *ſtat.* 5. *cap.* 6. "The Juſtice of the Foreſt, or his Lieu-
" tenant in preſence or by Aſſent of the Treaſurer, may take Fines and
" Amercements of Indictees for Treſpaſſes done there, and not tarry for
" the *Eyre* of the Juſtices."

A Felony committed within the Foreſt muſt be inquired of, &c. before the Judges of the Common Law, and it belongs not to the Conuzance of the Chief Juſtice of the Foreſt. 4 Inſt. 315.

A Receipt of an Offender in Hunting, &c. or of the King's Veniſon, out* of the Foreſt, cannot be puniſhed by the Law of the Foreſt, becauſe the Juriſdiction is Local. 4 Inſt. 317.

* But ſee the Stat. 3 *W.* & *M.* c. 10. 9 Geo. 1. c. 22. ſ. 13. 5 Geo. 1. c. 15. & 10 Geo. 1. c. 32. ſ. 7.

This Court may proceed upon the (*c*) Preſentments or Verdicts in the Swainmote. 4 Inſt. 290.

(*c*) By 9 H. 3. c. 16. Preſentments of the Foreſters, when enrolled and encloſed under the Seals of the Verderors, ſhall be preſented to the Ch. Juſtices, &c. and be determined before them.—How the Truth of ſuch Preſentment ſhall be inquired of, and after by Aſſent of the Foreſters, Verderors, Regarders, &c. and confirmed and ſealed with their Seals, *vide* 34 E. 1. c. 1. And Indictments taken in other Manner ſhall be void.—And by 34 E. 1. ſtat. 5. c. 2. If any Officer is dead, or ſick, ſo that he cannot be at the Swainmote, the Juſtice of the Foreſt ſhall put another in his Place, ſo that the Indictment may be by all, in Form.——If ſealed with the Seal of one Officer only, by Aſſent of all the Verderors, &c. it is well enough. Jones 268.

If upon the firſt Sitting of the Juſtice Seat, the four Men and Reeve of any Town make Default, the whole Vill ſhall be amerced; but if after Appearance they make Default upon an Adjournment, the Defaulters only ſhall be amerced. Jones 279.

If at the Swainmote the Preſentment of the Foreſters concerning Vert and Veniſon is found true, the Offender is Convict in Law, and (*d*) cannot traverſe; but a Preſentment at a Juſtice Seat (*e*) not found at the Swainmote may be traverſed, becauſe preſented but by one Jury. 4 Inſt. 290.

(*d*) Jones 347.

(*e*) Nothing can be done but upon their Preſentments. 2 Bulſt. 297.

If the King pardons a Treſpaſs in a Foreſt, and an Offender at a Juſtice Seat pleads it, by the Law of the Foreſt, before any Allowance thereof, the Juſtices muſt charge the Miniſters of the Foreſt to inquire whether the Delinquent hath done any Treſpaſs in Vert or Veniſion ſince the Date of the Pardon, and when the Pardon is allowed, the Entry is *quod invenit manucaptores quodammodo non forisfac'*, &c. 4 Inſt. 313.

If an Offender be convicted for a Treſpaſs in the Foreſt in Hunting*, &c. and adjudged to be fined or impriſoned, though he pays the Fine, yet he muſt find Sureties for his good Abearing. 4 Inſt. 313.

* See *ſupra*, the Reference to ſeveral modern Statutes.

If a Claim is allowed there which (*f*) ought not, the Party grieved, may, by *Certiorari*, remove the Record *in B. R.* and thereupon have a *Scire facias*, &c. 4 Inſt. 294.

(*f*) How the Ch. Juſtice may inquire of the Truth of ſuch Claims *per Miniſtros Foreſtæ*, or *tam per Miniſtros quam per alios*, at his Diſcretion. 4 Inſt. 294, 295.

*Page 639 * But if refuſed to be allowed where it ought, the Party ſhall have a
4 Inſt. 297. Writ *de Libertatibus allocandis* to the Juſtices of the Foreſt.

4 Inſt. 295. But if upon ſuch Claim a Difficulty ariſes, or a Demurrer is joined, the Chief Juſtice may adjourn it *in B. R. &c.*

Sid. 296. *Duke of Norfolk* v. *Duke of Newcaſtle.* 2 Keb. 43, 82. S. C. A *Certiorari* was prayed on Behalf of the Duke of *Norfolk*, to remove a Preſentment taken in the Foreſt of *Pickering*, to be directed to the Chief Juſtice in *Eyre*; the Judgment was, becauſe there was a Queſtion of Right, to whom certain Woods there did belong, whether to the Duke of *Norfolk*, or to the Duke of *Newcaſtle*; and the Duke of *Newcaſtle*, being Chief Juſtice in *Eyre*, would not let the Woods be cut, to the Prejudice of the Duke of *Norfolk*'s Right, but cauſed them to be preſented; whereas in Truth theſe Woods had been deafforeſted; and it was held by the Court, That in this Caſe no *Certiorari* ſhould go, for the Right of the Woods is not in Queſtion; for a Man (*a*) cannot cut his own Woods to deſtroy the Vert, but ſhall fine for it; and ſo the Chief Juſtice in *Eyre* may be a Judge for the King, though not for himſelf; and if it be deafforeſted, Treſpaſs lies, for the Proceedings will be *coram non Judice*; but if they ſhould be removed, there will be a Failure of Juſtice; for the *K. B.* cannot proceed to convict, not having their Laws nor their Officers; but after a Conviction it may be otherwiſe.

(*a*) *Vide* Manwood 370, &c.

Carth. 77. Lord *Lovelace*'s Caſe, and ſeveral Perſons apprehended on his Warrant diſcharged on a *Habeas Corpus*. The Chief Juſtice in *Eyre* cannot, upon an Information that ſuch and ſuch Perſons have killed Does and felled Trees in the Foreſt, iſſue his Warrant for apprehending ſuch Perſons; for it is (*b*) expreſsly provided, That no Man ſhall be taken or impriſoned by any Officer of a Foreſt without due Indictment, or being taken with the (*c*) Manner.

N. B. 67. (*b*) As by 1 E. 3. c. 8. 7 R. 2. c. 4 & *vide* Reg. f. 8. F. 4 Inſt. 289. (*c*) What ſhall be a Taking in the Manner, Carth. 79. & *vide poſt.*

Carth. 78. Nor can any ſuch Warrant be directed to a Meſſenger or other Perſon that is not an Officer of the Foreſt; for herein the Authority of the Chief Juſtice in *Eyre*, and that of a Juſtice of Peace, is the ſame, who cannot direct his Warrant to his Servant, or any other Perſon, but muſt direct it to the Conſtable or Pariſh Officers; and the Warrant *ſupra* being directed to a Meſſenger, for this Reaſon, principally, the Perſons were diſcharged.

2. Of the Swainmote Court.

4 Inſt. 289. (*d*) And at what Time, and who bound to appear there, The Swainmote is holden by the Steward before the Verderors as Judges, (*d*) thrice in the Year, and the (*e*) Foreſters are to preſent their Attachments at the next Swainmote, where the Freeholders within the Foreſt are to appear to ſerve on Juries.

vide 9 H. 3. c. 8. (*e*) 9 H. 3. c. 6.

4 Inſt. 289. & *vide* 34 E. 1. ſtat. 5. c. 4. This Court may inquire *de ſuperoneratione Foreſtarum & aliorum Miniſtrorum Foreſtæ & de eorum oppreſſionibus populo illat'*.

4 Inſt. 289. This Court may not only inquire, but convict, but (*f*) not give Judgment.

(*f*) And therefore a Swainmote without a Juſtice Seat is of no Force at all. 2 Bulſt. 298. *per Coke.*

3. Of

* 3. Of the Court of Attachment.

*Page640

The Court of Attachments, or Woodmote Court, is to be held before the Verderors, every forty Days; and at this Court the Foresters bring in their Attachments *de viridi & venatione*, and the Presentments thereof, and the Verderors receive and inrol them; but no Man ought to be attached by his Body for Vert or Venison, unless taken with the (*a*) Manner within the Foreſt, else the Attachment must be by his Goods.

4 Inst. 289.

(*a*) Taking in the Manner, is when a Man is taken in the very Fact, or ready to do it, as with his Bow bent, or ready to slip his Dogs or with his Hands bloody; also taking upon a fresh Pursuit, is a Taking in the Manner. Carth 79. Agreed *per totam curiam*.——But finding Timber of the Forest in a Man's Possession, as in his Yard, is not a Taking in the Manner. Carth. 79. *per* three Justices against the Chief Justice, who doubted.——* See *ante* 638, a Note, some References to modern Statutes.

Of the Sheriff's Torn.

THE Inhabitants of every County were formerly divided into Decennaries, *i. e.* ten Families living together in the same Precinct, the Masters whereof were every one of them mutually bound for each other, and punishable for the Default of any Member of any such Family, in not appearing to answer for himself on any Accusation made against him.

2 Inst. 70, 71. Bract. 124.

Over every County an Earl presided, and he, or the Shire-Reeve, arrayed the several Persons within the County; and for this Purpose the Perambulation was through the County twice every Year, and (*b*) if any Person was found that had no Compurgators, he was put into Prison until he could procure some Decennary to admit him: On the Law-Days the Sheriff used to give in Charge the several Articles of the Crown Law, and if any Person was guilty of the Breach of any of them, he was delivered up by his Compurgators.

Preface to 9 Co. 2 Inst. 70, 121.

(*b*) Hence the Stile of this Court is *Curia Visus Franci Plegii Domini Regis tenta apud C. coram Vicecom' tent' in Turno suo tali die, &c.* But the Law takes no Notice of any such Court, under the Stile of *Torn Vicecom' tent'*, *&c.* for the Word *Torn* does not properly signify the Sheriff's Court, but his Perambulation. 2 Inst. 71. Dalt. Sheriff 385, 391. Fitz. Leat 11. 2 Hawk. P. C. 55.

But though the Custom of the Decennary be now worn away, yet the Sheriff's Torn still subsists, which is the King's Court of Record, holden before the Sheriff, for redressing of common Grievances within the County, to which all Persons, above the Age of twelve Years, not specially privileged, are bound to attend; not only to make proper Inquiries, but to take the Oaths of Allegiance, *&c.*

Finch 241. F.N.B. 82

But

But for the better understanding hereof I shall consider,

(A) The Manner of holding this Court. 641.
(B) What Persons owe Suit to it. 641.
*Page641 (C) In what Cases it has a Jurisdiction. 642.
(D) Of the Form of its Proceedings. 644.

(A) The Manner of holding this Court.

6 H. 7. 1. b. Co. Lit. 115. *cont.*

BY the Common Law the Sheriff might hold his Torn at what Place, and as often as he thought fit; but this proving inconvenient, in giving the Sheriff too great a Power of oppressing the Subject,

By the Statute of *Magna Charta*, *cap.* 35. it is enacted, "That no Sheriff, or his Bailiff, shall make his Torn through a Hundred but twice in a Year, and at the Place accustomed, *viz.* once after *Easter*, and again after the Feast of St. *Michael*; and that the View of Frankpledge shall be at the Term of St. *Michael*."

Also by the 31 *E.* 3. *cap.* 15. it is enacted, "That every Sheriff shall make his Torn yearly one Time within the Month after *Easter*, and another Time within the Month after St. *Michael*; and if they hold them in other Manner, that then they shall lose their Torn for the Time."

Dyer 151. Keilw. 193. 2 Hawk. P. C. 56.

It is agreed, that since these Statutes, if the Sheriff holds his Torn at a different Time, or at an unusual Place, he may be indicted for it.

Yent. 107. 2 Sand. 290. 2 Keb. 731. 2 Hawk. P. C. 68.

Also it hath been holden, that in every Caption of an Indictment taken in a Sheriff's Torn, or Court-Leet, the Day whereon it was taken ought to be set forth, that it may appear not to have been on a *Sunday*.

The Sheriff is to hold his Torn in each particular Hundred; yet, as he has a Jurisdiction in the whole County, he may receive Presentments in one Hundred, of Offences committed in another; but the Jury cannot be charged on Oath to present any Offences but those which arose within their particular Hundreds. Also by the Statute of *Marlbridge*, *cap.* 10. it is provided, That those who have Tenements in different Hundreds, shall not be compelled to come to any Torn, but only in the Bailiwick wherein they shall be conversant.

(B) What Persons owe Suit to it.

2 Hawk. P. C. 56.

ALL Persons, as well Masters as (*a*) Servants, above the Age of twelve Years, are by the Common Law bound to appear at this Court in their (*b*) proper Persons.

(*a*) That every Master may be amerced for suffering a Servant to continue with him a Year and a Day without being put into the Decennary. 41 E. 3. 26. b. 45 E. 3. 26. b. (*b*) And therefore no Persons so bound to appear, are within the Benefit of the Statute of *Merton*, c. 10. which allows Suit-Service to be performed by Attorney. 2 Inst. 99.

But

But Tenants in antient Demeſne are privileged by the Common Law from coming to this Court, unleſs they and their Anceſtors have Time out of Mind uſed to come to it; alſo Parſons of Churches have the like Privilege by the Common Law, and all Peers of the Realm, and Women have the ſame Privilege by the Statute of *Marlbridge*, 52 *H.* 3. *cap.* 10. unleſs their Preſence be required for ſome particular Cauſe. F.N.B. 161. 2 Inſt. 121. 2 Hawk. P. C. 57.

* Alſo by the Common Law, as well as the Statute of *Marlbridge*, 52 *H.* 3. *cap.* 10. no one is bound to ſuch Suit to a Torn, within the Juriſdiction whereof he doth not reſide. *Page 642 2 Hawk. P. C. 57.

And if a Man has a Houſe which ſtands within the Precincts of (*a*) two Leets, he ſhall do his Suit to the Court in whoſe Juriſdiction his Bed-Chamber lies. 2 Hawk. P. C. 57.

(*a*) If one have a Houſe and Family in two Leets, he ought to do his Suit to that wherein for the moſt Part he Perſonally reſides. 2 Hawk. P. C. 57.

But no Man can be of two Leets; and therefore one, who lives within a private Leet, ſhall owe no Suit to the Torn or other Leet, unleſs the private Leet be ſeiſed into the King's Hands, or unleſs the Lord neglect to hold his Court. 2 Hawk. P. C. 57.

(C) In what Caſes it has a Juriſdiction.

THE Juriſdiction of the Sheriff's Torn is confined to Offences at Common Law, and cannot take Conuzance of any Crime made ſo by an Act of Parliament, unleſs (*b*) enabled to do ſo by the Act itſelf; (*c*) nor can it inquire of any Offence, unleſs it aroſe ſince the holding of the laſt Court. 2 Hawk. P. C. 66. (*b*) *Vide* 2 Dan. 291. Several Statutes mentioned which give the Sheriff's Torn and Court-Leet Juriſdiction. (*c*) Keilw. 66.

All Capital Offences being of a Public Nature, as (*d*) Treaſons, (*e*) Felonies are properly inquirable of at the Sheriff's Torn. Cromp. Juriſ. 212. 2 Hawk. P. C. 67. (*d*) Except againſt the King's Perſon. 9 H. 6. 44.——But 2 Hawk. P. C. 66. *cont'*, and yet it ſeems ſtrange, that the higheſt Offence ſhould be exempted; however, it is clear, that the Sheriff has no Power to inquire of any Offence made Treaſon by Statute, as of a Treaſon, but only as it was an Offence at Common Law. (*e*) Except Rape, becauſe as the Law now ſtands, it is a Felony only by Statute. 2 Hawk. P. C. 66.——And except the Death of a Man, becauſe no common Nuiſance: But Q. & *vide* 2 Hawk. P. C. 66, 67.

It may inquire of Aſſaults and Batteries, if accompanied with Bloodſhed, but otherwiſe not; becauſe without Bloodſhed they are not accounted common Grievances. 2 Hawk. P. C. 67.

Alſo it may inquire of all Affrays, as being *in Terrorem Populi*. 2 Hawk. P. C. 67.

Alſo it may inquire of the common Breaking of Hedges, Dikes or Walls, and of all Pound-Breaches, as being common Grievances; alſo it may inquire generally of inferior Offences, touching the King's Intereſt, as of all Purpreſtures or Incroachments upon the King, and Alienations in Mortmain, and (*f*) Seizures of Treaſure-Trove, or of Waiſs or Eſtrays, or Wreck belonging to the King. *Vide* 2 Hawk. P. C. 67. and the ſeveral Authorities there cited. (*f*) But Q. Whether it can preſcribe to inquire of the Seizure of ſuch Things belonging to the Lord, being a Subject. 2 Hawk. P. C. 67.

It

2 Hawk. P. C. 67. and the Authorities there cited.

It may inquire of all common Nuisances, as all Annoyances to common Bridges, or Highways, Bawdy-Houses, &c. and also of all other such like Offences, as selling corrupt Victuals, breaking the Assise of Beer and Ale, neglecting to hold a Fair or Market, keeping false Weights or Measures, &c. Also it is said, that it may inquire of all common Disturbers of the Peace, as Barrators, Eves-droppers, and of all common Oppressors, as Usurers, &c. and of all dangerous Persons, as Vagabonds, Night-walkers, &c. and of all Suitors to the Court who shall make Default, and of those who shall levy Hue and Cry without Cause *Page643 * or shall neglect to levy one where they ought, &c. and of the Neglect of keeping a Pair of Stocks in any Vill within the Precinct, for which every such Vill shall forfeit 5*l.*

Rol. Abr. 541. 2 Rol. Abr. 83.

But a Man cannot be amerced in a Leet for surcharging a Common, because this only concerns the private Interest of the Inhabitants.

Rol. Abr. 542. Lane 55.

But it hath been holden, that (*a*) a By-Law made at a Leet, in Pursuance of a Custom to make such By-Laws, that no one, under a certain Penalty, shall receive a poor Man to be his Tenant, who afterwards shall become chargeable to the Town, is good.

(*a*) Of Common Right, any Leet, with the Assent of the Tenants, may make By-Laws under certain Penalties, in relation to Matters properly cognizable by the Court, as the Reparation of Highways, &c. But By-Laws of a private Nature are most proper for a Court-Baron. 2 Hawk. P. C. 68.

2 Hawk. P. C. 57.

Although the above-mentioned Offences are properly inquirable of in the Sheriff's Torn, yet is his Power, as to the punishing of such Offences, much restrained by several Statutes; as by *Magna Charta*, *cap* 17. *which enacts, That no Sheriff, Constable, or* (*b*) *other Bailiff of the King, shall hold Pleas of the Crown.*

(*b*) As this Statute has been construed to extend to Stewards of Courts, neither the Torn nor Court-Leet can deliver any Persons indicted before them for Felony, but must refer them to the Justices of Gaol-Delivery. 2 Inst. 32. 2 Hawk. P. C. 57.

2 Hawk. P. C. 57.

But this Statute of *Magna Charta* doth neither restrain the Torn nor Leet from taking Indictments, or awarding Process thereon as before; but this Power of awarding such Process is taken from the Sheriff's Torn, but not from Courts-Leet, by 1 *E.* 4. *cap.* 2.

By which it is enacted, "That on Indictments and Presentments before "any of the King's Sheriffs, in his Counties, except in *London*, their Under-Sheriffs, Clerks, Bailiffs, or Ministers, at their Torns, or Law-Days, "they nor any of them shall have (*c*) Power to attach, arrest, or put in "Prison, or to levy or take any Fine or Amercement of any Person so indicted or presented, by Reason of any such Indictment or Presentment; "but that the said Sheriffs and Under-Sheriffs, Clerks and Bailiffs, and "their Ministers, shall deliver all such Indictments and Presenments to "the Justices of the Peace at their next County Sessions, on Pain of 40*l.* "and that the said Justices of the Peace shall have Power to award Process on all such Indictments and Presentments as the Law doth require, "and in like Form as if the said Indictments and Presentments were taken "before the said Justices of Peace; and also to arraign and deliver all such "Persons so indicted and presented before the said Sheriffs, &c. and such "Persons which shall be indicted or presented of Trespass, shall make "such a Fine as shall seem lawful by their Discretions; and the Estreats of "the said Fines and Amercements shall be inrolled, and by Indenture be "delivered to the said Sheriffs, Under-Sheriffs, their Clerks, Bailiffs or "Ministers, or some of them, to the Use and Profit of him that was "Sheriff at the Time of such Indictments or Presentments taken; and if "any

(*c*) Not only the Judge of the Court is punishable for awarding such Process, but also the Officer for obeying it. Jones 301. Cro. Car. 275.

"any of the ſaid Sheriffs, their Under-Sheriffs, Clerks, Bailiffs, or their "Miniſters, do arreſt, attach or put in Priſon, or cauſe any Fine or Ranſom to be taken, or levy any Amercement of any Perſon or Perſons ſo "indicted or preſented, by Reaſon or Colour of any ſuch Indictment or "Preſentment taken before them, at their Terms or Law-Days above "rehearſed, before that they have Proceſs from the ſaid Juſtices of "Peace, or Eſtreats delivered out of the ſaid Indictments or Preſentments ſo brought, delivered and preſented to them; that then the Sheriffs, which ſo do, ſhall forfeit an hundred Pounds."

* It ſeems agreed, that, at this Day, neither the Torn nor Leet have any Power to try any Perſon indicted before them, of any Offence whatſoever, and that there is no Remedy for ſuch Preſentments as are traverſable, but by removing them into the King's Bench. *Page 644 2 Hawk. P. C. 57, 71

But a Preſentment by twelve or more, in a Torn or Leet, of any Offence within the Juriſdiction of the Court, being neither Capital, nor concerning Freehold, ſubjects the Party to a Fine or Amercement, without any farther Proceeding, and binds him for ever, after the Day on which it is found, and admits of no Traverſe *; but if it concern Life or Freehold, as if it charge a Man with not repairing a Highway as he ought to do by the Tenure of his Lands, it may be removed into the King's Bench, and there traverſed; but not if it barely charge his Perſon, as for not cutting the Branches of his Trees hanging over the Highway, &c. alſo it ſeems, that an Indictment of an Offence out of the Juriſdiction of a Leet, as of an Affray done out of its Precinct, is in like Manner traverſable. 2 Hawk. P. C. 71. 3 Mod. 138.

* *Sed qu.* If it may not be removed, and traverſed, or if an Action may not be ſupported, for levying any Fine, or Amercement, where the Party has not been ſummoned, nor had any Opportunity of anſwering?—If a Fine in a Court-Leet be unreaſonable, it may be avoided by Plea, and Judgment of the Court; for the Judges are to determine the Reaſonableneſs of the Fine. R. 41. Co. 44.—An Amercement in a Torn muſt be by the Court, and not the Jury. 2 Term Rep. B. R. Pa. 186.

Alſo, notwithſtanding the above-mentioned Statutes, the Sheriff may, at this Day, impoſe a (*a*) Fine on all ſuch as ſhall be guilty of a Contempt, in the Face of the Court, and on a Suitor refuſing to be ſworn, and on a Bailiff refuſing to make a Panel, and on a Tithingman refuſing to make a Preſentment, and on a Juryman refuſing to preſent the Articles given in Charge, and on a Perſon duly choſen Conſtable, refuſing to be ſworn, but he (*b*) ought to find each Offender ſeverally, and not all jointly, except where a Vill is to be fined. 2 Hawk. P. C. 58.

(*a*) Or may award an Amercement at his Diſcretion.

8 Co. 39. Dalt. Sheriff 400. But for this *vide* Tit. *Fines and Amercements.* (*b*) 8 Co. 38.

Alſo on the Preſentment of a Nuiſance in a Torn or Leet, the Sheriff or Steward may either amerce the Party, and alſo order him to remove it, by ſuch a Day, under a certain Pain, or may order him to remove it, under ſuch a Pain, without amercing him at all; and the Party having Notice of ſuch Order, ſhall forfeit the Pain on a Preſentment at another Court, that he hath not removed the Nuſance, without any farther Proceeding; and every Pain ſo forfeited may be recovered in like Manner as a Fine or Amercement, by Diſtreſs, or Action of Debt; neither ſhall it be affeered to a leſs Sum than was at firſt ſet. 2 Hawk. P. C. 61. and ſeveral Authorities there cited.

(D) Of the Form of its Proceedings.

Kielw. 66, 141, 148. Dalt. Sheriff 388. Cromp. 212.

IN making Presentments, it is said to have been the Course, formerly, to impanel, not only a Grand Jury, but also a Jury of twelve Men which was commonly called the Petit Jury, and to have Offences first presented by the Headboroughs, and the Presentment affirmed by the Petit Jury, before they were brought to the Grand Jury.

9H.6.44.b. 2 Hawk. P. C. 69.

But however the Practice might have been, it seems now agreed, that no Exception can be taken to any such Indictment, in respect of the Non-observance of any such Custom or Usage; for that no Averment lies against the Acts of a Court of Record, and every Judge of such Court shall be presumed to act according to the Rules of it.

By *Westmin.* 2. 13 *Ed.* 1. *cap.* 13. "The Sheriff shall take no Inquest "(*c*) but by twelve Men at the least, who shall put their Seals thereto."

(*c*) In the Construction hereof it hath been holden, that if there be more than twelve Jurors, and all agree, all must put their Seals, but that if twelve only agree, it is sufficient for those twelve to set their Seals. Dalt. Sheriff 389.

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* By 1 *R.* 3. *cap.* 4. "No Officer shall return or impanel any Person "on any Inquiry in a (*d*) Torn, but such as be of good Name, and have "Freehold of 20*s. per Ann.* or Copyhold of 26*s. per Ann.* on Pain of 40*s.* "and every Indictment taken otherwise shall be void."

(*d*) That a Court-Leet seems not to be within the Equity of this Statute, for it is said, that any Person happening to be present at a Leet, or riding by where it is holden, may, for want of Jurors, be compelled to be sworn. 7 H. 6. 13. 14 H. 7. 18. b. Bro. Leet 15.

By 1 *E.* 3. *stat.* 2. *cap.* 17. "Sheriffs, and all others who take Indict-"ments in their Torns, or elsewhere, shall take them by Roll indented, "whereof the one Part shall remain with the Indictors, and the other with "him that takes the Inquest; so that the Indictment shall not be em-"bezzled as they had been in Time past."

28E.3.c.9.

But it must be observed, that what is above said concerning Indictments taken before the Sheriff at his Torn, is to be intended of such as are taken before him *ex Officio*, for he is restrained to take them by Virtue of any Writ or Commission, by 28 *E.* 3. *cap.* 9. which reciting the Mischiefs which had happened from Commissions and general Writs granted to Sheriffs at their own Suit, for their singular Profit, enacteth, That no such Commissions nor Writs shall be granted *.

* The Business of the Torn hath declined many Years, and is devolved on the Quarter-Sessions,

Of

Of the Court-Leet.

A COURT-LEET is a Court of Record, (*b*) having the ſame Juriſdiction within ſome particular Precinct, which the Sheriff's Torn hath in the County. Finch 246. 2 Hawk. P. C. 72.

(*b*) And ſaid to have been derived out of the Torn, being a Grant to certain Lords for the Eaſe of their Tenants and Reſiants within their Manors, that they may have the Array of them, and adminiſter Juſtice amongſt them in their Manors, &c. from whence came the Duty in many Leets *de certo Letæ*, towards the Charge of obtaining the Grant of the Leet; for the Non-payment whereof, or Default to preſent it, ſuch Grantees may preſcribe to amerce the Defaulters, and to diſtrain for the Amercement; but they cannot ſo preſcribe for any Matter of a private Nature. 2 Inſt. 71. Jones 283. 6 Co. 77. b. Dyer 30. pl. 209. See 12 Mod. 598.

The Statute 18 E. 2. † which ſhews of what Things the Sheriff's Torn and Court-Leet ſhall have Conuzance, (*c*) does not confine their Juriſdiction to thoſe Particulars enumerated in the Statute. 4 Inſt. 261. Cromp. Jur. 213.

(*c*) That the Leet may inquire of the ſame Offences with the Sheriff's Torn, of which *vide* Tit. *Sheriff's Torn*, Letter (C) 642, &c. of the Perſons that owe Suit to it, Letter (B) 641.—May inquire of corrupt Victuals, as a common Nuiſance, though omitted in this Statute. 4 Inſt. 261.—That a Railer is preſentable there. Hob. 247.—So of a Night-walker. Poph. 208.—Of the Several Statutes which impower this Court to inquire, &c. *vide* 2 Dan. 291.—That by the 31 Eliz. c. 5. They may inquire of Uſers of unlawful Games, or of any Art or Myſtery, not being brought up in it, but exerciſing a Trade contrary to 5 Eliz. c. 4. is not within the Act, nor preſentable in the Leet. Sid. 289. 2 Keb. 50. Raym. 154. S. C.

† The Stat. *for View of Frank Pledge.*

No Man can be within two Leets at the ſame Time, and in the ſame Reſpect; therefore, he who reſides within the Precincts of a Leet, the Lord whereof doth duly hold his Court, cannot be compelled to come to a Superior Leet, for any Purpoſe which may as well be anſwered by his Attendance at his own Leet; but if a private Leet be ſpecially granted for two or three Articles only, it ſeems that the Inhabitants muſt attend the Torn for all other Matters; alſo a Grand Leet may preſcribe to oblige a certain Number of Inhabitants in every Town within its Precinct, to appear at every ſuch Grand Leet, to inquire of ſuch Offences as were omitted by the Inferior: Alſo if a Leet be ſeized into the King's Hands, all who owed Suit to it ought to come to the Torn, &c. alſo the Sheriff's Torn, as an Overſeer of the Leet, is to inquire whether the Tithings be full, and may inquire of the Concealments of Offences inquirable in Leets. 2 Hawk. P. C. 73. and ſeveral Authorities there cited. *Page 646

A Court-Leet ſhall be forfeited, not only by Acts of groſs Injuſtice, but alſo by bare Omiſſions and Neglects, eſpecially if often repeated, and without Excuſe. 2 Hawk. P. C. 73.

The Caption of an Indictment in a Court-Leet, *ad Cur' Vif. Franc' Pleg' cum Cur' Baron'*, &c. is good, for the Words *cum Cur' Baron'* ſhall be rejected; for it ſhall be intended that the Indictment was taken by that Court, which alone hath the Colour of Authority to take it. Salk. 195. Ld Raym. 638.

The

Salk. 200. pl. 2. See 12 Mod. 400.

The not setting forth in the Caption, whether the Court was holden by Grant or Prescription, is helped by the Multitude of Precedents.

But the Business of the Leet hath declined many Years, and is devolved on the Quarter-Sessions.

Of the County Court,

Spelm. Rem. 50. 4 Inst. 266.

BY the Escheat of Earldoms and Baronies, the Tenants of such Earls and Barons were to hold from the King, and not being qualified to sit in the King's own Court, they composed a Court in each County, under the Array of the Sheriff, or the King's Bailiff; those were the *Pares* of the County Court: And hence it is that ever since it has been (*a*) held, that the Sheriff is no Judge, but only the Suitors.

(*a*) That Suitors are Judges. 2 Inst. 225.—Though the Proceedings be upon a *Justicies*. 2 Inst. 312. 6 Co. 51. b. Mod. 171. 12 Mod. 598. 2 Ld. Raym. 1310.

2 Inst. 380. 4 Inst. 266. (*b*) The Stile of the Court is *Curia*

(*b*) This Court is no Court of (*c*) Record, therefore an Action of Account against a Receiver for 13*s.* and 4*d.* or other Sum under 40*s.* lies not in the County Court; for being no Court of Record it cannot assign Auditors.

prima Comitat' E. C. milit' Vic' Com' pradict' tent' apud B. &c. 4 Inst. 266. (*c*) Therefore a Writ of false Judgment lies of a Judgment there, and not a Writ of Error. 4 Inst. 266.—But in a Rediſſeiſin the Sheriff is made Judge by the Statute of *Merton*, c. 3. And a Writ of Error lieth of his Judgment. 4 Inst. 266.

2 Inst. 312. (*d*) Though founded upon several

It is a Maxim of the Common Law, *quod Placita de catallis, debitis, &c.* (*d*) *quæ summam* (*e*) 40*s.* *attingunt vel excedunt secundum Legem & consuetudinem Angliæ sine breve Regis placitari non debent.*

Contracts, each of which were under 40*s.* Vent. 65. (*e*) An intire Debt, cannot be divided and sued for by several Plaints under 40*s.* 2 Inst. 312. But for this *vide* 2 Rol. Abr. 317. pl. 1.—If the Plaintiff counts his Damages 40*s.* though the Jury finds the Damages under 40*s.* so that in Truth the Cause *de Jure* belonged to the Court, yet he shall not have Judgment. 2 Inst. 312.

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2 Inst. 312. (*f*) Of Debts *ex*

* But by *Justicies* this Court may hold Plea of Goods, (*f*) Debts, &c. of any Value, and the Process therein is an Attachment of his Goods, &c. but no *Capias*.

contractu, but not of Debts *ex delicto*, as upon the Statute of Tithes. Lev. 253. *dubitatur*.

2 Inst. 312.

So by Force of a *Justicies* it may hold Plea of Trespass *vi & armis*.

In Replevin, by Writ or Plaint upon the Statute of *Marlbridge*, this Court may hold Plea of Goods and Chattels above the Value of 40*s*. 2 Inſt. 139, 312.

By the Statute of *Glouceſter*, made 6. *E.* 1. *cap.* 6. "Sheriff ſhall plead "Pleas of Treſpaſs in their Counties, as accuſtomed, &c. (*b*) but for "Maims and Wounds a Man ſhall have his Writ, as before hath been "uſed."

(*b*) So that this Court hath no Juriſdiction in ſuch Caſe; *ſecus* of a Battery without wounding or maiming. 2 Inſt. 312.—But it cannot hold Plea of any Treſpaſs *vi et armis*. Co. Lit. 118. 2 Lev. 93. Mod. 215.

And by the Statute of 12 *Geo.* 2. *cap.* 13. *ſect.* 7. "If any Perſon "ſhall commence or defend any Action, or ſue out any Writ, Proceſs "or Summons, or carry on any Proceedings in the County Court, who "ſhall not be admitted an Attorney or Solicitor according to the Act of "2 *Geo.* 2. *cap.* 23. he ſhall forfeit 20*l.* with Coſts, to him who ſhall "ſue, in any Court of Record."

Of the Hundred Court.

(*c*) THIS Court was, for the Eaſe of the Subject, by the King divided and derived from the County Court, and hath the (*d*) ſame Juriſdiction. 2 Inſt. 71. 4 Inſt. 267.

(*c*) Of the firſt Diviſion of Counties into Hundreds, and of the Grants of Hundreds, *vide* 6 Co. 11. 9 Co. 25. 4 Co. 33. Dyer 175. Rol. Rep. 118. Raym. 360. Vent. 399. 3 Mod. 199. (*d*) And therefore is no Court of Record. 4 Inſt. 267.—Cannot hold Plea of Debt or Treſpaſs, where the Debt or Damages amount to 40*s*. Co. Lit. 118.—Nor of Treſpaſs *vi et armis*. Co. Lit. 118.

Although the Stile of this Court is *Curia E. C. militis Hundredi ſui de B. in Com' Buck' tent' &c. Coram A. B. Seneſchallo ibidem*, yet the Suitors are Judges. 4 Inſt. 267.

In an Hundred Court the Plea was laid to be *coram Seneſchallo & Sectatoribus*; Serjeant *Newdigate* took an Exception to it, that it ſhould be laid to be held *coram Seneſchallo per Sectatores*; but *Wyndham*, *Atkins* and *Scroggs* thought it well enough; but the Chief Juſtice *con'*, and cited the Caſe of *Wyat* and *Wigges*, 4 *Co.* 47. where the Coroner of the Hoſtel and the Coroner of the County took an Indictment, where it did not appear that the Party was killed within the Verge; and reſolved to be ill; for that there the Record was intire, and it could not lie *coram non Judice*, as to the Coroner of the Hoſtel, and ſo void; and good as to the Coroner of the County; and perhaps the Jury, in their finding, were principally directed by the Coroner of the Hoſtel; ſo it might be here, for they in the Hundred Court may be ſwayed principally by what the Steward ſaid. Another Objection was, that the firſt Proceſs was an (*e*) Attachment; but as the Defendant appeared, the Court ſaid that Fault was cured; ſo Judgment was affirmed. Paſch. 30. Car. 2. *Clever* and *Curtois*.

(*e*) That the Court of King's Bench daily grants Attachments againſt Stewards of Hundred Courts, for granting Attachments againſt all the Parties Goods. Salk. 201. pl. 4.

The

*Page 648 Salk. 201. pl. 3.

* The true Proceſs of this Court at Common Law is a *Diſtringas*, but by Cuſtom the Proceſs may be (*a*) a *Levari facias*; and it is ſaid, that moſt Hundred Courts have this Cuſtom.

(*a*) An Execution may be in the Hundred Court by *Levari facias*; and therefore where the Books ſpeak of a *Diſtringas*, they muſt be intended of a *Levari*, for a Diſtreſs infinite would be endleſs in an Execution. 2 Lev. 81. 2 Keb. 117, 126. *Vide* Carth. 54.——And for the Manner of ſetting forth a Judgment in this Court, *vide* alſo Carth. 53, 54. 2 Lutw. 1369. 3 Lev. 403.

Salk. 201. pl. 3.

If a Jury in an Hundred, or other Inferior Court, will not agree on their Verdict, the Way is, as in other Courts, to keep them without Meat, Drink, Fire or Candle, till they agree; and the Steward may from Time to Time adjourn the Court till they do agree.

Of the Court-Baron.

4 Inſt. 264. 4 Co. 33. Co. Lit. 58. (*b*) That it is incident to a Manor,

THIS Court is (*b*) incident to every Manor, and had (*c*) antiently Conuzance of all Pleas of Land within the Manor, ſo that no Perſon within the Manor could apply to any other Juriſdiction without a *Remiſit Curiam* from the Lord.

and was at firſt inſtituted for the Eaſe of the Tenants, for ending Controverſies where the Debt or Damage was under 40*s.* at Home, &c. 4 Inſt. 268. Owen 35. Brownl. 175. Bulſt. 55. (*c*) But at this Day is no Court of Record, nor can it hold Plea of Debt or Treſpaſs, where the Debt or Damage amounts to 40*s.* Co. Lit. 118. 2 Inſt. 311.——Nor of Treſpaſs *vi & armis*, becauſe it cannot impoſe a Fine. Co. Lit 118. 2 Inſt. 311, 312.

6 H. 4. pl. 3. Co. Lit. 58.

The Suitors are (*d*) Judges, and the (*e*) Steward but as a Regiſter.

4 Co. 33. b. 4 Inſt. 268. S. P. (*d*) Though the Plea there is held upon a Writ of Right, 6 Co. 11. b. 12. a. 4 Inſt. 268. (*e*) And a Man cannot preſcribe to hold a Court Baron before his Steward, but before Suitors. Cro. Jac. 582. adjudged. Mod. 173. Cro. Eliz. 792. Noy 20. Godb. 49.—But perhaps may preſcribe to hold a Court before his Steward, but not a Court-Baron. Cro. Jac. 582. Leon. 316. Brownl. 21. Noy 20. 2 Jones 23. Godb. 68.——A Court-Baron being incident to a Manor of common Right cannot be preſcribed for. Cro. Eliz. 792. adjudged. Noy 20. adjudged.

4 Inſt. 268. (*f*) My Lord *Coke* ſays, he

The Stile of this Court is (*f*) *Curia Baronis E. C. militis Manerii ſui prædicti* (having the Manor's Name written in the Margin) *tent' tali die coram A. B. Seneſchallo ibidem, &c.*

hath ſeen Court Rolls in the Reign of Edw. 1. (having the Name of the Manors in the Margin) ſtyled thus, *Aula ibidem tent' tali die*, &c. becauſe it was holden in the Hall of the Manor. 4 Inſt. 268.

Co. Lit. 58. a.

This Court cannot be holden out of the Manor; but if a Man be Lord of two or three Manors, and there be a Cuſtom to hold a Court at one for them all, ſuch Courts are by Cuſtom good.

This

* This Court is of two Natures, the first is by Common Law, and called the Freeman's Court, or Court-Baron; and of this the Suitors are Judges, and the Steward is Register; and this may be kept from (*a*) three Weeks to three Weeks: The second is (*b*) a Customary Court, and concerns Copyholders, of which the Lord, or his Steward, is Judge; as the first cannot be without Freeholders, so this cannot be without Copyholders; a Court-Baron may be of this double Nature, and then the Roll contains Matter concerning both. *Page 649 Co. Lit. 58.

(*a*) *Note*; The Court of King's Bench has granted informations against Lords and Stewards for oppressing the Tenants, by warning Courts-Baron every three Weeks, and distraining them to appear, or pay a certain Sum of Money, upon no Occasions at all, but to extort Amercements from them. (*b*) For this *vide* 4 Co. 27. Cro. Car. 366. Jones 342.

By *Magna Charta*, (*c*) *cap.* 24. "A *Præcipe in Capite* is not to be "granted, whereby any Freeman may lose his Court."

(*c*) For the Exposition thereof, *vide* 2 Inst. 39.

By 52 *H.* 3. *cap.* 22. (*d*) "No Man shall cause his Freeholders to "swear (*e*) against their Will, for that ought not to be done without the "King's (*f*) Commandment.

(*d*) The King bound hereby in his Court-Baron, Hundred or County Court. 2 Inst. 143. (*e*) Intended between Party and Party, for to inquire for the Lord of all the Articles belonging to the Court-Baron or Hundred, they may be sworn. 2 Inst. 142. For which Articles *vide* Statute 4 Edw. intitled *Extenta Manerii*. (*f*) In a Writ of Right Patent, wherein Plea is held of Freehold, the Court may give an Oath, for the Writ is *Mandatum Regis*. 2 Inst. 143.

All Pleas in a Court Baron, of common Right, and by Course of Law, are determinable by Wager of Law; but by Prescription they may be determined by Jury. 4 Inst. 143.

If a Man recovers in a Court-Baron, they have not Power to make Execution to the Plaintiff of the Goods of the Defendant; but they may distrain him, and retain the Distress till Satisfaction. 4 H. 6, 17. 22 Ass. 72. Rol. Abr. 543. Bro. Court-Baron 6. S. C. But a *Quære* made, for it is usual for the Suitors, assigned by the Steward, to tax the Sums, and then to award a *Levari Facias*. *Quære*, If by Custom, or Common Law? See 12 Mod. 124.——By Brownl. 81. Upon a *Levari* out of a Court-Baron, Goods cannot be sold without a Custom to sell, &c. & *Vide* Noy 17.

If in a Court-Baron the Defendant appears not upon the Distress, yet the Goods distrained are not forfeited, nor can be sold by the Bailiff, for the Distress is but in Nature of a Pledge; and though by the Course of the Common Law, where a Man is attached by his Goods, and appears not, they are forfeited; yet in a Court-Baron no (*g*) Attachment lies, but a Distress infinite only. Yelv 194. *Gomersal* and *Medgate* adjudged. Cro. Jac. 255. Bulst. 52. S. C. adjudged. (*g*) The Process in a Court-Baron is Summons, Attachment, and Distress infinite. 2 Rol. Rep. 493. & *vide* Bulst. 53.

Courts

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*Courts of the Cinque Ports.

Bract. lib 3. f. 118. 4 Inst. 222. (a) For ancient Records touching the Cinque Ports, *vide* 2 Inst. 558.

THE Cinque Ports are (a) ancient trading Towns lying towards the Sea Coasts; these held *per Baroniam*, and were represented in Parliament by the Lord Warden or Keeper of the Cinque Ports; but they did not hold by the Tenure of Knight-Service, only by sending Ships to Sea, &c. and as they were instituted for the Defence and Safety of the Kingdom, they had several (b) Liberties and Privileges granted them, in respect of their necessary Attendance in those Ports.

——At first the privileged Ports were but three, *viz. Dover*, *Sandwich* and *Romney*, but *Hastings* and *Hithe* were added by *William* the Conqueror. 4 Inst. 222.——To which *Winchelsea* and *Rye* were adjoined; these now send each of them their Representatives to Parliament; and though seven in Number, are still called Cinque Ports. 2 Inst. 556. 4 Inst. 222. (b) To which they have a lawful Title, confirmed by *Magna Charta*, c 9. in these Words, *Barones de Quinque Portubus & omnes alii Portus habeant omnes Libertates & Liberas Consuetudines suas.* 2 Inst. 20. ——But this Confirmation does not extend to Pleas of the Crown, with which they intermeddle as Justices of the Peace. Cro. Car. 253.

4 Inst 233. (c) Sid. 166. It is said by *Twisden*, that no Body knows where this Court is.

There are several Courts within the Cinque Ports; one before the Constable of the Castle of *Dover*; others within the Ports themselves, before the Mayors and Jurats; (c) another which is called *Curia Quinque Portuum apud Shepway*.

Sid. 166. *per Curiam*. (d) Sid. 356. It is said the great Use of their Chancery is to relieve against Errors in Proceedings at Law, which they used to indorse upon the Bill.

There is a Court of Chancery in the Cinque Ports, but no Original Writs issue thence, but it serves only to decide (d) Matters of Equity.

2 Inst. 556. (e) Exempt from the Admiralty of *England*; 27 H. 8. c. 4. 28 H. 8. c. 15. 5 Eliz. c. 5. 11 & 12 *W.* 3. c. 7. & *vide* 2 Jon. 66, 67. Chan. Ca. 305.

The Lord Warden hath two Jurisdictions, 1. The (e) Authority of an Admiral, to hold Plea by Bill concerning the Guard of the Castle, &c. according to the Course of the Common Law.

which Jurisdiction is saved to him in several Acts of Parliament, as 2 H. 5. stat. 1. c. 6.

(f) Who is always Warden of the five Ports 2 Inst. 556.

By 28 *Edw.* 1. *cap.* 7. "The (f) Constable of the Castle of *Dover* shall not hold Plea of a Foreign County within the Castle Gate, except it touch the Keeping of the Castle; nor distrain the Inhabitants of the Cinque Ports, other where or otherwise than they ought after the Form of their Charter for their old Franchises, confirmed by *Magna Charta*."

2 Inst. 557. Dyer 376. 4 Inst. 224. S. P. (g) *Secus* upon the Judgment of the Court of *Shepway*. Sid. 356. *Per Twisden*; and so are the Books which speak of a Writ of Error to the Cinque Ports to be intended.

The Mayors and Jurats of the several Cinque Ports have Power to hold Plea, &c. and (g) upon their Judgment no Writ of Error lies in *B. R.* but they are examinable by Bill in Nature of a Writ of Error, *coram Domino Custode seu Guardiano Quinque Portuum apud Curiam suam de Shepway*.

The

* The Jurisdiction of the Cinque Ports is general, as well as to (*a*) personal as (*b*) real and mixed Actions. *Page 651

4 Inst. 224.

(*a*) Otherwise in Debt or Trespas transitory. Cro. Eliz. 910.—Where a Stranger comes within the Cinque Ports, and does a transitory Trespas, and after goes out of their Jurisdiction, he to whom the Trespas was done may have an Action at Common Law, else he would be without Remedy; for they can call none in who are out of their Jurisdiction, and the Privileges were granted for the Ease and Benefit, and not the Prejudice, of the Inhabitants. Yelv. 12. 2 Inst. 557. (*b*) And they hold Plea of Freehold by Plaint. Sid. 166. But a Judgment in *B R.* for Lands there shall bind for ever, though such Judgment for Lands in *Wales*, or a County Palatine, is merely void. 2 Inst. 557. 4 Inst. 223. Bro. *Cinque Ports* 24.—That they cannot plead to the Jurisdiction of the Court of *Westminster*, but must demand Conuzance. 4 Inst. 224.—Also if an Ejectment on a feigned Lease be brought of Lands within the Cinque Ports, the Courts of *Westminster* will not allow the Tenant of the Lands, on his Prayer, to be made Defendant, to plead to the Jurisdiction of these Courts, but will tie him strictly to the Rules of confessing Lease, Entry, and Ouster, and pleading Not guilty; this is not like the Case of Antient Demesne, where a Recovery in the Courts above makes the Lands Frankfee for ever †.

† *Qu.* If it is not the same with respect to Wales, &c.

If a Man is murdered in any of the Cinque Ports, his Wife may have an Appeal against the Murderer, (*c*) directed to the Sheriff of the County, and he shall execute the Writ (*d*) within the Cinque Ports, for the Constable hath no Jurisdiction to hold Plea thereof.

2 Inst. 557. Said to have been resolved between *Waes* and *Braines*.

Cro. Eliz. 694. S. C. adjudged. (*c*) Because the King in a Manner is concerned; for if the Plaintiff is nonsuit, the Defendant shall be arraigned at his Suit. Yelv. 13. Cro. Eliz. 911. (*d*) Yet *per* Yelv. 13. *per* Poph. If the Defendant at all Times after continued within the Cinque Ports, so that he might be proceeded against there, no Appeal would lie elsewhere.

So if the Defendant is *in Custodia Mareschalli*, the Appeal may be against him by Bill.

2 Inst. 557. Cro. Eliz. 695, 778.

If a Man hath Judgment in any of the King's Courts, and the Defendant hath no Lands or Goods but in the Cinque Ports, the Plaintiff may have (*e*) a Writ to the Lord Warden to make Execution.

4 Inst. 223. (*e*) The Record must be certified into Chancery, and from thence by *Mittimus* to the Lord Warden to make Execution. And. 28. 3 Leon. 3. W. Bendl. 46.

If a Man is imprisoned at *Dover* by the Lord Warden, an (*f*) *Habeas* (*g*) *Corpus* (*h*) may issue to the Lord Warden, &c. for the Privilege, that the King's Writ runs not, must be intended between (*i*) Party and Party, for there can be no such Privilege against the King.

Cro. Jac. 543. Palm. 96. S. C. adjudged. 4 Burr. 834.

Doug. 213, 751. (*f*) Where a Prohibition, *Mandamus* &c. Cro. Car. 543. Palm. 55. Sid. 353. 4 Inst. 223. 2 Lev. 86. 3 Keb. 598. Hard. 475.—Where a *Certiorari*, *vide* Rol. Abr. 395. 2 Hawk. P. C. 286, 287. (*g*) *Ad faciendum & recipiendum*; but if *ad Respondendum* a private Person, Q. Mod. 20. 8 Mod. 22. 12 Mod. 666. (*h*) But Sid. 166. it was said by some, that it had scarce ever been known that a Prohibition or *Habeas Corpus* went to the Cinque Ports ‡. (*i*) A *Quo minus* lieth thither. Hard. 475.

‡ Can there be a Doubt, as to those Writs running in the Cinque Ports?

The (*k*) Lord Warden is the immediate Officer of the Court, and (*l*) Writs shall be directed to him (*m*) as in all real Actions, &c. for Land within the five Ports.

2 Inst. 557. 4 Inst. 223.

By S. P. (*k*) The Constable or Keeper of *Dover-Castle* is also Warden of the Cinque Ports, and the Writs directed to him are *Rex*, &c. *Constabulario Castri suo de Dover & Custodi Quinque Portuum*, &c. 2 Inst. 556. 4 Inst. 223. (*l*) But Writs of Appeal must be directed to the Sheriff. Cro. Eliz. 604. Because the King is in a

By the 2 *W. & M. cap.* 7. "Whereas the late Lord Wardens claimed "a Right of Nomination of one Perſon to each of the Cinque Ports, the "two ancient Towns, and their Members, whom they ought to elect to "ſerve in Parliament; it is declared and enacted, that all ſuch Nomina- "tions were and are againſt Law, and void."

Yelv. 12, 13. Cro. Eliz. 910. S. C. 2 Hawk. P. C. 406. *Page 652

If a Murder is committed at *Sandwich*, and an Appeal brought by Original in *B. R.* directed to the Sheriff of the County of *Kent*, who brings * in the Defendant, who pleads that *Sandwich* is Part of the Cinque Ports, *ubi breve Domini Regis non currit, &c.* and demands Judgment of the Writ, this is a bad Plea; for the Defendant having done the Murder within the Cinque Ports, and after flying out, if this Pleading ſhould be allowed, (*a*) there would be a Failure of Juſtice.

(*a*) For the Cinque Ports cannot award Proceſs of Outlawry, for that ought to be proclaimed in open County. Cro. Eliz. 910.

Yelv. 13. But if the Defendant by his Plea ſhews that at the Time of the Murder ſuppoſed, and at all Times after, he had been an Inhabitant, and Commorant within the Cinque Ports, and ſo had given Juriſdiction to the Judges there, and ſhewed they might have proceeded, *&c.* it had been a good Plea. *

* *Qu.* If the Appeal is by Bill, ſuppoſing the Defendant to be in the Cuſtody of the Marſhal if ſuch Appeal will not lie?

Of the Courts of the Stannaries.

4 Inſt. 229. (*b*) For ancient Charters, Records, and Acts of Parliament concerning the Stannaries, and for an Expoſition of the Charter of E. 1. and the Statute 50 E. 3. which gave great Privileges to the Tinners, *vide* 4 Inſt. 232. 12 Co. 10, 11. Plow. 327. Rol. Abr. 547, 548; & *vide* 16 Car. 1. c. 15. by which their Privileges are declared and circumſcribed.

THESE Courts were (*b*) inſtituted for the Conveniency of Tinners, that they might be encouraged in the making of Tin, one of the Staple Commodities of the Kingdom; and therefore in *Cornwall* and *Devonſhire*, where the Ore or Mine of which it is made chiefly abounds, the Workers herein were allowed the Privilege of ſuing and being ſued in thoſe Places.

Manner concerned. *Vide* Yelv. 13. Cro. Eliz. 911. 2 Inſt. 557. (*m*) But if there be an Indictment before Juſtices of Peace within the Cinque Ports, a *Certiorari* may be immediately directed to them; for they proceed by Virtue of their Commiſſion, and not their ancient Charters, *&c.* Cro. Car. 253, 254. but for this *vide* Rol. Abr. 395.

The

The Jurisdiction of the (c) Court is guided by special Laws, by Customs, and by Prescription Time out of Mind. 4 Inst. 229. (c) For the Stile of the Court, *vide* 4 Inst. 299.—And that the Lord Warden hath Jurisdiction of all the Tin in *Cornwall* and *Devon*. 4 Inst. 229.

No Writ of Error lies upon (d) any Judgment in these Courts; but the Party grieved must be relieved by Appeal in several Degrees, first to the Steward of the Stannary Court, where the Matter lies; then to the Under Warden of the Stannaries; and from him to the Lord Warden of the same Stannaries; and for Want of Justice there, to the Prince's Privy Council. 4 Inst. 230. (d) For any Matters touching the Stannaries, otherwise upon a Judgment there given upon collateral Matters. 3 Bulst. 283. *Per Coke*, Ch. Justice, said to have been so resolved upon a Conference by all the Judges, as is to be seen recorded in Chancery in the Petit-Bag Office, Q. Ow. 8. Sid. 233.

Blowers, and all other Labourers and Workers, without Fraud or Covin, in and about the Stannaries in *Cornwall* and *Devon*, have the Privilege of the Stannaries during the Time they work there. 4 Inst. 231. Resolved by all the Judges.

Vide 2 Rol. Rep. 44. and the Statute 16 Car. 1. c. 15.

*All Matters concerning the Stannaries, or depending thereupon, are to be heard and determined (e) according to the Custom of the same Time out of Mind used. *Page 653

4 Inst. 231. resolved by all the Judges. (e) But *vide* Cro. Car. 333. Cowp. 424.

Transitory Actions between Tinner and Tinner, or Worker and Worker, though not concerning the Stannaries, nor arising therein, if the Defendant be found within the Stannaries, may be brought in these Courts, or at Common Law. 4 Inst. 231. Resolved by all the Judges.

But if one Party only be a Tinner or Worker, such Transitory Actions which concern not the Stannaries, nor arise therein, cannot be brought there, and in such Case the Defendant by the Custom and Usage of that Court may plead to the Jurisdiction, and (f) ought not to be arrested *ante* to swear it, or *redeundo*. 4 Inst. 231. Resolved by all the Judges. (f) 2 Rol. Rep. 379. S. P.

But it was said by the Chief Justice, that after the Oath taken they will for 3*d*. enter the Plaintiff a Tinner.

There ought to be no Demurrer in those Courts for want of Form, but for Matter of Substance only. 4 Inst. 231. Resolved by all the Judges.

They have no Jurisdiction of (g) any local Action arising out of the Stannaries, and (h) Matters of Life, Member and Plea of Land, are expressly excepted out of their Charters. 4 Inst. 231. Resolved by all the Judges.

(g) That the Plaintiff must shew that he was a Tinner, and that the Court was held within the Jurisdiction of the Stannaries. Fares. 103. (h) They have no Court of Equity, and therefore a Suit concerning an Agreement relating to Mines, &c. proper here 2 Vern. 483, 484.

† See a small Octavo Treatise, on the Laws, &c. of the Stannaries, intituled "Laws of the Stannaries of *Cornwall*, made at the Convocation or Parliament of Tinners at *Truro*, Sept. 13 *Ann.* 27 Geo. 2. Published by Order of the Convocation.

Of the Court of Commiſſioners of Sewers.

(a) Reg. 127. F.N.B. 113. 4 Inſt. 276

BY the (a) Common Law the King uſed to grant Commiſſions for inquiring into the Want of Reparations of Sea Walls, Ditches, Gutters, Sewers, &c.

(b) As *Magna Charta*, c. 15, 16, 23.

But as theſe Matters are now to be regulated according to (b) ſeveral Acts of Parliament, it will be neceſſary to ſet down the Purport of ſuch as are moſtly in Uſe at this Day.

for which *vide* 2 Inſt. 29, 30. 25 E. 3. c. 4. 45 E. 3. c. 2. 1 H. 4. c. 12. 6 H. 6. c. 5 9 H. 6. c. 5. 18 H. 6. c. 10. 23 H. 6. c. 9. 12 E. 4. c. 6. 4 H. 7. c. 1. 6 H. 8. c. 10. See 12 Mod. 331.

The chief Statute relating hereto, is 23 *H.* 8. *cap.* 5. which ordains that the Lord Chancellor, Treaſurer, the two Ch. Juſtices for the Time being, or any three of them, whereof the Lord Chancellor to be one, ſhall, as often as Need be, direct Commiſſions, and appoint Commiſſioners; the Form of * which Commiſſion is ſet forth in the Statute, which fully declares the Duty and Authority of the ſaid Commiſſioners, *viz.* That they do inquire by the Oaths of the honeſt and lawful Men, &c. through whoſe Default the Hurts and Damages have happened, &c. and who hath, or holdeth any Lands or Tenements, &c. or hath, or may have any Hurt, Loſs, or Diſadvantage, &c. and all theſe Perſons, and every of them to tax, &c. and to make and ordain Statutes, Ordinances, &c. after the Laws and Cuſtoms of *Rumney Marſh* in the County of *Kent*, or otherwiſe after their own Wiſdoms and Diſcretions.

*Page 654

23 H. 8. c. 5. Which *vide* at large, made perpetual by 3 & 4 E. 6. c. 8. and *vide* 7 *M.* ſ. 3. c. 11. This Statute to extend to *Glamorgan*, &c.

The 25 *H.* 8. *cap.* 10. enacts, "That no Perſon ſhall be compelled to "take upon him the Execution of any ſuch Commiſſion, unleſs he be a "Dweller in the County wherein he is appointed Commiſſioner; alſo that "every Perſon refuſing to take the Oath of Commiſſioner, as appointed "by 23 *H.* 8. *cap.* 5. ſhall, as often as ſuch Refuſal ſhall be certified into "Chancery forfeit five Marks."

25 H. 8. c. 10.

"The 3 & 4 *E.* 6. *cap.* 6. directs in what Manner the King's Lands "ſhall be liable, and taxed by the Commiſſioners, and his Tenants diſ-"charged and indemnified in their Payments of ſuch Taxes, and that "every ſuch Commiſſion ſhall be in Force for five Years from the Teſte, "unleſs ſuperſeded."

3 & 4 E. 6. c. 6.

"By the 13 *Eliz.* *cap.* 9. all Commiſſions of Sewers ſhall continue in "Force for 10 Years after the Date thereof, unleſs they be repealed by a "new Commiſſion or *Superſedeas*; alſo by this Statute all Laws, Ordi-"nances, and Conſtitutions duly made, according to the Statute 23 *H.* 8. "*cap.* 5. and written in Parchment, indented under the Seals of the Com-"miſſioners, or ſix of them (whereof one Part ſhall remain with the Clerk "of the Commiſſion, and the other in ſuch Place as the Commiſſioners or "ſix of them ſhall appoint,) ſhall without any Certificate to be made into "the Chancery, and without the King's Aſſent, continue in Force, not-"withſtanding

13 Eliz. c. 9.

" withſtanding any Determination of ſuch Commiſſion by *Superſedeas*, " until the ſame Laws, Ordinances, and Conſtitutions ſhall be altered, re- " pealed, or made void by Commiſſioners afterwards aſſigned; alſo by " this Act there ſhall be no Certificate or Return of the Commiſſion, or " of any of their Laws, Ordinances, or Doings by virtue thereof."

" By 3 *Jac.* 1. *cap.* 14. all Walls, Ditches, Banks, Gutters, Sewers, " Gates, Cauſways, Bridges, Streams, and Water-Courſes within two " Miles of *London*, having their Fall into *Thames*, ſhall be ſubject to the " Commiſſion of Sewers, and to all Statutes made for Sewers, and to all " Penalties in the ſaid Statutes contained." 3 Jac. 1. c. 14. & *vide* 7 Ann. c. 9. By which Power is given to the Lord Mayor of *London* to appoint Commiſſioners.

By the 7 *Ann. cap.* 10. reciting the Power of the Commiſſioners by former Statutes, as to ſelling the Lands of thoſe who refuſed to pay the Taxes and Proportions with which they were charged, and that theſe Laws did not extend to Copyhold Lands, it is enacted, That the Commiſſioners ſhall have the like Power as to Copyhold Lands, and that the Lords of ſuch Copyholds ſhall admit the Vendees, &c. Alſo by this Act it is enacted, that it may be lawful for the Commiſſioners by Warrant to authorize any Perſon to levy the Sums of Money aſſeſſed upon the Lands, &c. by Diſtreſs and Sale of the Goods of the Party refuſing, returning the Overplus. 7 Ann. c. 10.

Notwithſtanding the ample Powers by the above-mentioned Statutes given to the Commiſſioners of Sewers, yet are their Proceedings ſtill examinable in the Courts above, and accordingly we find ſeveral Reſolutions in which their Proceedings and Sentences have been controuled by the Courts at *Weſtminſter*. 4 Inſt. 276.

As where the Commiſſioners, on the finding of a Jury that *J. S.* had ſeven Acres of Land next adjoining to a Bank on the River *Thames*, and that the Occupiers of thoſe ſeven Acres uſed to repair, but that there were beſides 800 Acres within the ſame Level liable to be ſurrounded, * having taxed each of the ſeven Acres at 8 *s.* it was held; *1ſt*, That the finding that the Occupiers of theſe ſeven Acres uſed to repair, was not material, becauſe that ſuch Occupiers might have been Tenants at Will, whoſe Acts could not bind him who had the Inheritance. *2dly*, That tho' theſe ſeven Acres lay next the Bank, yet ought the Commiſſioners to tax all thoſe Lands which were in Danger of being damnified by the overflowing of the Waters, and conſequently received Benefit by the Repairs; for tho' they are to act (*a*) according to their Diſcretion, yet ſuch Diſcretion muſt be governed and directed by the Rules of Law and Reaſon. 5 Co. 99. b. *Rook's* Caſe. *Page 655 (*a*) Hard. 146.

The Commiſſioners of Sewers cannot make any (*b*) new Inventions to charge the People; (*c*) but if there were an old Wall, they may build another (if that be decayed) on the Inſide, or ſome ſmall Way diſtant, if it be neceſſary, and may compel them that repaired the former to repair it if they have no Damage by the Remove. (*b*) *Vide* 10 Co. 137, 138. 13 Co. 35. Moor 825. Sid. 145. (*c*) 2 Keb. 129.

If one be bound by Preſcription to repair a Bank, which by ſudden Violence, and without the Default of him who is ſo bound to repair, is thrown down, the Commiſſioners are not to charge him only with the Repair, but ought to tax all others according to the Advantages accruing to them from ſuch Repairs. 10 Co. 139. *Keighley's* Caſe. 5 Co. 100. a. S. P.

The Commiſſioners of Sewers cannot tax a whole Townſhip, but muſt proportion each Man's Share according to the Quantity of his Land, &c. and therefore where the Commiſſioners aſſeſſed a Fine on the Village of *D.* and by their Warrant ordered it to be levied on *J. S.* whoſe Cattle being diſtrained, he brought his Action, and had Judgment; afterwards the ſaid *J. S.* refuſing to releaſe the Judgment, he was committed by the Commiſſioners; 2 Bulſt. 197. Cro. Jac. 336. S. P. 3 Inſt. 125 S. P.

ſioners; but upon Complaint thereof the Court of King's Bench committed and fined the Commiſſioners, and held that by ſuch Proceedings after a Judgment at Law, they were guilty of a *Præmunire*.

Sid. 145. It has been holden that, tho' the Commiſſioners of Sewers are not a Court of Record, and may thus commit for a Contempt; yet that muſt be underſtood of a Contempt in the Face of their Court, and not to impriſon a Perſon for diſobeying their Orders.

Lev. 288. The Caſe of the Commiſſioners of Sewers for *Whitechappel*. Raym 186. Vent. 66. Mod. 44. 2 Keb. 635. S. C. Salk. 145. pl. 6. S. C. cited.

There was a Complaint of the Inhabitants of *Whitechappel* at the Council-Board, that the Commiſſioners of Sewers had taxed the ſaid Inhabitants for Repair of a Sewer in *Wapping*, whereas they were not within the Level; thereupon the Council ordered a *Certiorari* out of *B. R.* and that the Matter in Queſtion ſhould be tried there; which was accordingly done, and the *Certiorari* delivered; notwithſtanding which they iſſued out their Warrants for putting the Orders in Execution, and the Officers refuſing to execute the ſame were fined 10*l.* a Man; thereupon a ſecond *Certiorari* was delivered to return all Proceedings and all Orders, &c. concerning the ſame; this being alſo diſobeyed, and new Orders made for fining ſome of their Officers for their Contempt; whereupon they appeared, and tho' they alledged the Advice of Council in what they did, yet they were committed for the Contempt; the next Day the Return was brought into Court, and upon the ſeveral *Certiorari's* the Returns were ſeveral, which the Court diſallowed, and ordered them to return all their Proceedings upon the Return of the firſt Writ, and to return upon the laſt, that *ante adventum brevis* they had returned the whole Matter, which was accordingly done and filed; and after they continued a Week in Priſon without Bail, they were fined 40 Marks a-piece, and diſcharged, and the Matter ordered to be tried at the *B. R.* It was here moved in Behalf of ſome of the Commiſſioners, that theſe Orders, whereby the Contempt of the Commiſſioners appeared, tho' they were returned, might not be filed upon a Clauſe in 13 *Eliz. cap.* 9. which excuſes them from returning their Orders, and exempts them from Penalties; but it was reſolved that that, and other Proviſoes in the ſame Statute, did only extend to the Court of Chancery, to abridge the Power which the Court of Chancery had over the ſaid Commiſſioners, and the Orders by 23 *H.* 8. *cap.* 5. and that it did not at all (*a*) reſtrain the Court of *B. R.* from proceeding by *Certiorari*.

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(*a*) That the Commiſſioners of *Cambridge* Fenns, by 15 Car. 2. c. 17. have an abſolute Juriſdiction, and are not to return their Proceedings on a *Certiorari*; but if they obſerve not the Statute, their Proceedings will be void, & *coram non Judice*, and the Parties may examine the ſame by an Action at Law. Sid. 296. See Stra. 609. Forteſc. 374.

Sid. 78. Lord *Dunbar's* Caſe.

If it be found before Commiſſioners of Sewers, that ſuch a one ought to repair a Bank, and he removes the Proceedings into *B. R.* the Court will neither quaſh the Inquiſition, nor grant a new Trial, unleſs he, who is found to be the Perſon that ought to repair, will firſt repair the Bank; after which, if it be otherwiſe found, they will order him to be reimburſed.

2 Hawk. P. C. 288. Salk. 145. pl. 6.

There is a Rule in the Court of King's Bench, that no Order of Commiſſioners of Sewers ought to be filed without Notice given to the Parties concerned; alſo it is every Day's Practice of that Court, before it will ſuffer the Return of a *Certiorari* for the Removal of the Orders of ſuch Commiſſioners to be filed, to hear Affidavits concerning the Facts whereon they are grounded; and if the Matter ſhall ſtill appear doubtful, to direct the Trial of feigned Iſſues, and either to file the Return, or ſuperſede the *Certiorari*, and grant a *Procedendo*, as ſhall appear to be moſt reaſonable for the Trial of ſuch Iſſues, and to give (*b*) Coſts againſt the Proſecutor of the *Certiorari*, if it appears to have been groundleſs.

(*b*) 2 Keb. 500.

An

An Order of Sewers was made for levying 9*d. per* Acre on 1312 Acres, to be paid to the Clerk, to be applied towards defraying of Charges in and about the Execution of the Commiſſion, which was confirmed by the Court of King's Bench. 2 Stra. 1127.

Objections to Orders of the Commiſſioners of Sewers, removed into the Court of King's Bench, muſt be argued before they are filed. * 2 Stra. 1263.

* Iſſues ſet by a Judgment of the Commiſſioners, may be diſcharged on Motion, though a *Certiorari* would not lie originally to remove their Order. *Rex* v. *Biſhop.* in *Sc.* P. 1720. Bunb. 61.

Court of Pipowders.

THIS Court is incident to every Fair and (*e*) Market, and is called *Curia Pedis Pulveriſati* (*d*); becauſe for Contracts or Injuries done concerning the Fair or Market, Juſtice ſhall be done as ſpeedily as the Duſt can fall from the Foot.

(*e*) Incident to every Market as well as Fair, 4 Inſt. 272.

(*d*) Mirror Kelw. 99. Brownl. 175. Bulſt. 55. Cro. Eliz. 773.——That there may be a Court of Pipowders by Cuſtom without Fair or Market, and a Market without an Owner. 4 Inſt. 272. cap. 1. ſect. 3. Bract. lib. 3. fol. 334. 4 Inſt. 272

It is a Court of Record, of which the Steward is Judge, there being no Suitors. 4 Inſt. 272. 6 Co. 12. 2 Bulſt. 23.

Its Juriſdiction conſiſts herein, that the (*e*) Contract or (*f*) Cauſe of Action be in the ſame Time of the ſame Fair or Market, and not before, or in former; it muſt be for ſome Matter concerning the ſame Fair or Market, done, complained on, heard and determined the (*g*) ſame Day within the Precinct of the ſame Fair or Market.

4 Inſt. 272. (*e*) Cannot hold Plea of Obligations for this Court is ordained for Things ariſing within the Fair. Rol. Abr. 545 Moor 830. Cro. Jac. 313. 2 Bulſt. 21. (*f*) If one ſlanders another who trades in the Market, in any Thing which concerns his Trade, as by diſparaging his Goods, which he expoſes to Sale there, an Action lies; *ſecus* if the Words do not concern any Thing touching the Market. 10 Co. 73. *Hall* and *Jones* adjudged. Cro. Eliz. 773. Moor 623. S. C. adjudged. 4 Inſt. 272. Rol. Abr. 544. S. C. cited. (*g*) The Proceedings being *de Hora in Horam*. 2 Inſt. 272.——This Court continues during the Time of the Fair, and no longer. 2 Bulſt. 23.——It may be adjourned from Market to Market. Keilw. 99.—— The Continuance may be entered by an *Idem Dies*, &c. Moor 459.

* By the 17 *E.* 4. *cap.* 2. reciting, that divers Perſons coming to Fairs be grievouſly vexed and troubled in the Court of Pipowders, by feigned Actions, and alſo by Actions of Debt, Treſpaſſes, Feats and Contracts made and committed out of the Time of the ſaid Fair, or the Juriſdiction of the ſame, contrary to Equity and good Conſcience, &c. it is enacted, "That "no Miniſter of any ſuch Court of Pipowders ſhall hold any Plea (*h*) with- *Page 657 Made perpetual by 1 *R.* 3. cap. 6.

(*h*) Though ſuch Oath ought to be made if the Defendant will inſiſt upon it, yet it ſhall not be made Part of the Record. 4 Inſt. 272.

"out

(*i*) Yet this concludes not the Defendant, but notwithstanding he may plead to the Juriſdiction of the Court. 4 Inſt. 272. 2 Bulſt. 22.

" out (*i*) Oath made by the Plaintiff or his Attorney, that the Contract, " or other Feats contained in the Declaration, was made within the Fair, " and within the Time of the Fair, and within the Juriſdiction and bounds " of the ſaid Fair.

Of the Courts in London.

4 Inſt. 247. THERE are ſeveral Courts within the City of *London* which exerciſe a Juriſdiction according to their own ſtated Rules and Forms, but yet are ſubject to the Controul and Correction of the King's Courts at *Weſtminſter* whenever they exceed their Juriſdiction; the Chief of theſe are,

1. The Court of Huſtings.

4 Inſt. 247. (*c*) My Lord *Coke* ſays, it is derived from the *Saxon* Words *Hus*, which ſignifies a *Houſe*, *Dbing*, *Thing*, that is, the Houſe of Cauſes or Things. 4 Inſt. 247.—— But by Forteſc. Pref. to Monarchy 59. it is a pure *Saxon* Word, ſignifying any Council or Court in general, and therefore applied to the Supreme Court of the City of *London*.

This is the (*c*) higheſt and moſt ancient Court of Record within the City of *London*, and is always held at *Guild-hall*, before the Lord Mayor and Sheriffs of *London* for the Time being; but when any Matter is to be argued and determined in this Court, the Recorder ſits as Judge with the Lord Mayor and Sheriffs, and gives Rules and Judgments therein.

4 Inſt. 247. (*d*) In this Court Deeds may be inrolled, Recoveries may be paſſed, Wills may be proved, and Replevins, Writs of Error, Writs of Right Patent, Writs of Waſte, Writs of Partition, and Writs of Dower, may be determined for any Matters within the City of *London* and the Liberties thereof. *Lex Lond.* 105. But *note*, That all Real Actions are now grown out of Uſe.

This Court hath Juriſdiction of (*d*) all Pleas Real, Perſonal and Mixt; and for this Purpoſe it is diſtinguiſhed into two Courts, as the Judges ſit one Week on Real Actions, and the other on thoſe which are Perſonal or Mixt.

4 Inſt. 247. Judgment of Outlawry in the Huſtings is not given by the Mayor, who is Coroner, or his Deputy, but by the Recorder, by the Cuſtom of the City.

Lex Lond. 15. In this Court, the Lord Mayor for the enſuing Year, the Sheriffs, Chamberlain, and Bridge-maſters, are choſen.

*Page 658 18 E. 3. 14. Upon a Judgment given in this Court of Huſtings, a Writ of Error lies at St. *Martin's* (*e*) before certain Juſtices.

Rol. Abr. 745. S. C. Lev. 309. 2 Sand. 252. S. P. And upon a Judgment of the ſaid Juſtices a Writ of Error lies in Parliament. 2 Leon. 107. (*e*) For their Commiſſion, *&c. vide* Reg. 130. F. N. B. 23.

2. The

2. The Sheriffs Courts.

There are two Sheriffs of *London* and *Middlesex*, each of whom keeps a Court of Record for all Personal Actions within the City of *London*; these Courts are kept at *Guild-hall*, and in each Court a Steward is the Judge; they have belonging to these Courts two Prisons, called *Counters*, the one in *Wood-Street*, the other in the *Poultry*. 4 Inst. 248.

The (*b*) Process in these Courts is by Summons, Arrest, (*c*) Foreign Attachment, &c.

(*b*) But for this *vide Lex Lond.* 241, &c. (*c*) *Vide* for this Title *Customs of London.*

From these Courts a Cause may be removed by *Habeas Corpus* to *Westminster-Hall*; but if an erroneous Judgment be given, the Cause may be removed by Writ of Error to the *Hustings*, before the Lord Mayor and Sheriffs. 4 Inst. 247, 248.

If a Plaint be levied in a Counter in *London*, and a *Habeas Corpus* is brought, it is returned by that Sheriff in whose Counter the Party is in Custody, and he only is to answer if he escapes. Skin. 105.

3. The Court of Equity before the Lord Mayor, commonly called the Court of Conscience.

The Jurisdiction of this Court arises from (*d*) a Custom in *London*, *viz.* that if a Plaint of Debt is entered in the Sheriff's Court, upon Suggestion of the Defendant, the Lord Mayor may send for the Parties, and for the Record, and examine the Parties upon their Plea; and if he finds that the Plaintiff is satisfied, he may award that the Plaintiff shall be barred, but he cannot examine after Judgment. 4 Inst. 248. (*d*) That this is a reasonable Custom, altho' it hath been of late abused. Skin. 67. pl. 13.

Judgment was given in an Action in the Sheriff's Court in *London*, and after it was removed to the Mayor's Court by *Levata Querela*, within which Court there are four Attornies, who, by an exclusive Custom, are the only Attornies of the Court; one of them was assigned to the Plaintiff by the Recorder, who refused to act, as did all the others, because the then Lord Mayor was concerned in Interest. On Complaint to *B. R.* it was held, That no Person could withdraw himself from the Jurisdiction of the King's Bench, which had a Power of obliging all Officers to do their Duty; that the denying Justice in such a Manner was of dangerous Consequence, and might be punished by Information, &c. That in the Case of the Abbot of *Crowland*, 20 *E.* 4. the Liberties were seized, because he had not Officers; and that the Attorney's Refusal in this Case was sufficient to forejudge him. Hil. 26, 27. Car. 2. in *B. R. Buxton* v. *Singleton.* 3 Keb. 432. S. C.

There is also the Court of Requests, which is called the Court of Conscience, and is held before certain Commissioners at *Guild-hall*, and was (*e*) established for recovering Debts under forty Shillings. *Lex Lond.* 229. (*e*) First began by an Act of Council, 9 H. 8. but has since been confirmed by Act of Parliament, 3 Jac. 1. c. 15. which *vide*, and 14 Geo. 2. c. 10.

This Court cannot grant Prohibitions to stay Proceedings in the Courts at *Westminster*; and therefore where *J. S.* brought Debt upon an Obligation of 10*l.* for Payment of 5*l.* in *B. R.* against a Freeman of *London*, who cited the Plaintiff in the Court of Conscience, surmising that less than 40*s.* * was due; the Plaintiff appeared there, and shewed the Obligation; notwithstanding which, the Commissioners there, upon the Allegation 3 Keb. 533. See 12 Mod. 204. *Page 659

gation of the Defendant, that leſs than 40*s.* was due, ordered the Plaintiff to accept it, and to ſtay Proceedings in *B. R.* which he refuſing, the Commiſſioners ordered the Regiſter to keep the Obligation, ſo that the Plaintiff could not proceed in *B. R.* whereupon the Court granted an Attachment againſt the Commiſſioners and Regiſter.

Curteſy of England.

Dr. & Stud. lib. 1. *c.* 7. Co. Lit. 30. a. *Cowel*, Tit. *Curteſy*; it began in *England* and *Ireland* in the Time of H. 1. *Seld. Jan.* 65. and in *Scotland*, in the Time of *Malcom.* Macan, 56. Both by a poſitive Inſtitution.

TENANT by the Curteſy is he, who after his Wife's Death (having had Iſſue by her inheritable) is introduced into her inheritance, and has an Eſtate for Life therein; and he is ſo called from the Favour or Curteſy of that Law which made this Proviſion for him, to which he had no Natural Right, nor to which any other Nations, except thoſe of *Great-Britain* and *Ireland*, admitted him.

Wright's Introduc. to Ten. 193. Note (9).

The Words of this Law, as they are found *Pat.* 11. *H.* 3. *M.* 30. exemplified are, *Si aliquis deſponſaverit aliquam hæreditatem, habentem et ex ea prolem habuerit cujus Clamor auditus fuerit* * *infra Quatuor Parietes, et Vir ſupervixerit Uxorem, habebit totâ vitâ ſuâ Cuſtodiam hæreditatis, licet hæredem habuerit ex primo viro qui plenæ ætatis eſt: Præceptum eſt quod eadem Lex obſervetur in Hibernia.* Under this Head we ſhall conſider,

* If the Iſſue is *born* alive tho' it was never heard to cry, he ſhall be Tenant by the Curteſy; for Crying is but Evidence of the Life. Co. Lit. 29. b.—But if the Iſſue be ript out of the Belly of it's Mother, though it be alive, he ſhall not be Tenant by the Curteſy. *Ibid.*—Nor if the Iſſue be a Monſter, which hath not Human Form. *Ibid.*

(A) **What Perſons may be Tenants by the Curteſy, what not.** 660.

(B) **Of what Sort of Inheritances this Eſtate is allowable, of what not.** 660.

(C) **What Eſtate the Wife muſt have to ſet in the Huſband to be Tenant by the Curteſy.** 662.

And herein,

1. The deſcendible Quality of ſuch Eſtate. 663.
2. The Seiſin of the Wife thereof. 663.
3. When

3. When this Eſtate and Seiſin is to begin, and how long it muſt continue. 664.

(D) **Of the Husband's Title being initiate by having of Iſſue, and to what Purpoſes.** 666.

And herein,

1. What Sort of Iſſue this muſt be. 666.
2. When it muſt be born. 666.
3. What it muſt do to intitle the Huſband to be Tenant by the Curteſy. 666.

* (E) **The Nature and Quality of ſuch Tenancy by Curteſy.** 667. *Page 660

1. With reſpect to the Eſtate itſelf. 667.
2. With reſpect to the Privity between him and the Heir. 667.

(F) **By what Means this Title may be prevented and deſtroyed.** 668.

(A) What Perſons may be Tenants by the Curteſy, what not.

1. THE Words of this Law are general, and ſeem to extend to all Sorts of Perſons without Diſtinction; therefore (*a*) Ideots and Lunaticks, and (*b*) Villains, may be Tenants by the Curteſy.

(*a*) But the King ſhall have this Eſtate during the Ideocy or Lunacy, and provide for them and their Families, as he ſhould do out of their own Eſtates. 4 Co. 123, *Beverly*'s Caſe. (*b*) The Lord, if he will, may enter and hold thoſe Lands againſt the Villain and his Iſſue for ever. Co. Lit. 118, 123. 2.

2. Perſons convict only of (*c*) Felony or Treaſon, Perſons (*d*) outlawed in any Civil Action, may be Tenants by the Curteſy.

(*c*) For they forfeit only their Goods and Chattels abſolutely, for of their Lands the King gains but a Pernancy of the Profits. 5 Co. 110. Co. Lit. 92. b. 391. a. Stanf. 192. (*d*) Bro. Tit. *Outlawry* 26, 36, 59 Co. Lit. 128. For ſuch Proceſs of Outlawry might be eaſily ſuperſeded, and thereby the King's Pernancy of the Profits diſcharged.

3. But Perſons attainted of (*e*) Felony or Treaſon ſhall not be Tenants by the Curteſy; for they being thereby *extra Legem poſiti*, and their Perſons forfeited to the King, they are from thenceforth become incapable of our Laws in general, and by Conſequence, of this in particular, which intended to give the Inheritance only to thoſe who were capable of holding it *tota vita ſua*; alſo Perſons attainted in (*f*) a *Præmunire* are excluded the

(*e*) Bro. Tit. *Curteſy* 15. Staundf. 196. Godb. 323. (*f*) Co. Lit. 391. a. 3 Inſt. 43.

the Benefit of this Law, and alſo (g) *Aliens*, be they Friends or Enemies; and in theſe Caſes their Title ſhall never ariſe, even for the Benefit of the King, but the Wife's Eſtate ſhall be diſcharged of it for ever.

(g) But if the *Alien* be made Denizen, or the Perſon attainted pardoned, and have Iſſue after, they may be Tenants by the Curteſy, in reſpect to that Iſſue had after, but not in reſpect of any Iſſue had before. 7 Co. 25.—Popiſh Recuſants were diſabled from being Tenant by the Curteſy, 3 Jac. 1. c. 5. ſ. 13.

B) Of what Sort of Inheritance this Eſtate is allowable, of what not.

Dr. et Stud. 403. Perk. 457, 463. Dyer 9. pl. 25. Co. 1. 123. 4 Inſt. 87. *Page661

1. OF a Uſe * at Common Law, or what is now called a Truſt, it is expreſsly reſolved, that a Man ſhall not be Tenant by the Curteſy; and *Doctor and Student* aſſigns this as one Reaſon, why ſo much Land was put in Uſe to prevent this Title: and the 27 *H.* 8. *cap.* 10. in the Preamble recites this as one of the Miſchiefs that Statute intended to remedy; the Reaſon ſeems, that of a Uſe there was neither Tenure nor * Wardſhip, nor any Eſcheat nor Benefit to the Lord, and therefore not within the Reaſon of this Law; beſides that the Feoffees were Tenants to the Lord, and the Land in their Hands the proper Subject of ſuch Titles, and therefore could not be double out of the ſame Lands; another Reaſon may be, that the Uſe conſiſting merely in Privity between the Feoffor and Feoffees, and being in the Nature of a Thing in Action, for which no Remedy lay but by *Subpœna* in Chancery, and therefore none could have any Remedy for it, but thoſe who were Parties or Privies to the Feoffment, or within the Words or plain Meaning thereof, † and conſequently the Huſband could not be Tenant by the Curteſy, nor his Wife be endowed thereof, they being Strangers and Collaterals to the Feoffment; and they denying of them the Rents and Profits, could be no Breach of Truſt in the Feoffees, they not being originally truſted for any ſuch Purpoſe, nor compellable to account to them.

* If a Man gives his real Eſtate to Truſtees to permit his Daughter to take the Profits, and to diſpoſe, &c. for her ſeparate Uſe, notwithſtanding her Coverture, her Huſband is not Tenant by the Curteſy. *Hearle* v. *Greenbank*, *P.* 1749. 3 Atkyns 695. 1 Vezey 298.—But Huſband may be Tenant by the Curteſy of a *Truſt*, though a Wife cannot have Dower thereof. *Chaplin* v. *Chaplin*, H. 1733. 3 Peer Wms. 229.—If a Man by Will directs Truſtees to convey a fourth Part of his Freehold Lands to the Uſe of his Daughter for her natural Life, ſo as ſhe alone ſhall take the Rents, and her Huſband not to intermeddle therewith, and after her Death, for the Heirs of her Body in Fee; her Huſband is not Tenant by the Curteſy, it being only an *executory Truſt*, and ſhe taking only an Eſtate for Life. *Roberts* v. *Dixwell*, M. 1738. 1 Atkyns 607. ——If Land is deviſed to *A.* and her Heirs, and if ſhe die before her Huſband, he to have 20*l. per Annum* for Life, the Remainder to go to her Children, the Huſband is not Tenant by the Curteſy. *Sumner* v. *Partridge*, T. 1740. 2 Atkyns 47.

† As to the Conſtruction this Matter has received in the Courts of Equity, and the Relief given to Tenants in Dower and by Curteſy, *vide* 2 Vern. 585, 681. Chan. Rep. 254. 2 Vern. 404. Abridg. of Equity 218.

4 Co. 22. Hob. 216. Cro. Eliz. 361. 2 Wilſ. 16. Doug. 716. 1 Term Rep. 600.

2. A Man ſhall not be Tenant by the Curteſy of a Copyhold unleſs there be a ſpecial Cuſtom to warrant it, for the Freehold and Inheritance being in the Lord, and the Copyhold being only a Cuſtomary Right of taking the Profits Time out of Mind at the Will of the Lord, this Cuſtom, like all others, muſt be a Law to itſelf, and all Eſtates derived thereout are ſo far good as they are warranted by that Law, and no farther; if therefore there be no Cuſtom for a Man to be Tenant by the Curteſy, of his Wife's Eſtate, there is no Law by which he can claim it; and if there be no Law, he can have no more Right than to another Man's

Man's Property; and this Statute cannot operate upon Copyhold, ſince this Statute, like other Statutes, was made within Time of Memory, and ſo falls ſhort of any Share in the Original Conſtitution, or Governing of Copyholds; and for this Reaſon, where ſuch Cuſtom of holding by the Curteſy has prevailed, it has yet been taken literally ſtrict, and not to be extended in the leaſt beyond thoſe Bounds the Cuſtom has allowed of.

3. As where *J. S.* ſet forth, that within ſuch a Manor there was a Cuſtom, That if one took to Wife any Cuſtomary Tenant of the ſaid Manor in Fee, and had Iſſue by her, if he outlived ſuch Wife he ſhould be Tenant by the Curteſy; and the Caſe was, that *J. S.* married a Woman, who at the Time of the Marriage had not any Copyhold, but afterwards, during the Coverture, a Copyhold deſcended to her; and it was adjudged, that he ſhould not be Tenant by the Curteſy by this Cuſtom, for that his Wife was not a Cuſtomary Tenant at the Time of the Marriage, which by the ſtrict and literal Meaning of the Cuſtom ſhe ought to be. Sir *John Savage's* Caſe. Leon. 109, 208.

4. Of an Annuity to a Woman and her Heirs, after a Writ of Annuity brought, a Man ſhall not be Tenant by the Curteſy no more than a Woman ſhall be endowed thereof, for thereby it becomes a Perſonal Inheritance. Co. Lit. 144. b. Poph 87. Moor 83.

5. A Man may be Tenant by the Curteſy of Lands held in *Antient Demeſne*, and a Woman may claim Dower of ſuch Lands; alſo of Lands in *Borough Engliſh*. 5 Co. 105. Cro. Eliz. 826. *Alden's* Caſe.

6. Of Lands in *Gavelkind*, a Man may be Tenant by the Curteſy without having Iſſue by his Wife, by the Cuſtom; and herewith our Statute has nothing to do, ſince Cuſtom, a Law of much longer ſtanding, had already provided for him, and preſcribed the Terms of his enjoying of it. Co. Lit. 30. a. Dav. 50. L. P. R. 627.

7. There are ſome Kinds of Inheritances whereof a Man may be Tenant by the Curteſy, though a Woman, in ſuch Caſe, ſhall not be endowed; as if Lands holden of the King by Knight's Service deſcend to a Woman, and after Office found ſhe intrudes and taketh Huſband, and * hath Iſſue, in this Caſe the Huſband ſhall be Tenant by the Curteſy, yet if the Heir Male, after Office found in the like Caſe intrudeth, and taketh a Wife, ſhe ſhall not be endowed by the expreſs Proviſion of *Prærogat' Regis, cap.* 13 But this Statute doth not alter or abridge the Statute that gives a Man a Title by the Curteſy. *Prærog. Regis*, c. 13. 4 Co. 55. *Page 66 a

8. So if a Man marry the Nief of the King, by his Licence (which amounts to an Infranchiſement, at leaſt during the Coverture) and after Lands deſcend to the Wife, and the Huſband hath Iſſue by her, and then ſhe dies, the Huſband ſhall be Tenant by the Curteſy; but if a Woman marry the Villain of the King, by his Licence, ſhe ſhall not be endowed; for notwithſtanding the Licence, he ſtill remained a Villain to the King, who may enter at his Pleaſure, and defeat the Wife's Title of Dower by his own Title Paramount. Co Lit. 30. b.

9. A Man ſhall be Tenant by Curteſy, of a Caſtle, of a (*a*) Houſe that is *caput Baroniæ*, or *Comitatus*, becauſe able to defend the Realm, and of a Common without Number; but of theſe a Woman ſhall not be endowed. Co. Lit. 30. b. (*a*) But for this *vide* Head *Dower*, and that by a late Reſolution, a Woman ſhall be endowed of ſuch a Houſe.

10. Of Offices of Profit a Huſband ſhall be Tenant by the Curteſy. Plow. 379. My Lord *Coke* cites ſome antient Records, wherein Tenancy by the Curteſy was allowed of Dignities and Offices of Honour, as to carry a Sword before the King at his Coronation, to be his Carver upon that Day; and to the Earl of *Saliſbury* by the Curteſy; but theſe being Offices, as appears annexed to particular Dignities, or being Dignities themſelves, and capable of being intailed, may without any inconvenience be allowed the Privilege of this Law. Co. Lit. 29.

11. Of

7 Vin. 156. pl. 23. 11. Of an Equity of Redemption. *

* See further 3 Com. Dig. 243-4.

(C) What Eſtate the Wife muſt have to let in the Huſband to be Tenant by the Curteſy.

Lit. ſ. 35. Dyer 148. 6 Co. 41. 8 Co. 36. Co. Lit. 227. 8 Co. 34. Leon. 167. *Pain's* Caſe. Co. Lit. 30. a.

1. LITTLETON acquaints us, That it muſt be an Eſtate either in Fee-ſimple or Fee-tail general, or where the Wife has it as Heir of the Special Tail; and my Lord *Coke* ſays, for the Huſband to be Tenant by the Curteſy is one of the Incidents to an Eſtate-tail, which to reſtrain by Condition, were repugnant, &c. and therefore if a Woman, Tenant in Tail general, marries and hath Iſſue, which Iſſue dieth, and then the Wife dies, ſo that the Eſtate is thereby determined, yet the Huſband ſhall be Tenant by the Curteſy; the ſame Law if the Limitation had been to the Woman and the Heirs of her Body, upon Condition, that if ſhe die without Iſſue then to remain to another; for this is not a Condition but a Limitation, and no more than what the Law ſaith.

Co. Lit. 30. a.

2. So if one, ſeiſed of a Rent in Fee, makes a Gift in Tail general, or if a Rent *de novo* be granted in Tail general to a Woman, who marries and hath Iſſue, the Iſſue dieth, and then the Wife dieth without other Iſſue, yet the Huſband ſhall be Tenant by the Curteſy, of the Rent, tho' the Eſtate-tail therein be determined and ſpent; for this being an Incident to ſuch an Eſtate at the Time of its Creation, whenever the Huſband has Iſſue, his Title is initiate, and ſhall not be loſt after by Failure of Iſſue, which, being the Act of God, ought not to turn to his Prejudice; and this is within the Words of our Law *Hæreditatem habentem*, without fixing its Continuance: But to underſtand the Nature of the Wife's Eſtate we muſt conſider farther,

*Page 663

* 1. The Deſcendible Quality of ſuch Eſtate.

This Rule ſeems to have been formed after the Statute *de donis*, and by Virtue thereof; for our Statute requires no ſuch Property in the Inheritance, neither did the Common Law; but for this *vide* 2 Inſt. 336. 8 Co. 35, 36. Co. Lit. 29. b. Perk. 465.

1. The Rule herein to be obſerved is, that the Iſſue of ſuch Huſband may by Poſſibility inherit.

8 Co. 35. Co. Lit. 29. b.

2. Therefore if Lands are given to a Woman and the Heirs Male of her Body, and ſhe has Iſſue a Daughter, and dies, the Huſband ſhall not be Tenant by the Curteſy; the ſame Law if it had been given to her and the Heirs Female of her Body, and ſhe had Iſſue a Son.

Bro. Tit. *Curteſy* 8. Perk. 466. 8 Co. 34. Lit. ſ. 52.

3. But if a Woman ſeiſed in Fee marries, and hath Iſſue, and then the Huſband dies, and ſhe takes another Huſband, and hath Iſſue by him and dies; though the firſt Iſſue be living, yet the ſecond Huſband ſhall have it by the Curteſy, becauſes his Iſſue, by Poſſibility may inherit; as if the firſt Iſſue die without Iſſue, whereby it comes to the Uncle, &c.

2. The Seiſin of the Wife thereof.

Dr. and Stud. lib. 2. c. 15.

1. That the Wife muſt be *ſeiſed* of the Eſtate, is required by the very Words of the Law, which ſays, *aliquam hæreditatem habentem*, ſo that there

there must be a Poſſeſſion of ſuch Inheritance by the very Words of the Law; and therefore if a Man die ſeiſed of Lands in Fee-ſimple or Fee-tail general, and thoſe Lands deſcend to his Daughter, and ſhe marries, and hath Iſſue and dies, before any Entry made by her and her Huſband, or any other for them, the Huſband ſhall not be Tenant by the Curteſy; but here we muſt underſtand Seiſin in a two fold Senſe, *viz.* Seiſin in Fact and Seiſin in Law; and where a Seiſin in Fact may be had, as in the above Caſe, there a Seiſin in Law will not do; nay, though the Huſband doth all he can to get Poſſeſſion in his Wife's Life-time, and as ſoon as he heareth of her Father's Death, goeth towards the Land to take Poſſeſſion, and before he can come there the Wife dies, yet he ſhall not be Tenant by the Curteſy, and therefore one * Book ſays, he ſhould have ſpoken to ſome Neighbour, being near the Lands, to have entered for his Wife, as in her Right, immediately after the Father's Death; and the Reaſon of this is from the Words of the Law, which require that the Wife ſhould have actual Poſſeſſion of the Inheritance; and of Things lying in Livery the Wife hath not actual Poſſeſſion till the Entry of the Huſband.

Perk. 464. Co. Lit. 29. a. 90. 8 Co. 34. 36. F. N. B. 143. Keilw. 2. a. Bro. Tit. *Curteſy* 7. *Perk. 470.

2. But now of ſuch Inheritances, whereof there cannot poſſibly be a Seiſin in Fact, a Seiſin in Law is ſufficient; and therefore if a Man ſeiſed of an Advowſon, or Rent in Fee, hath Iſſue a Daughter, who is married and hath Iſſue, and he dieth ſeiſed, and the Wife die likewiſe before the Rent becomes due, or the Church becomes void, this Seiſin in Law in the Wife ſhall be ſufficient to intitle her Huſband to be Tenant by the Curteſy, becauſe, ſay the Books, he could not poſſibly attain any other Seiſin, as indeed he could not, and then it would be unreaſonable he ſhould ſuffer for what no Induſtry of his could prevent; but the true Reaſon is, That the Wife hath theſe Inheritances which lie in Grant, and not in Livery, when the Right firſt deſcends upon her; for ſhe hath a Thing in Grant when ſhe hath a Right to it, and nobody elſe interpoſes to prevent it.

Co. Lit. 29. Perk. 468, 469. 7 Ed. 3. 66. Kielw. 104. Co. 97. 6 Co. 68. F. N. B. 149. Bro. Tit. *Curteſy* 5, 9. 2 Sid. 110.

* 3. When the Eſtate and Seiſin is to begin, and how long it muſt continue. *Page 664.

1. The Eſtate and Seiſin of the Wife ought to begin ſome Time during the Coverture; ſo the Words of the Law import, *Si aliquis deſponſaverit aliquam hæreditatem habentem, &c.* and therefore if a Woman be diſſeiſed and marries and dies, leaving Iſſue before any Re-entry made, the Huſband ſhall not be Tenant by the Curteſy; for here ſhe had no Inheritance, but only a Right to an Inheritance, which is out of the Words of this Law; but if the Huſband or Wife had entered during the Coverture, there after the Wife's Death, he ſhould have it by the Curteſy, becauſe ſhe had *hæreditatem* during the Coverture.

Co. Lit. 29. a. 30. a. Perk. 458.

2. If a Woman Seignoreſs intermarry with the Tenant, and have Iſſue and die, the Huſband ſhall not be Tenant by the Curteſy of the Seignory, becauſe by the Intermarriage the Seignory was in Suſpence, and ſo ſhe could not be ſaid to have it, or if ſhe had, it is like the Seiſin of an Inſtant whereof a Woman ſhall not be endowed.

5 Leon. 347. Perk. 460. Co. Lit. 29. b.

3. A Woman Tenant in Tail, *apres* Poſſibility, *&c.* takes Huſband, and hath Iſſue, and the Fee-Simple deſcends upon the Wife, be it before or after Marriage, the Huſband ſhall be Tenant by the Curteſy, becauſe by the Deſcent of the Fee the other Eſtate was merged and gone, and ſhe became Tenant in Fee-Simple executed.

Bro. Tit. *Curteſy* 4.

4. In Treſpaſs, the Defendant ſays, that one *A.* was ſeiſed of thoſe Lands in her Demeſne as of Fee, and that he took her to Wife, and they had Iſſue between them, and after *A.* died, and he held himſelf in as Tenant by the Curteſy, and (*inter alia*) it was moved, that he did not ſhew

Kielw. 2. which plainly ſhews that Seiſin in the

Wife ſome Time during the Coverture, is eſſential to make the Huſband Tenant by the Curteſy.

ſhew that after the Marriage he was ſeiſed in his Demeſne as of Fee in Right of his Wife; and though it was anſwered, that his ſhewing that *A.* was ſo ſeiſed, and that he took her to Wife was ſufficient, ſince it could not be intended but that the Defendant was ſeiſed in Fee, as in Right of his Wife; yet, ſays the Book, the Defendant *videns opinionem Curiæ* amended his Plea according to the Exception taken by the Plaintiff.

But in the Caſe of the Leaſe, if a Rent were

3. If a Woman ſeiſed in Fee makes a Leaſe for Life, or endows her Mother, and after has Iſſue and dies, living the Leſſee or Mother, the Huſband ſhall not be Tenant by the Curteſy of the Reverſion.

reſerved to her and her Heirs, Q. if the Huſband ſhall not have the Rent during its Continuance, and after the Death of the Leſſee the Land itſelf, as Tenant by the Curteſy; and *vide* Perk. 467. Co. Lit. 29. a. Bro. Tit. *Curteſy* 10. Co. Lit. 15. a. 32. a. Keilw. 104. pl. 12.

Bro. Tit. *Curteſy* 121.

6. In a *Quare Impedit* by the King againſt divers, the Defendant makes Title that the Advowſon deſcended to three Coparceners, who made Partition to preſent by Turns, the Eldeſt to have the firſt, the Middle the ſecond; and that he married the Youngeſt, and had Iſſue by her, and ſhe died, and the Church became void, and ſo it belonged to him at preſent; and doth not alledge that ever his Wife preſented, and yet he was allowed Tenant by the Curteſy by the Seiſin of the others; the Reaſon of which Caſe ſeems to be, that the Advowſon being in its Nature intire and indiviſible, and deſcending upon all the Daughters as Coheirs, though they do agree to ſhare the Fruits of it in ſuch Proportions amongſt themſelves, yet the Inheritance remains intire in them all, and they all have a Seiſin in Law before Preſentment by either, which, according to the Rules before laid down, is ſufficient to intitle the Huſband to be Tenant by the Curteſy.

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* 7. A Rent-charge is granted to a Woman and her Heirs, payable at two Feaſts of the Year, the firſt Payment to begin at ſuch of the two Feaſts as ſhall happen after the Death of *J. S.* The Feme takes Huſband, and hath Iſſue and dies; then *J. S.* dies; and one Queſtion was, if the Huſband ſhould be Tenant by the Curteſy of this Rent.

2 Sid. 110. 117. *Dethick* v. *Bradburn.*

In this Caſe no Judgment is given, but the Opinion of *Glyn* Ch. Juſt. that he ſhould; for though this begins *in futuro*, yet it is grantable over preſently, which proves it to be *in eſſe*, and then ſhe may be well ſaid *habere hæreditatem*, and the Seiſin is not material, eſpecially in the Caſe of a Rent.

The Time when this Eſtate and Seiſin in the Wife is to begin, whether before or after Marriage, is not material; and therefore if a Woman marries, and hath Iſſue, which dies, and after Lands deſcend to the Wife, and the Huſband enters, and then the Wife dies without other Iſſue, yet the Huſband ſhall be Tenant by the Curteſy, for the Time of the Deſcent is not material, ſo it be during the Coverture; the ſame Law is if Lands had been conveyed to the Wife *mutatis mutandis*.

As to the Continuance of this Eſtate and Seiſin in the Wife, in ſome Caſes it is neceſſary it ſhould continue in her till Iſſue had, and in ſome not; and in ſome Caſes Continuance both before and after will nor ſerve; for the Firſt, if a Woman ſeiſed in Fee of Lands hath Iſſue, and after commits Felony, and is attainted thereof, yet the Huſband ſhall be Tenant by the Curteſy, in reſpect of the Iſſue had before, and which by Poſſibility might have inherited; *aliter* if the Wife had been attainted before Iſſue; but in the other Caſe, the Huſband's Title, by having of Iſſue was ſo

Co. Lit. 40. a. 351. a. Bro. Tit. *Curteſy* (3). But Q. if in this Caſe after Iſſue had

the Feme had been attainted of Treaſon, if the Huſband's initiate Title ſhall prevail againſt the King. Q. Alſo in the Caſe of the Felony, if the huſband may enter preſently upon the Attainder during the Wife's Life, who is thereby *civiliter mortua*, as he might if the Wife had abjured the Realm, which

ſo far initiate that the Lord might avow upon him for Homage without the Wife, and then her Crimes after ſhall not defeat him of it; beſides, this is within the Letter of our Law, *&c.* which is one Kind of Attainder; for which *vide* Co. Lit. 133. And that the Abjuration is an Attainder, *vide* Co. Lit. 13. a. 390. b.

In ſome Caſes it is not neceſſary that the Seiſin ſhould continue till Iſſue; and therefore if a Man, ſeiſed of Lands in Fee in Right of his Wife, is diſſeiſed before Iſſue, and afterwards he hath Iſſue, and the Wife die before any Re-entry made, yet the Huſband may re-enter and hold the Land as Tenant by the Curteſy, for the Diſſeiſin left a Right in him to be Tenant by the Curteſy, if he had Iſſue, as it did in the Wife and her Heirs to the Inheritance. Perk. 472. Co. Lit. 30. a.

So in ſuch Caſe, if a Recovery had been had againſt the Baron and Feme by erroneous Proceſs, or by falſe Swearing, and after Execution ſued thereof they have Iſſue, and the Wife dieth, yet the Huſband ſhall have Error or Attaint, and upon Reverſal ſhall enter and hold as Tenant by the Curteſy, for being Party to the Record he may well have theſe Writs, and when the Recovery is reverſed, it is ſo *ab initio* as to him. Perk. 475.

In ſome Caſes Continuance of Seiſin before and after Iſſue will not do, therefore if a Woman makes a Gift in Tail, reſerving Rent in Fee, and marries and hath Iſſue, and then the Donee dies without Iſſue, and then the Wife dies, the Huſband ſhall not be Tenant by the Curteſy of the Rent, for that is determined and gone, but he ſhall have the Land. Co. Lit. 30. a.

If a Woman marries and hath Iſſue, and Lands deſcend to the Wife, and the Huſband enters, and after the Wife is found an Indeot, by Office, the Land ſhall be ſeiſed for the King; for when the Title of the King and a common Perſon begin at one Inſtant, the Title of the King ſhall be preferred; *a fortiori* in this Caſe, if the Woman had Lands before Iſſue, and after Iſſue had been found an Ideot. Plow. 263. Co. Lit. 30. b. 55. But Q. of this Caſe, becauſe the King's Title can continue no longer than during the Ideot's Life.

* If a Daughter Inheritrix marries and hath Iſſue, and after a Son is born, who enters upon the Huſband and Wife, and then the Wife dies, the Huſband's Title is defeated; but if after the Son had died without Iſſue, and the Huſband had re-entered, it ſeems he ſhould be Tenant by the Curteſy, whether he had Iſſue by his Wife after or not, and though ſuch firſt Iſſue was dead before his Re-entry; ſo if the Daughter in ſuch Caſe after Iſſue had endowed her Mother, and after the Mother dieth, and the Huſband re-enters, and his Wife dieth without other Iſſue, yet it ſeems reaſonable the Huſband ſhould have it by the Curteſy; otherwiſe in theſe Caſes, if the Son or the Mother had not died till after the Death of the Wife, for their Title in both Caſes was Paramount the Wife's, and diſaffirms her Title *ab initio* from the Death of the Father; but when the Son or the Mother dies, living the Wife, then the Eſtate comes to her again, and whether it come before or after Iſſue, ſo there be an Entry made, is not material, as before appears. *Page 666 Bro. Tit. *Curteſy* (10, 13.)

If a Woman Tenant in Tail General makes a Feoffment in Fee, and takes back an Eſtate in Fee, and marries, and hath Iſſue and dies, yet the Iſſue may recover in a *Formedon* againſt his Father and then he ſhall not be Tenant by the Curteſy; for the Eſtate-tail he cannot have, that being diſcontinued during the whole Coverture; the Fee he cannot have, that being defeated and gone, and the Iſſue reſtored to his Right *per formam Doni*; and as the Eſtate of the Wife, during the Coverture, was tortious, ſo Co. Lit. 29. b.

must the Husband's be too after her Death, and liable to be defeated by the Issue. *

* If a Woman seised in Fee mortgages, marries, has Issue and dies, without redeeming, the Husband is Tenant by the Curtesy of the mortgaged Premises, for the Land in Equity is considered only as a Pledge for the Money, and does not alter the Mortgagor's Possession. *Casborne* v. *Scarfe*. H. 1737. 1 Atkyns 603.——If by Articles previous to Marriage a Woman grants to her intended Husband, during her Life, the Interest of her Money, and the Rents of her Estate, to maintain the House, &c. this does not abridge his legal Rights, but he shall have the Curtesy in her real Estate at the Marriage, and in what came to her afterwards. *Steadman* v. *Palling*, H. 1746. 3 Atkyns 423.—If Lands on which Leases for Years are existing, and a Rent incurred, descend to a Wife as Tenant in Tail, and she survives three Months after Rent-day incurred, but makes no Entry, nor is any Rent paid during her Life, yet this is such a Possession of the Wife, as will make the Husband Tenant by the Curtesy. *De Gray* v. *Richardson*. P. 1747. 3 Atkyns 469.——A Husband shall be Tenant by the Curtesy of Money to be considered as Land. *Cunningham* v. *Moody*, M. 1748. 1 Vezey 174.

(D) Of the Husband's Title being initiate by having of Issue, and to what Purposes: And herein,

1. What Sort of Issue this must be.
2. When it must be born.
3. What it must do to intitle the Husband to be Tenant by the Curtesy.

8 Co. 35. *Pain's* Case. Co. Lit. 29. b. S. P.

AS to the First, if a Woman be delivered of a Monster, which hath not the Shape of Mankind, this is no Issue in Law; but however deformed it may be, or if it be born deaf and dumb, or an Ideot, yet this is such Issue as will entitle the Husband to be Tenant by the Curtesy.

8 Co. 35. Co. Lit. 29. b.

2dly, It must be born during the Life of the Wife; therefore if the Wife die in Childbed, and the Issue is ript out of her Womb, the Husband shall not be Tenant by the Curtesy, because he had no Issue during the Marriage, and therefore he cannot be said *ex ea prolem habere*, and in pleading he must alledge that he had Issue during the Marriage.

8 Co. 34. Co. Lit. 29. b. Dyer 25. pl. 159. Bendl. 21. Perk. 471. Keilw. 2. a.

3dly, the Statute says, *Cujus clamor Auditus fuerit*; but this is put but for an Instance; for if it be born alive, though dumb, and could not cry, it is within the Meaning of this Statute; and there are other Signs of Life besides crying, as Motion, &c. but some Books seem to incline, that it ought to be baptized, and if it be not, through the Husband's Neglect, he shall not be Tenant by the Curtesy; but the Statute requires no such Thing, and therefore it seems no essential Part of his Title.

But in *Scotland* they require that the Child should cry.

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Co. Lit. 30. a. 67. a. 2 Inst. 145.

* As to what Purposes this Title is initiate in the Husband by having of Issue, it appears before, that after Issue had he shall do Homage alone and receive Homage alone during the Life of his Wife, and Avowry shall be made only upon him; for the Statute says *si ex ea prolem habuerit, &c. habebit tota vita sua Custodiam hæreditatis*; but Homage done by the Husband before Issue shall not bind the Wife.

17 Ed. 3. 51. Co. Lit. 30. a. 183. a. accord.

Therefore if an Estate be made to two Women, and the Heirs of their two Bodies, and one of them marries, and hath Issue and dieth, the Husband shall be Tenant by the Curtesy of her Moiety; for this Statute severs the

the Jointure between them by giving the Husband the Custody of it in the Life of the Wife; but if such Limitation had been to two Men in this Manner, their Wives should not be endowed, for the Jointenancy takes Place of the Dower. 2 Rol. Abr. 90. cont.

If the Husband, after Issue, makes a Feoffment in Fee, and the Wife dies, the Feoffee shall hold it during the Life of the Husband, and the Heir of the Wife shall not, during his Life, avoid it by *sur cui in vita*, for it could not be a Forfeiture, because the Estate of Tenant by the Curtesy was but initiate, and not consummate; and now since 32 *H.* 8. *cap.* 28. the Issue shall not enter in such Case till after the Husband's Death, which shews, that in this Feoffment his Interest and Title to be Tenant by the Curtesy is involved, and passes by it to the Feoffee, though not to such Purpose to make him Tenant by the Curtesy, which none but the Husband himself can be; for the same Reason, it seems, that after Issue he may lease the Lands for his own *(a)* Life. Co. Lit. 30. a. 326. a. Dyer 363. pl. 26. 8 Co. 72.

(a) But Q. if such Feoffment or Lease before Issue shall be made good for his Life by Issue had after.—[In answer to this Question, another may be asked, *viz.* who is to avoid the Lease, if the Tenant chooses to hold the Land?]

Baron and Feme have Issue, and after join in suffering a Recovery, the Feme was within Age and appeared by Attorney, yet after her Death it seems the Heir could not assign this for Error till after the Husband's Death †. Hob. 324. *Darcy* v. *Lee.*

† See farther 3 Com. Dig. 243-4.

(E) The Nature and Duality of such Tenancy by Curtesy.

1. With respect to the Estate itself.
2. With respect to the Privity between him and the Heir.

AS to the first, this Estate, in several Respects, is looked upon as a Continuance of the Estate of the Wife, and therefore if three Coparceners are of an Advowson, and they agree to present by Turns, the Eldest first, and so on, and the Eldest die, her Husband, Tenant by the Curtesy, shall present as she should have done; and so of any of the other Sisters. 3 Co. 22. Co. Lit. 166. b. 186. a. 2 Inst. 365. Cro. Eliz. 19. F. N. B. 34. Bro. Tit. *Curtesy* (2.)

So a Writ *de Partitione facienda* lies against Tenant by the Curtesy, because he is in Continuance of the Estate of Coparcenary, though not being a Coparcener in Fact he cannot have such Writ. Co. Lit. 174. b. 175. a. Keilw. 118.

If Baron seised of an Advowson in Right of his Wife presents, and after hath Issue, and the Wife dies, and then the Church becomes void, the Husband shall not have Assise *de Darrein Presentment*, because he is in of another Estate than that upon which he presented before; for before he had no Estate but in Right of his Wife, and now he is seised for his own Life, as Tenant by the Curtesy. 2 Rol Abr. 38. Keilw. 118. Q. But it seems clear, if the first Present-ment had been after Issue, he should have had this Writ.

*Page668 * The Wife's Heir ſhall not be in Ward during the Life of Tenant
F.N.B.143. by the Curteſy, becauſe by his Continuance of his Wife's Eſtate, the Deſcent to the Heir is interrupted.

Dyer 51. *in Margine.* If a Woman, Tenant in Tail, acknowledge a Statute and marries, and hath Iſſue and dies, the Land may be extended in the Hands of her Huſband, Tenant by the Curteſy.

9. H. 7. 24. So the Entry of the Diſſeiſee is congeable of the Tenant by Curteſy, but not on the Heir after his Death.

2 Inſt. 309. If Tenant by the Curteſy alien in Fee, in Tail, or for Life of the Leſſee, he in the Reverſion ſhall have a Writ of Entry *in Caſu conſimili* preſently, by the Statute of *Weſtm. 2. cap.* 24.

Hob. 21. 2 Jones 8. Rol. Abr. 167. If Tenant by Curteſy grant his Eſtate with Warranty, and comes in as Vouchee, he ſhall have Aid of him in the Reverſion for the Weakneſs of his Eſtate; ſo if he himſelf be impleaded.

3 Co. 23. 9 Co. 142. 11 Co. 83. 4 Co. 62. Co. Lit. 54. 2 Inſt. 301. F.N.B. 56. Cro. Car. 430. *Dr. & Stud.* lib. 2. c. 1. As to the Privity between him and the Heir, this is ſo inſeparable, that at Common Law, although both had, as it were by Conſent, granted away their Eſtates, yet no Action of Waſte lay againſt any other than the Tenant by the Curteſy, nor againſt him by any other than the Heir at Law; but now by the Statute of *Glouceſter, cap.* 5. Remedy is provided for the Grantee of the Reverſion againſt Tenant by the Curteſy, ſo long as he continues his Eſtate, or againſt his Aſſignee, if he aſſign it over; but ſtill ſo long as the Heir keeps the Reverſion, Tenant by the Curteſy is liable to his Action of Waſte notwithſtanding any Aſſignment, that Statute having provided no Remedy for this Caſe; and the ſame Law of Tenant in Dower.

(F) By what Means this Title may be prevented and deſtroyed.

Bro. Tit. *Curteſy* (6.) Co. 111. Hob. 338. Moor 31, 32. But Q. as to the firſt Caſe, becauſe the IF the Huſband before Iſſue make a Feoffment in Fee, and retake an Eſtate to him and his Wife, by which the Wife is remitted, and after he hath Iſſue, and the Wife dies, yet he ſhall not be Tenant by the Curteſy, for the Law gives him *Cuſtodiam hæreditatis*; and if he parts with it in Fee, ſo that it is once out of him, there is no Law that gives it to him again, ſince he hath extinguiſhed it by his unjuſt Alienation; *a fortiori* if after Iſſue he had made this Feoffment.

Feoffment being before Iſſue, the Huſband hath not Title either initiate or conſummate, but his Title began wholly afterwards by having of Iſſue, and then the Wife was in actual Seiſin by the Remitter.

Co. Lit. 30. b. So if after Iſſue he make a Feoffment in Fee upon Condition, and re-enter for the Condition broken, and then the Wife dies, yet he ſhall not be Tenant by the Curteſy, for that Title was incluſively paſt and given away by the Livery, and the Condition was not annexed to his Title but to the Feoffment; and yet if ſuch Feoffment were before Iſſue, one (*a*) Book makes a Q. of it; but it ſeems clear in this Caſe he ſhall not, becauſe, upon his Re-entry for the Condition broken, he is not in of an Eſtate in Right of his Wife, but of the tortious Eſtate gained upon the Diſcontinuance of his Wife's Right.

(*a*) Perk. 474.

Bro. Tit. *Curteſy* (1) A Woman, Tenant in Tail General, marries, ſhe and her Huſband levy a Fine, and take back an Eſtate to them and the Heirs of their two Bodies, and have Iſſue, the Huſband dies, ſhe marries another, and hath Iſſue and dies, and the Huſband claims to be Tenant by the Curteſy upon Pretence, that by the Eſtate taken back upon the Fine his Wife was remitted

remitted to her general Tail, and ſo every Iſſue Inheritable, and he Tenant * by the Curteſy; but *optima Opinio*, that as his Wife was eſtopped, ſo ſhall the ſecond Huſband, who claims by her. *Page 669

Baron and Feme ſeiſed of Lands in Right of the Feme (whereof the Huſband was intitled to be Tenant by Curteſy) levy a Fine, which was after reverſed as to both, for the Nonage of the Feme, the Huſband ſhall have it again, as Tenant by the Curteſy, becauſe the Fine was utterly avoided. Cro. Jac. 482. Cro. Eliz. 128. *Charnock* and *Worſley*, adjudged.

The Huſband leaving his Wife, and living with another Woman, does not forfeit his Tenancy by the Curteſy. 3 P. Will. Rep. 269, 276, 277.

CUSTOMS.

(A) Of the Commencement and Length of Time neceſſary to eſtabliſh a Cuſtom. 669.

(B) What Perſons are affected with or bound by a Cuſtom. 670.

(C) Of ſuch Cuſtoms as are againſt the Rules of the Common Law, yet, not being unreaſonable in themſelves, are good, and, from the Conveniency of them, bind in particular Places. 671.

(D) Where, from the Benefits accruing from them, they ſhall bind. 675.

(E) Where, from the Certainty or Incertainty of them, they ſhall be deemed good or void. 677.

(F) How to be conſtrued; and to what Things a Cuſtom ſhall be ſaid to extend. 677.

(G) Cuſtom, how deſtroyed. 678.

(H) Of the Manner of alledging and pleading a Cuſtom. 679.

(A) Of

(A) Of the Commencement and Length of Time neceſſary to eſtabliſh a Cuſtom.

THE frequent Repetition of an Act, which at firſt was (*a*) aſſented to by the People of a certain Place (*b*) for their mutual Convenience and Advantage, is called a Cuſtom, and every ſuch Cuſtom, being certain and reaſonable in itſelf, and commencing Time immemorial, and always continuing without Interruption, * has obtained the Force of a Law, and in ſuch Places ſhall prevail, though (*c*) contrary to the general Laws of the Kingdom.

*Page 670

Co. Lit. 110. b. Dav. 32. (*a*) That all Laws bind by the Aſſent of the People, and ſuch Aſſent may be expreſſed as well by Facts as by Writing or Word. 44 E. 3. 19. Dav. 32. (*b*) The Difference between Cuſtom and Preſcription is, that Cuſtom is local, as prevailing in a certain Province, County, Hundred, &c. but Preſcription is for the moſt Part perſonal, being made in the Name of a certain Perſon and his Anceſtors, or thoſe whoſe Eſtate he has, or of a Body Politick, and their Predeceſſors. Co. Lit. 13. b. 6 Co. 69. 8 Co. 61. & *vide* 2 Bulſt. 206. Rol. Rep. 46. (*c*) *Conſuetudo ex certa Cauſa rationabili uſitata privat communem Legem.* Lit. ſ. 37.

Co. Lit. 110. b. (*d*) The Continuance of an Uſage from the Reign of *R.* 1. which being the Time of a Limitation of a Writ of Right, is ſaid to be a good Title of Preſcription. Co Lit. 113. That laying a Cuſtom for forty Years is naught though it was ſaid that it might have been for more Years, and ſo Time out of Mind. Skin. 108. pl. 8. 109.—That Cuſtoms may be Time out of Mind, though not coeval. Salk. 203. pl. 1.

Time and Uſage are eſſential Parts of a Cuſtom, and therefore no Cuſtom is (*d*) allowable but ſuch as hath been uſed by Title of Preſcription, *viz.* Time out of Mind.

46 E. 3 16. Bro. Eſtray. 5 Co. 109. Co. Lit. 114.

Hence it is, that though a Lord of a Manor may have Waifs and Strays by Preſcription, yet he cannot have the *bona Felonum & Fugitivorum* without Grant from the King; becauſe no Man can preſcribe, for them, for every Preſcription muſt be immemorial, and the Goods of Felons and Fugitives cannot be forfeited without Record, which preſuppoſes the Memory of that Continuance.

(B) What Perſons are affected with or bound by a Cuſtom.

Co. Lit. 114. Rol. Abr. 566. (*e*) A Cuſtom that exalts itſelf above the King's Prerogative is void. Dav. 33.

THE King only, by his Prerogative, can make a Corporation, Conſervator of the Peace, &c. therefore in theſe, or in other Things which (*e*) highly touch the King's Prerogative, no Title can be gained by Cuſtom or Preſcription, as Conuzance of Pleas, to have a Sanctuary, to make a Corporation, Coroner, Conſervators of the Peace, &c.

Co. Lit. 114. b.

But Treaſure Trove, Waifs, Eſtrays, Wreck, to hold Pleas, Courts-Leet, Hundreds, Infangthef, Outfangthef, a Park, Warren, Royal Fiſh, Fairs, Markets, Frankfoldage, Keeping of a Gaol, Toll, &c. may be claimed by Preſcription, without any Matter of Record; and a County Palatine

Palatine may be claimed by Preſcription, and, by Reaſon thereof, *Bona Felonum, &c.* Alſo a Corporation may be by Preſcription.

Alſo Cuſtoms that bind private Perſons do not extend to the King; therefore if Lands in Gavelkind deſcend to the King and his Brother, the King ſhall take one Moiety, and his Brother the other; but if the King dies, his Moiety ſhall deſcend to his eldeſt Son, and not according to the Rules of Deſcent in Gavelkind; for the King was ſeiſed of his Moiety *Jure Coronæ*; therefore it ſhall attend the Crown, and conſequently go to the eldeſt Son. Plow. 205. a. Co. Lit. 15. b. Raym. 77. Sid. 138.

So the Cuſtom of *London*, as to retaining Goods mortgaged till Satisfaction be made of the Money lent on them, extends not to the King's Jewels. 3 H. 6, 26. Dav. 33. b. Rol. Abr. 566. 2 And. 152.

So if a Man hath Toll, or Wreck, or Strays, by Preſciption, this extends not to the King's Goods. Dav. 33. b.

A Cuſtom may extend to and give an (*a*) Infant a Power of doing that which by the Rules of the Common Law he could not do, as an Infant at the Age of ſixteen may makes a (*b*) Feoffment of Lands of the Nature of *(*c*) Gavel-kind; but this, like all other Cuſtoms is to be conſtrued ſtrictly, and in ſuch Manner as that no Prejudice may accrue to the Infant thereby; and therefore ſuch Feoffment muſt be for (*d*) valuable Conſideration; muſt be made in (*e*) Perſon, and not by Attorney; cannot be with (*f*) Warranty; muſt be of Lands which (*g*) deſcended to him in Gavelkind, and not of Lands by Purchaſe; and muſt be of Lands in (*h*) Poſſeſſion, not in Remainder or Reverſion. *Page 671 (*a*) *Dr.* and *Stud.* 21. 5 H. 7. 41. Fitz. Cuſtom 9. 9 Co. 76. a. (*b*) By the Cuſtom of a Town an Infant may bind himſelf Apprentice. 9 H. 6, 7, 8. Bro. Cuſtom 63. (*c*) Lamb. 624. (*d*) And. 193. Lamb. 625. (*e*) Lamb. 628. (*f*) Rol. Abr. 568. (*g*) Bendl. 33. pl. 52. Lamb. 627. (*h*) Bendl. 33. pl. 52. Lamb. 627.

It is a good Cuſtom in a Copyhold Manor, that a Feme Covert, with or without the Conſent of her Huſband, may deviſe her (*i*) Copyhold Land to her Huſband, or whom ſhe pleaſes. Moor 123. pl. 268. Godb. 14, 143.

3 Leon. 81, 83. 2 Brownl. 218. (*i*) But of ſuch a Cuſtom as to Freehold Lands, Q. & *vide* 4 Co. 61. b. And. 152. Rol. Abr. 563. pl. 6.

(C) Of ſuch Cuſtoms as are againſt the Rules of the Common Law, yet, not being unreaſonable in themſelves, are good, and, from the Convenience of them, bind in particular Places.

EVERY Cuſtom ought to appear to have had a reaſonable Commencement, and that at firſt it was voluntarily agreed to, for the better promoting of Trade and Commerce, the Suppreſſion of Fraud, the greater Security of Men in their Eſtates and Poſſeſſions, *&c.* and in ſuch Caſes, though the Cuſtom be contrary to the Common Law, or againſt the Intereſt of a particular Perſon, yet it ſhall be good. Dav. 32. b. *Vide* of the Cuſtoms of Gavelkind, Borough-Engliſh, Copyholds, Regulation of Corporations, Commons, chuſing Conſtables, Church-wardens, *&c.* the ſeveral Heads.

As

21 E. 4. 28. Bro. Cuſtom 51. Rol. Abr. 560. Dav. 32. b. S. C.

As a Cuſtom that a Man, in ploughing his own Ground, may turn the Plough on the Ground of his Neighbour; for this is for the general Good, being in Favour of Huſbandry and Tillage, although a particular Perſon receive Prejudice thereby.

5 Co 84.

So a Cuſtom to dry Nets upon the Land of another; for this is in Favour of Fiſhing and Navigation.

Dav. 32. b. Dyer 60. b.

So a Cuſtom to build Bulwarks on the Lands of another for the Safety of the Kingdom, is good.

Dav. 32. b.

So is a Cuſtom to pull down the Houſe of another, to prevent the ſpreading of Fire.

Mod. 202. *Vaughton* and *Atwood*. 2 Mod. 56. S. C. Cro. Jac. 555. *Wallis's* Caſe. *V.* 1 Bur. 239.

It is a good Cuſtom in a Manor, that the Homage have uſed yearly to chuſe two Surveyors, to take Care that corrupt Victuals are not ſold within the Manor, and to deſtroy ſuch as they find expoſed to Sale there, for the Preſervation of Men's Health is deſigned thereby; and it is at the Peril of the Surveyors if they deſtroy any Meat that is not ſo.

A Cuſtom in *Ipſwich* to chuſe yearly two Burgeſſes, who uſed yearly to make a Feaſt, and to fine thoſe who refuſed to make a Feaſt, and to impriſon them till paid, was allowed a good Cuſtom, upon an *Habeas Corpus*, and the Priſoner remanded. *

* Some By-Laws are ſupported by Cuſtom, that otherwiſe would not be good.—A By-Law that a Burgeſs ſhall make a Feaſt at his Election is good. R. 2. Cro. 555.——That every one, admitted to the Livery in the Vintner's Company, pay 31*l.* 13*s.* 4*d.* when the *Cuſtom* warrants the Payment of a reaſonable Sum, for the Dignity, and Charges of the Company, is good. R. Ray 446. Semb. 1. Salk. 349. 5 Mod. 319.

*Page672 Rol. Abr. 560. But *vide* 8 Co. 127.

* It is a good Cuſtom, that every Man of the Town, that hath an Houſe next adjoining, and abutting to the High-Street, may ſell all Merchandizes in his Shop within the ſaid Houſe in the Time of the Market, which is held in the High-Street.

8 Co. 126. (*a*) That a Skimington, or Riding, where a Woman cuckolds her Huſband, is a Cuſtom againſt Law, *vide* 3 Keb. 578. Raym. 401.

A Cuſtom in *Exeter*, that every Woman taken in Adultery ſhould be (*a*) whipped, is good. And note that ſuch Riding has been held by *Holt*, C. J. a Libel, *vide* Tit. *Libel*.

30 Aſſ. pl. 47. (*b*) So that a Woman ſhall not have Dower where ſhe received, during the Coverture, Part of the Money for the Sale of the Land. Bro. Cuſtoms 53.—So that a Widow who marries ſhall not have Dower. Rol. Abr. 562.—But a Cuſtom that the Wife of a Tenant in Fee ſhall not have Dower, is void. Dav. 46. b.—So that the Wives of *Iriſh* Lords ſhall, during Coverture, have the ſole Property of certain Goods, to diſpoſe of them without the Aſſent of the Huſband. Dav. 50. b. Rol. Abr. 563.

A Cuſtom that a Feoffment by Tenant in Tail with Warranty ſhall not be a Diſcontinuance, is good; although this is againſt the (*b*) Rule and Maxim of the Common Law.

Dav. 32. b. 6 Mod. 124. Ld. Raym. 57, 499, 869, 1135. Fitzgib. 51. Salk. 203. (*c*) That a Cuſtom againſt the Law of Reaſon, is void, *vide* Moor 588. Bridg. 11, 12. 1 Leon. 217, 314. 3 Leon. 41.

But every Cuſtom which appears to have been unreaſonable in (*c*) itſelf, as being againſt the Good of the Commonwealth, or injurious to a Multitude, though beneficial to a particular Perſon; or to owe its Commencement to the arbitrary Will and Oppreſſion of a powerful Lord, and not to the voluntary Agreement of the Parties, is void; nor can any Continuance of ſuch a Cuſtom give it a Sanction, or make that Good which was void in its Creation.

A Cuſtom

A Cuſtom within a Pariſh, that all Lambs fallen and bred upon one Tenement in the ſame Pariſh, though belonging to ſeveral Owners, ſhall be reckoned together, as if but one Man's, and the Tenth, ſo counted together, paid for Tithes, is void and unreaſonable; for by this Means it might happen that a Man might have but one Lamb, and that ſhould be taken for Tithe; and he that had more ſhould pay nothing. Hob. 329. *Barker* and *Cocker*, adjudged.

A Cuſtom to elect a Supernumerary before any Vacancy, to be admitted upon the Death of the next Prebendary, is ridiculous and void. Skin. 4<. pl. 17. 2 Jon. 199. S. C.

A Cuſtom that no Commoner ſhall put his Cattle into the Land before the Lord, is void; for a Cuſtom that leaves it to the arbitrary Will of the Lord, whether the Tenant ſhould ever enjoy any Benefit by the Common, or not, can never be preſumed to have had a reaſonable Commencement. Rol. Abr. 560. Dav. 32.

So a Cuſtom that the Lord of the Manor ſhall detain a Diſtreſs taken upon the Demeſnes till a Fine at his Will is paid for the Damage, is void. Lit. ſ. 46. Dav. 33. a.

A Cuſtom, that every Tenant of a Manor that marries his Daughter without the Licence of the Lord, ſhall pay a Fine, is againſt Reaſon, and void; for every (*c*) Freeman may marry his Daughter to whom he pleaſes. Lit. ſ. 209. (*c*) But that every Tenant (though his Perſon be free) that holds in Bondage, the Freehold being in the Lord, ſhall pay ſuch Fine, is good. Co, Lit. 140. a. †

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† The Caſes cited by Lord *Coke* are in the time of E. 3. & H. 6.—*Qu.* If there is any ſuch Tenure now? And ſee 12 Car. 2. c. 24.

If the Lord of a Copyhold by Cuſtom claims to have a Fine of the Copyholder, upon every Alteration of the Lord, be it by Alienation or otherwiſe, this is a void Cuſtom as to the Alteration or Change of the Lord, by the Act of the Lord himſelf; for by ſuch Means the Copyholders might be oppreſſed by the Multitude of Fines by the Act of the Lord. Co. Lit. 59. b. But for this *vide* Tit. *Copyhold*.

* A Cuſtom, that the Lord ſhall have Common in all the Lands of his Tenants for Life or Years lying freſh, is void, for it is againſt Law that the Leſſor ſhall have Common againſt his own Leaſe, becauſe it is Part of the Thing demiſed; *aliter* of an Heriot, which is collateral. *Page 673 Palm. 211. *White* and *Sayer*, adjudged.

A Cuſtom that the Lord may take for his Heriot (*a*) the Beaſt of a (*b*) Stranger, levant and couchant upon the Land of the Tenant, is not good. Rol. Abr. 561. 2 And. 153.

(*a*) So where the Cuſtom was laid, that if the Tenant hath none, or the beſt Beaſt is enſloined, the Lord has uſed to take the beſt Beaſt levant and couchant upon the Land. Moor 16. N. Bendl. 112. adjudged.—But that the Cattle of a Stranger may be diſtrained for an Heriot, but not ſeiſed, *vide* N. Bendl. 302. pl. 294. Dalſ. 61. Ow, 146. March 165. (*b*) A Cuſtom that the Lord ſhall have the beſt Beaſt of every Perſon dying within his Manor, which is found there, is naught; for between the Lord and a Stranger it could have no lawful Commencement, though between the Lord and his Tenants it may be good. Cro. Eliz. 725. adjudged. Rol. Abr. 266.

A Cuſtom in a Town, for a Lord to enter into the (*c*) Lands of his Tenant till an Agreement made for the Arrears, when the Tenant ceaſes for two Years, is not good; for it is an ill Uſage to ouſt a Man of his Inheritance without Action or Anſwer. 43 E. 3. 32. 2 Inſt. 56. (*c*) But if this Cuſtom had extended itſelf into many Towns it had been good. 43 E. 3. 32., Rol. Abr. 559.

A Cuſtom that the Lord of the Manor ſhall have 3*l*. for every Pound Breach, of every Stranger, is not good; (*d*) but it is good againſt the Tenants of the Manor. Rol. Abr. 561. Dav. 33.

(*d*) So of a Cuſtom, that if a Tenant makes a Reſcous, or drives his Cattle off the Land when the Lord comes to diſtrain that he ſhall be amerced by the Homage, &c. Godb. 135.

As

Rol. Abr. 564. Cro. Eliz. 185. As to particular Cuſtoms relating to the Proceedings in Inferior Courts, ſuch as have prevailed Time out of Mind, and are in Furtherance of Juſtice, ſeem to be good; but ſuch as are in Delay of Juſtice, and tend to Oppreſſion and Injuſtice, and are againſt the general Rules of Law and Reaſon, have always been held void.

Rol. Abr. 564. in *Maidſtone* in *Kent*. Hence it is, that a Cuſtom in an Inferior Court, that when any Man comes to the grand Diſtreſs in any Plea, and it is returned that he is diſtrained by his Goods, & *quod nihil habet ulterius per quod diſtringi poteſt*, that his Goods ſhall be delivered to the Plaintiff, finding Security, that if the Suit paſſes for the Defendant, that he ſhall have again his Goods; and that if it paſſes for the Plaintiff, that he ſhall have them, has been held good.

Rol. Abr. 564. So a Cuſtom in the County Palatine of *Cheſter*, that if Judgment be given in a baſe Court there, and thereupon a Writ of Error is brought before the Chief Juſtice there, and he reverſes the firſt Judgment, to give Coſts to him at whoſe Suit it is reverſed, is good.

Rol. Abr. 564. Cro. Eliz. 894. Rol. Rep. 193. Mod. 96. So it is a good Cuſtom in an Inferior Court, that in an Action of Debt, if the Defendant does not deny the Debt, but *Petit quod inquiratur de vero debito ſecundum conſuetudinem*, that a Jury may be returned that ſhall try it, and if they find it to be a true Debt, that the Plaintiff ſhall have Judgment thereupon.

S. P. adjudged, and ſaid by *Hale* Ch. Juſt. that this Cauſe prevented a Suit in Chancery.

Rol. Abr. 563. But a Cuſtom in an Inferior Court, upon a Judgment in the ſame Precept, in the Nature of a *Capias ad Satisfaciendum*, to give a Warrant to the Bailiff to take the Principal in Execution, if he may be found, and in his Default to take the Bail, is not good; for it is (*e*) againſt Law *Page 674 * to take the Bail before a *Capias* returned againſt the Principal, and (*f*) a *Scire Facias* againſt the Bail.

(*e*) For this Reaſon a Cuſtom in an Inferior Court, which is not within the Statute of 32 H 8. to grant a *Tales de circumſtantibus*, is void. Rol. Abr. 463, 564.——So to award a *Capias* in Debt before any Summons. Rol. Abr. 563, 780. (*f*) That the Cuſtom of *London* to take the Bail without a *Scire Facias*, is void. Cro. Car. 561. Palm. 567. Cro. Eliz. 185. 2 Leon. 29. 2 Wilſ. 204. Doug. 204. 2 Black Rep. 768.

Rol. Abr. 564. *Tredinwick* and *Peryman*, adjudged, in a Writ of Error upon a Judgment in *Bodmyn* in *Cornwall*. Cro. Car. 259. S. C. adjudged; and ſaid by *Jones*, That although in ſome Parts of *Wales* there be ſuch Trials by Six only, it is by Reaſon of the Statute of 34 & 35 H. 8. c. 26. which appoints, that Trials may be by Six only, where the Cuſtom hath been ſo. 1 Sid. 233. S. P. *per Cur'*. A Cuſtom in an Inferior Court to try Iſſues by ſix Jurors, is not good, though many Courts have uſed it, and many Judgments depend thereupon.

9 H. 6. 44. b. (*g*) But a Cuſtom that, if they conceal any Thing that ought to be preſented, they ſhall be amerced, is good. 9 H. 6. 44. Rol. Abr. 560. A Cuſtom in a Leet, that if the Petit Jury make any (*g*) falſe Preſentment, and it is found falſe by the Grand Inqueſt, that the Petit Jury ſhall be amerced, is void; for this is againſt common Right, and Extortion.

Rol. Abr. 564. *Burges* and *Spark*, adjudged; and ſuch Judgment given in *Plymouth* reverſed accordingly. If there be a Cuſtom in an Inferior Court, that if a Man brings an Action againſt another there, and the Defendant appears and pleads to Iſſue, and, at the Day of Trial, the Defendant, being ſolemnly called, does not appear, nor find Pledges *qui eum manucapere voluerint*, to have his Body from Court to Court, at every Court there after to be held, till the Plea be determined, as he ought by the Cuſtom, but in Contempt of the Court *receſſit & defaltam fecit*; and Judgment is thereupon given; yet this is not a good

a good Cuſtom, but utterly unreaſonable; but they ought according to Law to take the Inqueſt by Default; for if he had appeared and ſtaid in Priſon without finding Pledges, yet they ought not to have given Judgment againſt him if he would have pleaded to Iſſue.

It is no good Cuſtom in *Sandwich*, that, if the Goods of a Freeman of *Sandwich* come into the Hands of a Freeman of *London*, the Mayor of *Sandwich* ſhall write to the Mayor and Aldermen of *London*, to call the Party before them, and take Order for the Reſtitution; and if they refuſe, or return no anſwer to the Mayor and Jurats, the Mayor of *Sandwich* ſhall write *alias* & *pluries*, and after give Judgment of *Withernam* againſt the Mayor and Commonalty of *London*; which ſhall be ſignified to the Mayor of *London*; and if he make not Reſtitution in fifteen Days, then thoſe of *Sandwich* may retain the Body of any *Londoner* that comes there, till Reſtitution. Moor 603, pl. 834. *Paramour* and *Veral*. 2 And. 151. S.C. & *vide* Moor 588. Palm. 56. 2 Inſt. 204. Sid. 355.

A Cuſtom in an Inferior Court, to give a Day to one that hath (*c*) made Default, is void and againſt Law. Cro. Jac. 357. adjudged.

(*c*) So a Cuſtom to give Judgment in a Perſonal Action upon four Defaults before Appearance, is void. Style 124.

(D) Where from the Benefits accruing from them they ſhall bind. *Page 675

WHERE-EVER the Party bound by a Cuſtom has ſome Benefit by it, or the Party, who claims the Advantage of it, is at ſome Charge thereby, the Cuſtom is good. 6 Mod. 124.

Hence it is, that a Cuſtom that the Parſon of the Pariſh ſhould find a Bull and a Boar for the Uſe of the Pariſh, and in Conſideration thereof ſhould have the Tenth of the Increaſe, has been held good. Cro. Eliz. 569. Moor 355. Rol. Abr. 559. S. C.

So a Cuſtom, that whereas *J. S.* is ſeiſed in Fee of the Manor of *T.* and all the Tenements in the ſaid Town are held of the ſaid Manor, that he and all thoſe, &c. have had, Time out of Mind, &c. a Bakehouſe, Parcel of the ſaid Manor, maintained at their Charge, and that this Bakehouſe was ſufficient to bake Bread for all the Inhabitants, and for all Paſſengers through the ſaid Town; and the Bread there baked had uſed, &c. to be ſold at reaſonable Prices, and that no other Perſon within the ſaid Town had uſed to bake any Bread to ſell to any Perſon; this is a good Cuſtom, (*d*) though it reſtrains other Men to exerciſe their Trades within a certain Place, for this might have a reaſonable Beginning to bind his own Tenants, as it only does. Cro Eliz. 203. 1 Stra. 465. Cowp. 17. Doug. 218, 221. Sir *George Farmer* and *Brook*, adjudged. Leon. 143. S. C. debated.

Owen 67. S. C. adjudged, *cont'*. 8 Co. 125. 3 Bulſt. 61. 2 Bulſt. 195. Rol. Abr. 559. S. C cited.

(*d*) A Cuſtom in *Wincheſter*, that none ſhall exerciſe a Trade there who is not free of the City, or brought up Apprentice there; & if good. Salk. 203. pl. 2. & *vide* 8 Co. *Wagonner's* Caſe *.

* It may be good if founded on ſome Conſideration. *Vide* Mo. 342. Sti. 111. 2 Lev. 210. 3 Lev. 241.—A Cuſtom which reſtrains Trade *ſub Modo*, may be good: And therefore the Cuſtom of *Foreign bought*, and *Foreign ſold*, whereby a Man not free of a City, &c. will be reſtrained from buying or ſelling Goods to other Foreigners within ſuch City, &c. is good. Dy. 279. b. R. Jon. 162. Adm. 1 Rol. Abr. 202. c. 45.—A Cuſtom that none ſhall uſe a Trade there, unleſs he be free of the *Guild. R.* in *London*, 8 Co. 125. *Dub.* Whether good in another City. 1 Salk. 204. Mod. Ca. 21.—A By-Law, that no one ſhall uſe a Trade in a Borough, not free there, where the By-Law is founded upon a *Cuſtom* to ſuch Intent, tho' the Cuſtom be not confirmed by Parliament, is good. *Adm. Lut.* 564. Adm. Godb. 254. 8 Co. 125. a. Now every Day's Experience warrants this Doctrine.

A Cuſ-

Rol. Abr. 561. But for this *vide* F.N.B. 271. Reg. 153. Hob. 189. Moor 887. 2 Sand. 117.

A Cuſtom, that every Inhabitant of an antient Meſſuage held of the Biſhop in the City of *S.* have ground at the Biſhop's Mill all their Grain ſpent in their Houſes, and that the Biſhops, in Conſideration thereof, have Time out of Mind kept Servants to grind and carry, *&c.* is good, becauſe mutual Conſiderations and mutual Actions will lie.

Style 421. Rol. Abr. 559. 2 Bulſt. 195, 196. Hard. 67. Lev. 15. Vent. 168. 2 Lev. 27. Carth. 193.

Rol. Abr. 561. *Hill* and *Hawks.* Moor 835. S. C. adjudged, and that the Cuſtom was good, though the Corn was not ſold, but brought in

A Cuſtom, that the Corporation of *Litchfield* have had a Market there Time out of Mind, *&c.* and that the Corporation ought to repair the Way to it, and to appoint a Bellman, that ought to ſweep the Market-Place, and in Recompence thereof, the ſaid Bellman, Time out of Mind, *&c.* from thoſe that brought their Grain to the ſaid Market, and untied their Sacks there to ſell it, had uſed to take a Pint of Grain if it was but one Buſhel or under, but if it was above a Buſhel, then a Quart to the Uſe of the ſaid Corporation; this is a good Cuſtom, for the Men that are charged by it have a reaſonable Benefit thereby.

to be ſold. 2 Bulſt. 201, 206. Rol. Rep. 1, 2, 44, 46. S. C. adjudged.

Vent. 71. Mod. 47. *Haſpart* and *Wills*, S. C. that there would have been ſome

It is no good Cuſtom, that the City of *Norwich* hath Time out of Mind maintained a Quay for unlading Goods brought up the River to the City, and that every Veſſel paſſing through the River by the Quay had paid a certain Sum; for the Veſſels that unlade not at the Quay or other Place in the City, have no Benefit from the Maintenance of the Quay.

Reaſon for it, if it had appeared that they cleanſed the River. Sid. 454.

If a Lord of a Manor, which extends itſelf upon the Banks of Part of a River only, hath Time out of Mind maintained a Quay for the Lading and Unlading of Goods, and kept a Buſhel within the Manor for

*Page 676 * the Meaſuring, and other Merchandizes, he cannot preſcribe *ratione inde* for a Buſhel of Salt, of every Ship ſailing in the River; for the Repairing the Quay, and keeping a Buſhel within the Manor, cannot warrant the taking of Toll out of the Manor, for Goods not brought to the Quay within the Manor, though brought to another Place within the ſame River.

2 Lev. 96, 97. *Prideaux* and *Warn.* Raym. 232. Mod. 104. S. C. adjudged. See Ld. Raym. 385, 2 Stra. 1228.

3 Lev. 37.

It is a good Cuſtom, that the Mayor and Commonalty of *London* have had of every Maſter of a Ship 8*d. per* Tun, in the Name of Weighage, for every Tun of Cheeſe brought from any Place in *England* to the Port of *London*; for the Liberty of bringing it into the Port, which is a Place of Safety, is a ſufficient Conſideration; and the Mayor and Commonalty have the View and Correction of the River *Thames*.

3 Lev. 424. *Criſp* and *Bellwood*, for keeping a Ferry-Boat. Carth. 192.

The Lord of a Manor may preſcribe to keep and repair a Wharf within the Manor, & *ratione inde* to have Toll of all Goods landed within the Manor, though not upon the Wharf; for the Landing upon the Soil is in Eaſement; and all the Lands in the Manor were the Lord's originally, and this is in Nature of a (*a*) Toll Traverſe.

(*a*) For this *vide* 2 Rol. Abr. 522.

3 Lev. 307. *Simpſon* and *Bithwood*, adjudged.

It is a good Cuſtom within a Manor adjoining to the Sea, that in Caſe of any Shipwreck of any Ship caſt upon the Manor *inter fluxum & refluxum maris*, the Lord ſhall take care of the Sick and Wounded, and Burial of the Dead, and keep the Goods there caſt for the Uſe of the Proprietors; and

and in Consideration thereof, to have the best Anchor and Cable of the Ship; for though Charity obliges the Lord so to do, yet it is not unreasonable that he should have a Recompence of his Charity and Charge: But 2.

For where in Trover the Jury found a special Verdict, that within the Manor of *Beeching* in *Sussex*, adjoining upon the Sea, there was this Custom, That if any Ship navigating and floating upon the Sea should happen to strike upon the Land, Parcel of or within the Manor, and should there happen to perish, or if a Ship so striking should happen to get off, that in both Cases the Lord of the said Manor used to have the best Anchor and Cable belonging to the said Ship; and the Custom was held unreasonable in both Cases; for there is no Consideration to ground such a Custom upon; for if there be a Trespass upon the Lord's Soil, it is involuntary, and by the Act of God, where it is by Stress of Weather; and therefore not to be punished as a voluntary Trespass; as if the House of my Tenant for Years be burnt with Lightning, I shall never have an Action of Waste against him, for it is the Act of God, which does no Man an Injury; but besides, it is very unreasonable for so (*b*) small a Damage done to the Lord, as striking upon his Soil, that he should have so great a Satisfaction as the best Cable and Anchor *. Hil. 34 Car. *Bear* and *Ballingsham*, 3 Lev. 85. S. C.

(*b*) That a Custom alledged by a Lord, that whoever broke his Pound should pay him 3*l*. is a void Custom as to Strangers; for this among other Reasons, because there is no Proportion betwixt the Damage and the Recompence. 11 H. 7. 13, 14. 21 H. 7. 40.——But where a Custom alledged in *Bucks*, That if any Swan cometh upon the Land of any Man adjoining upon the *Thames*, or upon any Water running into the *Thames*, and there lays and hatches Cignets, that the Owner of the Land shall have one, was held a good Custom; and yet the Damage which the Owner of the Land sustains is but very small. 2 R. 3. 15, 16. 7 Co. in the Case of Swans.

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* This Case is very different from the preceding.

By Special Verdict it was found, that by a Custom in *Newcastle*, Time out of Mind, &c. a Toll of five Pence for every Chaldron of Coals there shipped off, was due to the Corporation, in Consideration of their Charge in maintaining the Port, which they were bound to do, and had done Time out of Mind; and that the Custom was to distrain (for Non-payment of this Duty) any Goods of the Owner of such Ships, which were distrainable by Law; and it was held, That the Charge of maintaining a * Port was a sufficient Consideration, and that the finding that the Corporation are bound to repair, &c. was sufficient, without finding that it was then in Repair. Carth. 357. *Vinkinston* v. *Ebden*, adjudged. 5 Mod. 359. Salk. 248. S. C. pl. 4. *Page 677

(E) Where from the Certainty or Uncertainty of them they shall be deemed good or void.

EVERY Custom ought to be certain, or such as may be reduced to a certainty, for an uncertain Thing cannot be supposed to have had a reasonable Commencement; also the Uncertainty of a Custom destroys the Supposition of its Continuance and Duration Time out of Mind. Rol. Abr. 565. Dav. 33. Skin. 249.

Hence

Dav. 33. a. 4 Leon. 82. Hob. 225. S. C. cited, and ſaid, that ſuch Cuſtom is not good, but that it ought to be at a certain Age, that it may appear to be an Age of Diſcretion.

Hence it is, that a Cuſtom that when an Infant is of ſuch an Age that he can count twelve Pence, or meaſure an Ell of Cloth, that he may make a Feoffment, is void for the Uncertainty.

Rol. Abr. 565. Dav. 33. a. Dav. 28. b. to 42.

So a Cuſtom, that the Tenant of the Manor who firſt comes to ſuch a Place, &c. ſhall have all the Windfalls there, is void for Uncertainty.

So of the Cuſtom of *Tanniſtry* in *Ireland*, which was, That the Lands of that Nature of which a Man died ſeiſed, ſhould deſcend *Seniori & digniſſimo viro Sanguinis & Cognominis* of him that died ſo ſeiſed; and it was held void, both for the Uncertainty of the Perſon and the Eſtate.

Fitzgib. 55. 2 Ld. Raym. 1558. 2 Stra. 1145.

So a Cuſtom alledged and found by Verdict to pay ten Pence to *the Vicar at the uſual Time of churching Women*, was held void for Uncertainty.

For 24 Pariſhioners, &c. to make a Rate, and a certain Proportion to be levied on ſuch an Hamlet, incertain*.

* A Cuſtom that every Inhabitant of ſuch a Town ſhall have a Way over ſuch Land, either to Church, Market, &c. is good, for the ſame is only an Eaſement, and no Profit, and a Way or Paſſage may follow the Perſon. *Gateward's* Caſe. 6 Co. 60. b.

(F) How to be conſtrued, and to what Things a Cuſtom ſhall be ſaid to extend.

Rol. Abr. 567, 568. 11 Mod. 160. *Vide* Tit. *Gavelkind.*

EVERY particular Cuſtom, that is derogatory from the Common Law is to be conſtrued ſtrictly, becauſe as far as the particular Cuſtom hath not derogated from the Law, the general Cuſtom of the whole Kingdom ought to prevail; and we are not to preſume that the particular Cuſtom goes further than by notorious Facts may appear.

Rol. Abr. 567. Cro. Eliz. 434. Moor 411. S. C. adjudged. (*a*)

If the Inhabitants upon a Common have uſed Time out of Mind, &c. to dig Clay in the ſaid Common of their Lord, for the Reparation of their Houſes ſtanding upon the ſaid Common, and a Stranger digs Clay in the Common, the Inhabitants cannot take this Clay from him, for this is not (*a*) within their Cuſtom.

(*a*) Where Inhabitants have uſed to have Common to their Houſes, this extends not to a new Houſe. Owen 4. 2 Term Rep. 391.

Rol. Abr. 568. Cro. Eliz. 789. Yelv. 1. Noy. 42. Raym. 404.

If the Cuſtom of a Manor be, That if any Copyholder in Fee ſurrenders out of Court, and he to whoſe Uſe it is ſurrendered, does not come in at the Court to take his Copyhold after three Proclamations made, that then the Lord may ſeize the Copyhold as forfeited; and a Copyholder in Fee ſurrenders to the Uſe of another for Life, the Remainder over in Fee, and the Tenant for Life does not come into Court to take his Copyholder after three Proclamations made, according to Cuſtom, upon which the Lord ſeiſes the * Copyhold as forfeited; and after *Ceſtui que Uſe* for Life dies, he in the Remainder ſhall not be bound by the not coming in of the Leſſee; for the Cuſtom being in Deſtruction of an Eſtate ſhall be taken ſtrictly, and ſhall be intended of Tenant in Fee in Poſſeſſion, and not of him in Remainder, as in this Caſe.

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2 Leon. 109. 2 Leon. 208. S. C. cited to have been

If there be a Cuſtom within a Manor, that if a Man takes to Wife any Cuſtomary Tenant of the Manor, and has Iſſue, and over lives his Wife, he ſhall be Tenant by the Curteſy; and a Man marries one, to whom during the

the Coverture a Customary Tenement descends, and has Issue by her, and she dies, yet he shall not be Tenant by the Curtesy. adjudged, because the Custom extended only where the Wife was a Copyholder at the Time of the Marriage.

If there be a Custom in *London*, that none ought to intermeddle with the Art of a Weaver there, but only those who are free of the Guild; if a Stranger receives Silk in *London*, and carries it to *Hackney*, and weaves it there, and then brings it back again to *London*, and receives his Pay for it, this is not any intermeddling in *London* against the Custom, though the Contract was made in *London*. Cro. Eliz. 803. adjudged.

If there be a Custom in the Town of *Newcastle*, That the Owners of Houses there, but not Tenants in Tail, may devise them by Parol, and a Man is seised of an House there in Tail, Remainder to himself in Fee-simple, he may devise the Remainder; for the Word *Owner* is general, and comprehends all Ownerships. Style 409. debated, but no Resolution; & *vide* Rol. Abr. 609.

If there be a Custom within a Manor, that the Wife shall be endowed of the Moiety of all such Copyhold Lands as her Husband was seised of, and a Copyholder dies, and his Wife is endowed of a Moiety, and his Son and Heir having the other Moiety dies, the Wife of the Son shall be endowed of the Moiety of this Moiety; for this is directly within the Custom. Raym. 58. *Baker* and *Berisford*.

If there be a Custom within a Town to have 2*d*. for every Hide of every Sheep, Cow or Ox, that is killed or sold within the said Town, and for Non-payment thereof to seize the Hides, &c. the Party that is to have the 2*d*. cannot by this Custom justify the Tanning the Hides and converting them into Leather. Cro. Eliz. 783. Rol. Abr. 569. 2 Wilf. 313. 3 Wilf. 20.

General Customs may be extended to *new Things*, which are *within the Reason* of those Customs. Ld. Raym. 499. 12 Mod. 271.

5 Co. 82. See 2 Jon. 204.

It is a general Rule, that Customs are *not to be enlarged beyond the Usage*, because it is the Usage and Practice that makes the Law in such Cases, and not the Reason of the Thing. 11 Mod. 160. Fitzgib. 243.

(G) Custom how destroyed.

A Title gained by Prescription or Custom cannot be lost by Interruption of *Possession* ten or twenty Years, unless there be an Interruption of the *Right*, as by Unity of Possession of Right or Common, and the Land charged therewith of an Estate equally high and perdurable in both. Co. Lit. 114. b.

If Gavelkind Lands are held in Socage, and the Tenure is after changed into Knights Service, yet the Custom is not altered, for that goes with the Land, and not with the Tenure. Dalf. 23. Sid. 138. Style 476.

Lands in *Kent* were disgavelled by 31. *H*. 8. *cap*. 3. and a private Act made 2 & 3 *E*. 6. enacted, that the Lands of Sir *Henry Isles* amongst others, should be from thenceforth to all Intents, Constructions and Purposes, as Lands at the Common Law, any Custom to the contrary notwithstanding; and the Question was, Whether these Lands lost by these Statutes all their other Qualities or Customs belonging to Gavelkind, as well as their Partibility; and it was resolved that they lose only their Partibility. *Page 679. Raym. 59, 76, 77. Sid. 77, 155.

Lev. 79. 2 Keb. 288. Hard. 325. *Cotton* and *Wiseman*. For the Reasons hereof, *vide* Tit. *Gavelkind*.

If

If Lands of the Nature of Gavelkind, or Borough Engliſh, eſcheat to the Crown, and be enjoyed in ſeveral Deſcents, and are afterwards granted out by the Crown in Knights Service, yet they deſcend in Gavelkind or Borough Engliſh; for the Law of thoſe Places cannot be controlled by the King's Charter, or altered without an Act of Parliament.

2 Mod. 39. Freem. 203, pl. 206. The Queſtion was, *Whether the Stat.* 14 Car. 2. cap. 2. *being Affirmative for the Election of Scavengers, had taken away a Cuſtom in* Southwark? and held that it had.

(H) Of the Manner of alledging and pleading a Cuſtom.

Co. Lit. 110. b. But as to the Manner of laying a Cuſtom, and the Difference between alledging a Thing by way of Cuſtom, or by way of Preſcription, *vide* 6 Co. 60. † Hob 113. Cro. Eliz. 441. Poph. 201. Style 477. Lev. 176. Vent. 386. 3 Lev. 160. Carth. 192. 4 Mod. 342. 2 Lutw. 1317.

A Cuſtom of deviſing Lands Borough Engliſh or Gavelkind may be alledged in a City, Borough or Manor, but not in an upland Town, that is neither City nor Borough; but a Cuſtom to have a Way to the Church, and to make By-Laws for the Reparation of the Church, and well ordering of the Commons, and ſuch like Things, may be alledged in an upland Town, that is neither City nor Borough.

† *Gateward's* Caſe, containing a great deal of very uſeful Learning.

Sid. 237. Keb. 836. A Cuſtom for a Way was laid *quod talis habetur conſuetudo quod quilibet Inhabitans haberet, &c.* and the Court held it naught, for it ſhould be laid by way of Fact triable, *viz. tempore cujus contrarium, &c. uſi fuerunt habere* ‡.

‡ The former Way would do in a Declaration. The latter is proper in a Plea, *&c.*

Co. Lit. 175. b. (*a*) But as to ſuch Cuſtoms as are no Part thereof, but merely collateral, they must be ſhewn in Pleading, as that the Lands are deviſable. Lev. 80. Raym. 77. Sid. 77, 138. Cro. Car. 562.—So if a Man would intitle himſelf to be Tenant by the Curteſy, without having Iſſue, or a Woman to have Dower of a Moiety, it ought to be ſhewn ſpecially, that Time out of Mind, *&c.* Sid. 77. 2 Sid. 154.

The Law takes Notice of the (*a*) Cuſtoms of Gavelkind and Borough Engliſh, and therefore it is ſufficient to alledge generally that the Lands are of the Nature of Gavelkind, *&c.* But other private Cuſtoms muſt be ſet forth in Pleading, that the Judges may be apprized of them, and where they obtain, and ſo give their Deciſions with a proper Regard to them.

Godb. 183. 2 Mod. 104. But for this *vide* Rol. Abr. 558, 565. Yelv. 215. Bulſt. 115. 8 Co. 127. Cro. Car. 432. Jones 375.

One Preſcription or Cuſtom may be pleaded againſt another, where they are not inconſiſtent, but a Preſcription pleaded againſt another is not good without a Traverſe.

9 Co. 59. If one preſcribes to have a Way over the Land of *B.* to his Freehold, *B.* cannot preſcribe to ſtop it.

2 Ld. Raym. 869. A Cuſtom ought not to be laid in the Negative.

In

In an Action brought upon a Cuſtom, it *ſhould ſhew what the Cuſtom is*, otherwiſe it is not maintainable. 2 Ld. Raym. 1134, 1135.

* Cuſtoms of London. *Page 680

THE antient City of *London* being the Metropolis and chief Town for Trade and Commerce within the Kingdom, it was neceſſary that it ſhould have certain Cuſtoms and Privileges for its better Government; which though derogatory from the general Law of the Realm, yet being for the Benefit of the Citizens, and for the Advantage of thoſe who trade to, and therefrom, have not only been allowed good by the Judgments and Reſolutions in the Superior Courts, but (*a*) have alſo been confirmed by ſeveral Acts of Parliament †. 8 Co. 127.

(*a*) *Magna Charta*, *c.* 2. 7 Rich. 2. *&c.*

† On a *Certiorari* to the Mayor and Aldermen to certify a Cuſtom, the Recorder (in his purple Cloth Robe, faced with black Velvet) certifies *ore tenus*, and then, on Motion, delivers in the *Certiorari*, with a written Copy of the Return annexed; the Writ is filed, and the Return recorded. *Plummer* v. *Bentham*. H. 30 Geo. 2. 1 Bur. 248.——If it is not ſurmiſed in the Pleadings, that a Cuſtom ought to be tried thus, it ſhall be tried by the County. *Ibid.*

As theſe Cuſtoms are of various and different Kinds, I ſhall conſider them under the following Diviſion:

(A) Of the Cuſtoms of London in general. 681.
(B) Of the Cuſtom of London in reſpect to Orphans. 682.
(C) Of the Cuſtom of London in reſpect to a Freeman's Eſtate. 683.

And herein.

1. What ſhall be eſteemed ſuch an Eſtate as will be ſubject to the Cuſtom, and what Diſpoſition a Freeman may make thereof. 683.
2. Of the Childrens Part; and herein of Survivorſhip, Advancement, and bringing into Hotchpot. 685.
3. Of the Wife's Part, and what ſhall bar her thereof. 686.
4. Of the Legatory, or dead Man's Share. 687.

(D) Of the Cuſtom of London, as it relates to Feme Coverts. 688.

(E) As it relates to Maſters and Apprentices. 688.
(F) As it relates to Landlords and Tenants. 689.
(G) Of the Cuſtoms of London which are in Furtherance of Juſtice, and for the more ſpeedy Recovery of Debts. 689.
(H) Of the Cuſtom of Foreign Attachment. 689.

And herein.

1. Of the Nature of the Debt or Duty which may be attached. 689.
2. In whoſe Hands, and at what Time the Attachment may be made. 691.
3. Of the Form of the Proceedings in a Foreign Attachment. 692.

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* (A) Of the Cuſtoms of London in general.

Vent. 115. The City of *London* and *Coates*, adjudged. (*a*) Cuſtom to commit for refuſing to ſerve on the Livery, good. 2 Lev. 200. Raym. 447. Mod. 10. 2 Keb. 555. 5 Mod. 156, 319.——So to fine and impriſon for opproprious Words ſpoke of an Alderman. Vent. 327. Lev. 209. But *vide* Cro. Eliz. 689. and 2 Salk. 425. pl. 2. 2 Ld. Raym. 777. Fareſt. 28. ——But a Cuſtom to diſfranchiſe for contemptuous Words ſpoken of an Alderman, is void. 2 Lev. 200. 2 Salk. 426.——To impriſon for diſturbing the Election of a Warden of a Company, and for not promiſing not to diſturb again. Style 78. *dubitatur.*—To impriſon until he takes the Oath of an Alderman of *London*, a good Cuſtom. March 179.

IF a Freeman foreſtalls Fiſh coming to a Market within the City, and upon Complaint to the Court of Aldermen, he appears there and confeſſes the Fact, and they order that he ſhall deſiſt, and he will not promiſe to obey, &c. they may (*a*) commit him until he ſignifies to the Court that he will conform; and this is a good Cuſtom.

Rol. Abr. 556. Several Caſes to this Purpoſe. Moor 136. 8 Co. 127. S. P.

By the Cuſtom of *London*, a Freeman or Citizen might, even before the Statute of Wills, deviſe his Lands and Tenements of which he was ſeiſed in Fee-ſimple, to whom he pleaſed, and may at this Time deviſe the ſame in Mortmain, notwithſtanding the Statute of Mortmain, &c.

7 H. 6. 32. b. Rol. Abr. 557. S. C. S. P. C. 180. Letter C.

By the Cuſtom of *London*, no Attaint lies for a falſe Verdict given in *London*.

Fitz. Coron. 411. Rol. Abr. 557. & *vide* Moor 871. *Chamberlain* and *Thorp*; but *vide* Cro. Eliz. 186. Leon. 130. S. P. *dubitatur.*

A Citizen of *London*, upon an Appeal, brought by him, ſhall not be obliged to wage Battle.

It is a good Cuſtom in *London*, that the Mayor of *London* may take Recognizances of any Perſons, being of full Age, or Women unmarried, (*b*) (for he is a Judge of Record,) although the Debt was contracted out of *London*.

(*b*) And the Courts above will take Notice thereof. Leon. 284.

It

It is a good Cuſtom in *London*, that they, Time out Mind, have had the (*c*) Meaſuring of Coals *infra Portum London*, which (*d*) extends from *Staines* Bridge to *London* Bridge, and from thence to *Graveſend*, and from thence to *Yenland* and *Yendale*.

Rol. Abr. 557. (*c*) A Cuſtom that all Foreigners ſhall weigh at the City Beam, good. Lev. 14, 15, 6 Mod. 123 Ld. Raym. 498.——And a By-Law founded on the Cuſtom of *London*, which enables them, &c. That no Freeman ſhall, under a certain Penalty, ſell his Goods unleſs weighed at the City Beam, is good. Salk. 352. pl. 13. 5 Mod. 156. 6 Mod. 177. (*d*) For this *vide* 4 Inſt. 250. Sid. 148.

By the Cuſtom of *London* Whores are to be carted, and therefore if a Perſon calls a Woman (*e*) Whore (*f*) in *London*, an Action on the Caſe lies in reſpect of the Puniſhment they are ſubject to by the Cuſtom; but the Party (*g*) cannot be proceeded againſt in the Spiritual Court for Defamation; for that would be puniſhing him twice for the ſame Offence.

Rol. Abr. 550. (*e*) *Note*, That it hath been often adjudged of late, that calling one Baſtard, or Son of a Whore, or calling the Huſband Cuckold, was, by Implication, calling the Mother or Wife a Whore. (*f*) If laid in *London*, when ſpoken elſewhere, the Defendant may plead the Words were ſpoke at, &c. and traverſe the ſpeaking in *London*; and if the Plea is refuſed, may have a Prohibition. Lev. 116.——That the Action muſt be brought in the Courts in *London*. Carth. 75. † (*g*) Whether in ſuch Caſe a Prohibition muſt be granted after Sentence. Carth. 213.

† *Sed qu.* If the Action will not lie in the Superior Courts, if the Venue is laid in *London*, and the Plaintiff lives, and the Words were ſpoken there?

* There (*h*) is a Cuſtom in *London*, that when a Chaplain keeps any Woman in his Chamber ſuſpiciouſly, a Man may come to his Chamber with the Beadle of the Ward, and enter the Chamber and ſearch.

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2 H. 4. 12. b. Rol. Abr. 557. S. C. (*h*) The Cuſtom of *London*, That if a Villain abides in *London* for a Year and a Day, that he ſhall not be taken nor put out by Writ *de nativo habendo*, nor by any Proceſs thereupon iſſuing, is good. 7 H. 6, 32. 8 H. 6, 3. Rol. Abr. 557. S. C. Moor 2. pl. 4. S. P. adjudged.

By the Cuſtom of *London*, if a Man commit a Horſe to an Hoſtler, and he eat out the Price of his Head, the Hoſtler (*i*) may take him as his own, upon the reaſonable Appraiſement of four of his Neighbours; which is a Cuſtom ariſing from the Abundance of Traffick with Strangers, who could not be known to charge them with Actions.

Moor 876. 2 Bulſt. 271. Yelv. 67. Rol. Rep. 449. (*i*) But if a Man leaves ſeveral Horſes with an Inn-keeper in *London*, and takes them all away except one, the Inn-keeper cannot retain the Horſe ſo left till he is ſatisfied for the keeping of the other Horſes, unleſs there was an Agreement to that Purpoſe. Bulſt 207.——So if *A.* commit the Horſe of *B.* to an Hoſtler in *London*, and he eat out his Head, yet cannot the Hoſtler ſell him; for all Cuſtoms being derogatory to the Common Law, are to be taken ſtrictly; and there is no Cuſtom of *London* that hath gone ſo far as this Caſe, to authorize one Man to ſell and convey the Property of another. 2 Rol. Abr. 85.

It was (*k*) antiently inſiſted upon, that by Cuſtom all Indictments and Proceedings for any Cauſe, except Felony, ſhould be tried and determined in *London*, and not elſewhere; but (*l*) it ſeems to be now admitted, that a *Certiorari* lies to remove any Indictment from *London*; but (*m*) it is ſaid, that by the (*n*) City Charters, the Tenor of the Indictment only ſhall be removed, and not the Indictment itſelf.

(*k*) Cro. Car. 128. (*l*) Raym. 74. 3 Mod. 230. Hard. 409. 6 Mod. 246. & *vide* 5 & 6 *W. & M.* c. 11. (*m*) Keb. 252. Sid. 155. (*n*) That by the City Charters the Mayor ſhall be a Principal in every Commiſſion. 3 Inſt. 72. 2 Rich. 3. 11. a.

Beſides theſe and ſeveral other Cuſtoms, there is a general Cuſtom which is uſually ſet forth by the City, when any of their Proceedings is called in Queſtion, *viz.* That (*o*) if any of their Cuſtoms heretofore uſed prove hard

(*o*) What Ordinances

hard or defective, or if any Thing newly arising within the City where Remedy was not before provided, should need Amendment, in either of these Cases, the Mayor and Aldermen for the Time being, with the Assent of the Commonalty, may ordain fit Remedy thereunto, so as such Ordinance be profitable to the King, for the Profit of the Citizens, and agreeable to Reason.

Laws, &c. made by Virtue of this Custom are good, &c. *vide* 8 Co. 126.

Wagoner's Case Skin. 371, &c.—That none but a Freeman shall exercise a Trade, and that a Freeman bred up to one Trade, may exercise another of the same Nature, *vide* Cro. Car. 516. Rol. Rep. 10. Sand. 311. Sid. 427. 4 Mod. 145. Ld. Raym. 513, 1034, 1039. 10 Mod. 148, 336. 11 Mod. 63, 167. pl. 2. 12 Mod. 251. Stra. 552. *Vide* Tit. *By-Laws* †.

† By various Charters the Citizens of *London* are free from Toll, &c. throughout the Kingdom, are excused from Juries, &c. out of the City, *vide* 4 Com. Dig. 162. &c.—But a Jury of Citizens, may wave their Privilege, and consent to be sworn on a Trial at Bar in *Middlesex*. *Lockyer* v. *East India Company*, M 2 Geo. 3. 2 Wilf. 136.—As to the *Erection of Edifices*. A Man may heighten his *old Messuage*, or *House*, or re-build on the old Foundation to what Height he pleases, but of no other Erection or Building, so as to stop his Neighbours Lights. *Plummer* v. *Bentham*. H. 30 Geo. 2. 1 Bur. 248.—As to Buildings see further 14 Geo. 3. c. 78.—With respect to *Trade*. It is a good Custom that the Portage of Corn, Roots, &c. belongs to the City from *Staines Bridge* to *Tendal* in *Kent*, and the By-Law is good, that none but the Company of free Porters shall carry it, on Penalty of 20*s*. *Fazakerly* v. *Wiltshire*. T. 7. G. *Ludlam* v. *Bradley*, P. 13 G. *in C. B. Robinson* v. *Webb* T. 2 G. 2. *B. R. Stra.* 462. 6 *Com. Dig.* 418.—It is a good Custom, that Persons to be admitted to the Freedom be obliged to swear on the *New Testament*. *Rex* v. *Bosworth*. T. 12 Geo. 2. Stra. 1112.

(B) Of the Custom of London in respect to Orphans.

IF any Freeman or Freewomen die, leaving Orphans under Age unmarried, the Custody of their Bodies and (*a*) Goods, by the Custom of *London*, belongs to the City, and their Executors or Administrators must exhibit true Inventories of all their Goods and Chattels, and must (*b*) bind themselves to the (*c*) Chamberlain to the Use of the * Orphans, to account for the same upon Oath; which if they refuse to do, they may be committed; also (*d*) if the Ecclesiastical Court will compel them to account there, against this Custom, a Prohibition lies.

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Hob. 247. Rol. Abr. 550. S. C.

(*a*) Though given them as a Legacy by other Freemen. Hutt. 30.——Or in a foreign County. Vent. 180. (*b*) Although they have already acknowledged a Judgment at Common Law for the Securing, &c. Rol. Abr. 550. Hutt. 30. S. P.—So although they have given Security in the Prerogative Court, yet they may be compelled to give new Security to the Chamber of *London*. Rol. Abr 550. (*c*) For which Purpose he is a Corporation, and such Securities shall go to his Successor, who may sue the same. Cro. Eliz. 464. (*d*) 4 Inst. 249. S. P. But an Infant may wave the Benefit of suing in the Court of Orphans, and file a Bill against one for the Discovery of the Personal Estate. March 107.

If a Freeman of *London* leaves *London*, and resides in the Country, yet his Children, though born out of *London*, shall be Orphans, and subject to this Custnm.

Rol. Rep. 316. Sid. 250. Vent 180. Mod. 80. 2 Vern. 110. S. P.

If such Orphan is taken out of the Custody of such Person, to whom by them committed, they may imprison the Offender till he produces the Infant, or is delivered by Course of Law.

Sid. 250. Raym. 116. Lev. 162. & *vide* Mod. 80. Lev. 32.

Also

Also by this Custom, if *(a)* any one without the Consent of the Court of Aldermen, marry such Orphan *(b)* under the Age of twenty-one, tho' out of the City, they may fine and imprison him for Non-payment thereof; for if the Custom should not extend to Marriages out of the City their Power would be but in vain. Lev. 32. The *King* and *Harwood*. Vent. 178. Mod. 79. 8 Mod. 214, 215.

9 Mod. 98. Eq Cas. Abr. 261. Gilb. Rep. 172. Cases Temp. Talb. 59 Will. Rep. 696. pl. 201, 703 pl 205, 705. 2 Will. Rep. 102, 112, 118, 561 pl. 185. 3 Will. Rep. 116. pl. 26. &c. 154. 12 Mod. 516. S. C. *(a)* Tho' not a Freeman. Vent. 178. Mod. 79. and the above Authorities. *(b)* Whether the Marriage was before or after twenty-one, the Husband is fineable and may be committed if he had not the Licence of the Court of Orphans. Preced. Chan. 537, 538.

The Orphans Money in the Chamber of *London* is not a mere *depositum*, but in Nature of a Debt, or Chose in Action, which does not vest in the Husband by the Marriage of such Orphan, nor can he bequeath it by Will. 2 Vent. 340. Preced. Chan. 209. S. P. adjudged.

(C) Of the Custom of London in respect to a Freeman's Estate: And herein,

What shall be esteemed such an Estate as will be subject to the Custom, and what Disposition a Freeman may make thereof.

HERE it is necessary in the first Place to take Notice, that by the Custom of *London*, if a Freeman of *London* dies leaving a Widow and Children, his Personal Estate, after his Debts paid, and the customary Allowance for his Funeral, and the Widow's Chamber being first deducted thereout, is by the Custom of the said City to be divided into three equal Parts, and disposed of as follows, *viz.* One third Part to the Widow, another third Part to the Children unadvanced by him in his Life time, and the other third Part such Freeman may dispose of by his Will as he pleases; but if a Freeman of *London* has no Wife, but has Children, the Half of his Personal Estate belongs to his Children, and the other Half the Freeman may dispose of; so if the Freeman has a Wife and no Children, Half of his personal Estate belongs to his Wife, and the other Half he may dispose of. F. N. B. 122. 2 Inst. 33. Lit. Rep. 324. 2 Lev. 130. Chan. Ca. 285. Hetl. 158. Godb. 49. Latch. 134. 2 Leon. 29. Cro. Eliz. 185. Abr. Eq. 150. 2 Salk. 426.

This Custom extends only to the Personal Estate of the Freeman, for when it first begun, the Citizens of *London* had no regard at all to a Real Estate, for they did not suppose any Freeman of *London* would purchase *such Estate but would employ his whole Fortune and Stock in Trade, for the Benefit of Commerce. Abr. Eq. 150. *Page 684

But if a Freeman of *London* has a Mortgage in Fee, this shall be counted Part of his Personal Estate, and will be subject to the Custom. Chan. Ca. 285.

But a Lease for Years waiting on the Inheritance shall not be reckoned Part of a Freeman's Personal Estate, but shall, together with the Inheritance, descend to the Heir at Law. 2 Chan. Ca. 160. Vern. 2, 104. S. P. decreed.

Also

Also if a Freeman of *London* agrees to lay out Money in the Purchase of Lands, and to settle the same on his eldest Son, &c. this shall not be reckoned Part of the Freeman's Personal Estate.

Vern. 345. 2 Chan. Ca. 118. S. C. 2 Vern. 665. S. P. adjudged; for by the Agreement the Money is to be looked upon as Lands in Equity, and therefore not subject to the Custom.

On a Marriage of *B.*'s Daughter with *A.* a Freeman of *London*, *B.* the Father, settles a Term for Years in Trust, that *A.* the Husband, shall receive the Rents and Profits till such Time as *D.* and *E.* or the Survivor of them should otherwise appoint, and then such Persons as they should appoint; and for want of such Appointment, for such Persons as the said *A.* by Will should appoint; and for want of such Appointment, then in Trust for the Executors and Administrators of *A.* The Trustees having made no Appointment, the Queston was, Whether this Term should go according to that Appointment, or be looked on as Part of *A.*'s Personal Estate, who was a Freeman of *London*, and so go according to the Custom; and the Court was of Opinion, That it was not to be looked upon as Part of *A.*'s Personal Estate, because it never was in him, but was settled by his Wife's Father, and therefore not subject to the Custom.

Abr. E. 151. between *Grice* and *Gooding* decreed.

If a Freeman of *London* is made both Executor and residuary Legatee, and he dies before he has made his Election, whether he will take as Executor or Legatee, yet the Legacy must be considered as such, and will be subject to the Custom of *London*.

Chan. Ca. 310. *per* Ld. Chancellor.

By this Custom a Freeman could (*a*) not by Will dispose of such Part of his Personal Estate as belonged to his Wife or Children; and (*b*) even Dispositions by him in his Life-time have been held void, especially when they appeared to have been made in Fraud of the Custom, and with a View to defeat it.

Lev. 227. 2 Vern. 277. Chan. Ca. 199.

(*a*) It is said that this Custom of the City of *London*, that a Man could not give away any Part of his Estate without the Consent of his Children, is the Remains of the old Common Law, and is so taken Notice of in *Bracton*; but it being found extremely inconvenient and hard, it was by the tacit Consent of the whole Nation abrogated and grown into disuse: for what law has been ever made to repeal it? but in the City of *London*, where the Mayor and Aldermen had the Care of Orphans, they by that sole Authority and Power had preserved this Part of the Common Law in *London*, which is disused every where else. Preced. Chan. 596. (*b*) But for this *vide* 2 Lev. 130. 2 Vern. 98, 202, 612, 685. Lev. 227. Preced. Chan. 17, 50. Abr. Eq. 152.

But now by the 11 *Geo.* 1. *cap.* 18. *sect.* 17. it is enacted, "That it shall "and may be lawful to and for all and every Person and Persons, who "shall, at any Time from and after first Day of *June* 1725. be made or "become free of *London*, and also to and for all and every Person and "Persons, who are already free of the said City, and on the said first Day "of *June* 1725, shall be unmarried, and not have Issue by any former "Marriage, to give, devise, will and dispose of his and their Personal Estate "and Estates, to such Person and Persons, and to such Use and Uses, as "he or they shall think fit."

Provided nevertheless, "That in Case any Person, who shall, at any "Time or Times from and after the said first Day of *June* 1725, become "Free of the said City, and any Person or Persons who are already "Free of the said City, and on the said first Day of *June* 1725, "shall be unmarried, and not have Issue by any former Marriage, hath "agreed, or shall agree by any Writing under his Hand, upon or in Con-
*Page 685 * "sideration of his Marriage, or otherwise, that his Personal Estate shall "be subject to, or to be distributed, or distributable according to the "Custom of the City of *London*; or in Case any Person so Free, or be-"coming Free as aforesaid, shall die intestate, in every such Case the Per-
"sonal

"ſonal Eſtate of ſuch Perſon ſo making ſuch Agreement, or ſo dying "inteſtate, ſhall be ſubject to, and be diſtributed and diſtributable ac- "cording to the Cuſtom of the ſaid City; any Thing herein contained "to the contrary in any wiſe notwithſtanding."

2. Of the Children's Part; and herein of Survivorſhip, Advancement, and bringing into Hotchpot.

It has been already obſerved, That the Children of a Freeman of *London* are intitled to the third Part of his Perſonal Eſtate, in Caſe he dies leaving a Wife, and to a Moiety in Caſe he dies leaving no Wife, but (*a*) this Cuſtom does not extend to Grandchildren; and therefore if a Freeman of *London* has two Sons, and the eldeſt dies, leaving a Son, the Grandchild, though in Law a Repreſentative of the Son, ſhall have no Part by the Cuſtom. (*a*) 2 Salk. 426. Vern. 397. S. P.

But a Poſthumous Child ſhall come in with the Reſt of the Children for a Cuſtomary Share of a Freeman of *London*'s Perſonal Eſtate. Abr. Eq. 154.

If a City Orphan dies before twenty-one, his Orphanage Part ſurvives to the other Orphans, and he can make (*b*) no Diſpoſition (*c*) by Will to contradict it; but if he dies after twenty-one, at which Time he might by Will have diſpoſed of it, there, though he die inteſtate, it ſhall go according to the Statute of Diſtributions, between his Mother and ſurviving Brothers and Siſters. (*b*) 2 Salk. 426. Preced. Chan. 207. So certified by the Recorder.

Preced. Chan. 537. S. P.—2 Vern. 559. S. P. See 3 Will Rep. 318. in a Note S. C. cited. Although he deviſes it away at the Age of ſeventeen. (*c*) But if a Man marries an Orphan, who dies under twenty-one, her Orphanage Part ſhall not ſurvive to the other Children, but ſhall go to the Huſband. Vern. 88. But *vide* Preced. Chan. 537. *cont'*.

But if a Freeman of *London* dies, leaving two Daughters and a Wife, and one of the Daughters dies before twenty-one, though after a Diviſion and Partition of the Perſonal Eſtate, yet the ſurviving Siſter ſhall have the Whole of the Orphanage Part. Abr. Eq. 156. pl. 8. *Loeffes* and *Lewen*. Gilb. Eq. Rep. 32. Prec. Chan. 370, 372.

But this Cuſtom of Survivorſhip holds only with reſpect to the Orphanage Part belonging to ſuch Child; and therefore if he by Survivorſhip hath the Part of any other Brother or Siſter, ſuch Part ſhall go according to the Statute of Diſtributions, or may be diſpoſed of by him by Will before the Age of twenty-one. Preced. Chan. 537.

If the Daughter of a Citizen of *London* marries in his Life-time, againſt his Conſent, unleſs the Father be reconciled to her before his Death, ſhe ſhall not have her Orphanage Share of his Perſonal Eſtate; and it would be unreaſonable to take the Cuſtom to be otherwiſe. Vern. 354. Said by Lord Chancellor. Yet in *Hill* v. *Blacket*.

Caſes *Temp.* Finch 243. it is ſaid, the Recorder certified that there was no ſuch Cuſtom.

By the Laws and Cuſtoms of the City of *London*, if any Freeman's Child, Male or Female, be married in the Life-time of his or her Father, by his Conſent, and not fully advanced to his or her full Part or Portion of his or her Father's Perſonal or Cuſtomary Eſtate, as he ſhall be worth at the Time of his Deceaſe, then every ſuch Freeman's Child, ſo married as aforeſaid, ſhall be excluded and debarred from any further Part or Portion of his or their ſaid Father's Perſonal or Cuſtomary Eſtate, to be had at the Time of his Deceaſe, except ſuch Father, by his laſt Will and Abr. Eq. 154, 155. Certified acordingly in the Caſe of *Chace* and *Box*. Vern. 6., 89, 216. 2 Salk 426. S. P. Preced. Chan. 269.

*Page 686 and * Teſtament, or ſome (*a*) other Writing by him written, and ſigned with his Name or Mark, ſhall declare and expreſs the Value of ſuch Advancement; and then every ſuch Child, after the Deceaſe of his or her ſaid Father, producing ſuch Will or other Writing, and bringing ſuch Portion ſo had of his or her Father, or the Value thereof into Hotchpot, ſhall have as much as will make up the ſame a full Child's Part or Portion of the Cuſtomary Eſtate, his or her ſaid Father had at the Time of his Deceaſe, notwithſtanding ſuch Father ſhall by any Writing under his Hand and Seal declare that ſuch Child was by him fully advanced.

(*a*) Where the Huſband and his Wife, who was a City Orphan in Conſideration of 100*l.* executed a Releaſe of their Cuſtomary Share to the Father, and it was held, That they were barred from demanding any further Share, and that this Releaſe was no Writing under the Father's Hand ſignifying the Advancement. Preced. Chan. 594.

Abr. Eq. 155. *Bright* and *Smith*, decreed.

A Freeman of *London* having advanced his Daughther with a Portion, and intending to exclude her from any further Share (on ſome Diſpleaſure taken againſt her) made his Will, * and thereby recites, that he had advanced her with 300*l.* and (*b*) upwards, gives her 5*s.* and no more, and died; yet after his Death, the Daughter on a Bill brought to have the ſaid 300*l.* made up a Moiety of his Eſtate (he having no other Child, and the Cuſtom not extending to Grandchildren) had a Decree accordingly; for the Words, *and upwards*, are *certum in certo*, and not to be regarded, though it was objected it might be 1000*l.* or 2000*l.* or any other Sum above 300*l.*

(*b*) Where the Father by his Will declared that he had given 1000*l.* to one of his Children, 1000*l.* to another, &c. in full of their Orphanage Part by the Cuſtom; ſuch Declaration is ſufficient to let them into their full Cuſtomary Shares, on bringing theſe Sums into Hotchpot; but it ſeems that the Parties concerned are not ſo far concluded by this Declaration, but may give in Evidence that more was received by the Children than thus expreſſed. Preced. Chan. 470, 471.

* See the Stat. 11 Geo. 1. c. 18. ſ. 17. *ante* 684.

Chan. Ca. 160.

A (*c*) Settlement of a (*d*) Real Eſtate on a Child, is no Advancement, nor to be brought into Hotchpot.

(*c*) A Deviſe of the real Eſtate to a Child, does not bar ſuch Child of the Cuſtomary Share. 2 Vern. 753. (*d*) Or Money agreed to be laid out in the Purchaſe of Lands. Vern. 345. 2 Chan. Ca. 118 Abr. Eq. 153.

Abr. Eq. 250. *Feaſt* and *Feak*.

If upon a Marriage Treaty *A.* a Freeman of *London*, covenants to leave his Wife 2000*l.* at his Death, 2000*l.* to his eldeſt Son, and 1000*l.* a-piece to his younger Children, and dies, leaving ſeveral younger Children; the 1000*l.* a-piece to the younger Children being due only by Covenant, is a Debt on the Perſonal Eſtate, and not being to be paid till after the Father's Death, is no Proviſion or Advancement within the Cuſtom of *London*, to bar them of their Cuſtomary or Diſtributory Shares.

Vern. 345. 2 Vern. 281. 2 Salk. 426. S. P. 2 Vern. 234, 630. and 2 Vern 754. S. P. For if it were to be brought in, it muſt fall again into the Child's Part.

If a Freeman of *London* advances a Child in Part, by a Portion which is to be brought into Hotchpot, ſuch Portion or Advancement muſt be brought into the Orphanage Part only.

And therefore if there be but one Child, who has been in Part advanced by the Father in his Life-time, ſuch Child ſhall not bring his Part into Hotchpot, there being none in equal Degree with him.

3. Of the Wife's Part, and what ſhall bar her thereof.

Hetl 158. Vern. 132. Abr. Eq. 156

The Widow of a Freeman of *London*, by the Cuſtom, is intitled to her Widow's Chamber, and to a Moiety of his Perſonal Eſtate if he leaves no Children, and to a third Part in caſe he leaves any Child or Children.

But

But if a Woman, upon her Marriage, accepts a Settlement out of the (*d*) Freeman's Perſonal Eſtate, (*e*) ſuch Compounding, as it is called, ſhall (*f*) bar her of her Cuſtomary Share. Preced. Chan. 325. 326, &c. Abr. Eq. 157.

(*d*) Although the Compoſition or Sum to be paid her was Part of her own Fortune. Preced. Chan. 327. (*e*) Though no Notice was taken of the Cuſtom. Abr Eq. 159. (*f*) Where ſhe ſhall take by the Cuſtom, and likewiſe by her Huſband's Will. 2 Vern. 110. But *vide* Preced. Chan. 353.

* But though ſuch Compoſition ſhall bar the Wife of her Cuſtomary Share, yet ſhe is not thereby precluded from demanding the Benefit of any Gift or Deviſe the Huſband may think fit to make her †. *Page 687 Abr. Eq. 159.

† And now, by Will, if a Modern Freeman, &c. he may give her All or ſuch Part as he pleaſes, *vide* 11 Geo. 1. c. 18. *ante* 684.

Alſo if a Freeman, whoſe Wife has been thus compounded with, dies Inteſtate, his Widow ſhall have ſuch Part of the Legatory, or dead Man's Share, as ſhe is intitled to under the Statute of Diſtributions, eſpecially if there was no expreſs Words in the Agreement to exclude her. Preced. Chan. 327.

If a Freeman of *London* makes a Jointure on his intended Wife, and the ſame is expreſſed to be in Bar only of her Dower, or Thirds of Lands, Tenements and Hereditaments, this ſhall not bar her of her Cuſtomary Share of his Perſonal Eſtate. Abr. Eq. 158, 159. decreed in Chancery between *Atkins* and *Waterſon*.

4. Of the Legatory or dead Man's Share.

The Legatory or dead Man's Share is the third Part of a Freeman's Perſonal Eſtate, in caſe he has a Wife and (*g*) Children, which the Freeman might always have diſpoſed of by Will, and which for want of ſuch Diſpoſition is under the Direction of the Statute of Diſtributions, and not at all under the Controul of the Cuſtom of *London*. 2 Salk. 426. Vern. 6. 2 Vern. 559. Skin. 41. pl. 11. Preced. Chan. 499.

(*g*) But where there are no Children the Cuſtom of *London* gives no Directions, therefore the Perſonal Eſtate muſt be wholly governed by the Statute of Diſtributions. But the Cuſtom of the Province of *York* extends to give ſuch Moiety to the next of Kin to the Inteſtate. Preced. Chan. 327, 328. But *note*, that the Cuſtom of the City of *London* in the Diſtribution of an Inteſtate's Eſtate ſhall prevail againſt the Cuſtom of *York*. 2 Vern. 48.—As if a Freeman of *London* dies in *York*, his Heir ſhall come in for a Share of the Perſonal Eſtate, though by the Cuſtom of *York* he is debarred thereof, for the Cuſtom of *London*, which follows the Perſon, ſhall be preferred to that of *York*, which is only local. 2 Vern. 82.

If a Freeman of *London* makes his Will, and deviſes Legacies to his Children more than their Orphanage Part would amount unto, without taking any Notice whatſoever of the Cuſtom; theſe Legacies ſhall be a Satisfaction of their Orphanage Shares, to which they were intitled by the Cuſtom in the Nature of a Debt, and the Legacies ſhall not come (*h*) out of the Teſtamentary or dead Man's Part, for it would be unreaſonable that they ſhould take both by the Will and the Cuſtom. Abr. Eq. 160. & *vide* 2 Vern. 111, 754. S. P.

(*h*) Where it was held that 100*l.* deviſed for Mourning ſhould come out of the Teſtamentary, and not out of the whole Perſonal Eſtate. 2 Vern. 420.

But if ſuch Legacies are leſs than their Orphanage Shares, they ſhall not *pro tanto* be a Satisfaction, but in ſuch Caſe the Legatees ſhall take both, eſpecially if none of the Deviſees in the Will are thereby diſappointed †. Abr. Eq. 160. *per* Lord Chancellor; but in this Caſe he ſent it to the Recorder to certify the Cuſtom.

† See 11 Geo. 1. c. 18. *ante* 684.

Precod. Chan. 409. decreed between *Read* and *Duck*, although it was certified that there was no Custom in *London* which directed how such Loss should be borne. See 7 Vin. Abr. 216. (B. 9.) pl. 4.

If a Loss happens to a Freeman of *London*'s Estate by the Insolvency of his Executors, such Loss shall be borne out of the Testamentary Part of his Estate only, and not out of the whole Personal Estate, for the Wife and Children of a Freeman are in the Nature of Creditors, and shall have two Parts in three of the Personal Estate he died possessed of, although his Legatees are thereby defeated of their Legacies.

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*Page688 (D) Of the Custom of London, as it relates to Feme Coverts.

Cro. Car. 69. Hetl. 9. Lit. Rep. 31. S. C. Leon. 131. 2 Brownl. 218. S. P.

BY the Custom of *London* if a Feme Covert, the Wife of a Freeman, (*a*) trades by herself in a Trade, with which her Husband does not (*b*) intermeddle, she may (*c*) sue and be sued as a Feme Sole, and the Husband shall be named only for Conformity; and if Judgment be given against them she only shall be taken in Execution.

(*a*) Need not be in a Shop. Show. Rep. 184. (*b*) But if the Wife uses the same Trade that her Husband does, she is not within the Custom. Mod. 26. (*c*) But it must be in the Courts of the City. Moor 135, 136. Cro. Eliz. 409.* 3 Term Rep. 618.

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* And should such Action be removed *improvido* into a Superior Court, that Court on Motion, will send it back to the Inferior Court.

Show. Rep. 183. *Fabian* v. *Plant*.

If the Wife of a Freeman, who is a sole Trader, contracts a Debt and dies, and afterwards the Husband promises to pay it, yet such Promise is not sufficient to maintain an *Assumpsit* against the Husband, for as he was not originally liable, the subsequent Promise was without any Consideration.

Rol. Abr. 556.

A Recovery suffered by Baron and Feme of the Lands of the Feme shall as effectually bind the Right of the Feme by the Custom of *London*, as a Fine at Common Law.

(E) Of the Custom of London, with respect to Masters and Apprentices.

Moor 135. pl. 28. 2 Bulst. 192. 2 Rol. Rep. 305. Palm. 361. Mod. Rep. 271. pl. 22. 2 Keb. Rep. 687. pl. 14. 2 Vern. 492. pl. 445.

AN Infant unmarried, and above the Age of 14, may (*d*) bind himself Apprentice to a Freeman of *London* by Indenture with proper Covenants, which Covenants by the Custom of *London* shall be as (*e*) binding as if he were of full Age.

(*d*) Custom of *London* to put over an Apprentice to another, is good. March 3. (*e*) And for a Breach an Action may be brought in any other Court as well as in the Courts in the City. Moor 136.

2 Rol. Rep. 305. Palm. 361. & *vide* Mod. 271.

If the Indentures be not inrolled before the Chamberlain within the Year, upon a Petition to the Mayor and Aldermen, &c. a *Scire facias* shall issue to the Master to shew Cause why not inrolled; and if it was through the Master's

Maſter's Default, the Apprentice may ſue out his Indentures; otherwiſe if through the Fault of the Apprentice, as if he would not come to preſent himſelf before the Chamberlain, &c. for it cannot be inrolled unleſs the Infant is in Court and acknowledges it. Boh. Priv. Lond. 175, 338.

This Cuſtom does not extend to one bound Apprentice to a Waterman under 21, for the Company of Watermen are but a voluntary Society, and being Free of that does not make one Free of *London*. 6 Mod. 69. 12 Mod. 415.

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* (F) As it relates to Landlords and Tenants. *Page689

BY the Cuſtom of *London* a Tenant at Will under the yearly Rent of 40*s*. ſhall not be turned out without a Quarter's Warning; and ſuch Tenant paying above 40*s*. yearly Rent, ſhall not be turned out without Half a Year's Warning. 2 Sid. 20.

But a Cuſtom that Tenant for Years ſhall hold for Half a Year after his Term ended, is not good. Moor 8. pl. 27. Palm. 212.

(G) Of the Cuſtoms of London, which are in Furtherance of Juſtice, and for the more ſpeedy Recovery of Debts.

BY the Cuſtom of *London* a Creditor may, before the Day of Payment, arreſt his Debtor, and oblige him to find Sureties to pay the Money on the Day it ſhall become due. Hob. 86. Vent. 29. 5 Mod. 93. & *vide* Rol. Abr. 555.

If a Contract be entered into by two Citizens, and one of them, who is thereby obliged to pay a Sum of Money, dies inteſtate, his Adminiſtrator ſhall be obliged to pay it in the ſame Manner as if it were a Debt by Obligation. Cro. Eliz. 409. Noy 53. Rol. Abr. 557.

If *A.* and *B.* are bound as Sureties for and with *C.* to *D.* and *D.* recovers againſt *A.* in *London*, and has Execution againſt him, *A.* may there ſue *B.* for Contribution *ut uterque eorum oneretur pro rata* according to the Cuſtom of *London*, and therefore where ſuch Action was removed in *B. R.* by Writ of Privilege, the ſame was remanded, becauſe otherwiſe the Plaintiff would be without Remedy, for by the Courſe of the Common Law no Action lies. Leon. 166. Moor 136. S. P.

(H) Of the Cuſtom of Foreign Attachment: And herein,

1. Of the Nature of the Debt or Duty which may be attached.

BY the *(a)* Cuſtom of *London*, if *A.* is indebted to *B.* and *C.* is indebted to *A. B.* upon entering a Plaint againſt *A.* may attach the Debt due from *C.* (who is called the Garniſhee) to *A.* and this *(b)* Cuſtom of Foreign (*a*) Rol. Abr. 551. (*b*) Carth. 25.

Foreign Attachment is to no other Purpoſe but to compel an Appearance of the Defendant in the Action; for if he appear within (c) a Year and a Day, and put in Bail to the Action, the Garniſhee is diſcharged.

(c) For the Year and Day *diſtringere debitum*, *vide* Cro. Eliz. 713. Leon. 52. Rol. Rep. 106. Rol. Abr. 551.

Rol. Abr. 551. Cro. Eliz. 598, 830. The Garniſhee may plead this Cuſtom of Foreign Attachment to an Action brought againſt him by his Creditor, but then the Plaintiff may traverſe the Cauſe thereof, and that he was not indebted to him who attached it.

*Page 690 17 E. 4. 7. b. Rol. Abr. 551. S. C. * Such Goods cannot be attached, of which the Party had no Property at the Time of the Attachment.

So if *A.* be indebted to *B.* and *J. S.* a Stranger takes by Tort certain Goods of *A.* as a Treſpaſſer, *B.* cannot by the Cuſtom attach theſe Goods in the Hands of *J. S.* for the Debt of *A.* becauſe the Property is out of *A.* at the Time, and he had only a Right in him.

Rol. Abr. 551. Noy 115. S. P. A Legacy cannot be attached in the Hands of an Executor by Foreign Attachment; becauſe it is uncertain whether, after Debts paid, the Executor may have Aſſets to diſcharge it.

Rol. Abr. 551. *Spink* and *Tenant*. Rol. Rep. 106. S. C. If *A.* be indebted to *B.* by Obligation, and *B.* is indebted by Contract to *H.* and *B.* dies, and his Adminiſtrator demands the Debt upon the Obligation of *A.* who promiſes him that, if he will forbear him for a Month, he will pay him then, but he does not pay him accordingly, and after *H.* brings Debt in *London* againſt the Adminiſtrator upon the Contract (as he may there by the Cuſtom) the Debt of *A.* due by the Obligation may be attached in the Hands of the Adminiſtrator; for notwithſtanding the Promiſe broken, yet the Debt continued due by the Obligation, and a Recovery upon the Obligation will be a Bar of the Action upon the Promiſe, in which all ſhould be recovered in Damages †.

† This is not Law; if it was, by this Means, a ſimple Contract Creditor might get paid, in Preference to Judgment Creditors. *Fiſher*, Adminiſtratrix, v. *Lane* and others. C. P. T. 12 G. 3. 1772. 3 Wilſ. 297. and ſee *infra* 691.

Rol. Abr. 552. *Hals* and *Walker*, adjudged upon a Foreign Attachment in *Exeter*, where the Cuſtom is the ſame as in *London*. If *A.* lends *B.* 100*l.* to be repaid him upon the Death of his Father, and after the Death of the Father of *B.* this 100*l.* is attached by Force of a Foreign Attachment, and after *A.* brings an Action upon the Caſe againſt *B.* for this Money, this Foreign Attachment will be a good Bar thereof, though the Cuſtom be to attach Debts, and this is an Action upon the Caſe, in which Damages only are to be given, becauſe this is a Debt, and he might have an Action of Debt thereupon; and therefore, inaſmuch as this is well attached, he ſhall not defeat it by bringing an Action upon the Caſe.

Rol. Abr. 552. *Read* and *Hawkins*. If *A.* ſells certain Stockings to *B.* upon a Contract, for which *B.* is to give 10*l.* to *A.* and if he ſells the Stockings again before *Auguſt*, after that he ſhall give Twopence more for every Pair of the Stockings, the 10*l.* is attachable by Foreign Attachment, becauſe an Action of Debt lies for it, but the Twopence for every Pair of Stockings is not attachable, becauſe this reſts only in Damages, to be recovered by an Action upon the Caſe, and not by Action of Debt, becauſe it is made payable upon a Poſſibility.

Vent. 112. *Horſam* and *Target*. Lev. 306. S. C. If there are ſeveral Accounts, &c. between *A.* and *B.* and *A.* dies, and his Executor and *B.* ſubmit to the Award of *J. S.* and he awards that the Executor ſhall deliver certain Goods, of which *A.* died poſſeſſed, to *B.* and that *B.* ſhall pay the Executor 300*l.* this Money cannot be attached in the Hands of *B.* for the Debt of *A.* for upon the Matter the Executor being liable to a *Devaſtavit* ought to have Remedy in his own Right for the Sum awarded.

If

If *A.* is indebted to *B.* who is indebted to *C.* and *B.* aſſigns the Debt of *A.* to *C.* in Satisfaction of his Debt; now the Debt due from *A.* is become the Right and Property of *C.* and *B.* hath nothing, but in Truſt for *C.* and therefore it ought not to be attached for any Debt of *B.* and upon the ſpecial Matter ſhewn the Lord Mayor ought to give Relief. 2 Jon. 222. *Lewis* and *Wallis*.

In an Action of Debt for Tobacco, in the Detinet, a Debt cannot be attached within the Cuſtom, in Satisfaction thereof, becauſe it does not (*a*) appear of what Value this Tobacco was, ſo that it might appear that the Debt is but a Satisfaction to the Value, which cannot be ſupplied by a Plea in Bar made in another Action againſt him, in whoſe Hands the Debt was attached. Rol. Abr. 553.

(*a*) But if the Value of the Tobacco had been averred in the Record of the Attachment, the Debt might have been well attached in this Action. Rol. Abr. 554, & *vide* Jon. 406.

* A Debt due by Specialty may be attached by the Cuſtom of *London*, becauſe the Attachment may be pleaded if an Action be brought for it in the Courts at *Weſtminſter*, but a Debt (*b*) recovered in any Court in *Weſtminſter* by (*c*) a Judgment cannot be attached by the Cuſtom of *London*, becauſe the Party has then no Time to plead it. *Page 691 Rol. Abr. 552. 4 Leon. 240. Cro. Eliz. 63. Leon. 29, 264. Doug. 363. 2 Term Rep. 388.

(*b*) After Iſſue joined in an Action of Debt in *B. R.* the Debt for which the Action was brought cannot be attached in *London*, for the Inferior Court cannot attach a Debt in a Superior Court. Rol. Abr. 552.—So after Imparlance to an Action of Debt in *B. R.* Rol. Abr. 552. Cro. Eliz. 157. 3 Leon. 232.—So if a Writ returnable in *B.* be purchaſed before the Attachment. Cro. Eliz. 101, 593, 691. 3 Leon. 210. Rol. Abr. 552. (*c*) So if levied upon a *Fieri facias*, and in the Sheriff's Hands. 1 Leon. 30, 264.—So if a Suit be begun in Equity, the Effect thereof ſhall not be prevented by a Foreign Attachment. 2 Chan. Ca. 233.

If *A.* is indebted to *B.* and *C.* is indebted to *A.* and *B.* brings Debt in *B. R.* againſt *A.* pending this Action, *B.* may affirm a Plaint in *London* againſt *A.* for the ſame Debt, &c. and attach the Debt in the Hands of *C.* for though a Debt in *London*, for which there is a Suit depending in *B. R.* cannot be attached, yet he that hath brought an Action in *B. R.* may, notwithſtanding according to Cuſtom, attach the Debt of the Party, for the Debt in Queſtion in *B. R.* is not touched by this Attachment. Cro. Eliz. 593. *Lewknor* and *Huntly* 712, 713. S. C. reſolved alſo upon a Writ of Error, tho' the Judgment was reverſed for another Reaſon.

A. is indebted to *B.* and *C.* is indebted to *A.* by ſimple Contract, *A.* dies inteſtate, and *B.* enters a Caveat againſt his Widow's Taking out Adminiſtration, pending which he enters a Plaint in the Sheriff's Court of *London* againſt the Archbiſhop of *Canterbury*, and thereupon attaches the Debt due from *C.* after which the Widow has Adminiſtration granted to her, who brings an Action againſt *C* who inſiſted on the Matter *ſupra*; and it was held that this pretended Cuſtom in this Caſe was unreaſonable and void, becauſe the Archbiſhop had no Right to the Debt, nor any Means to recover it; beſides, hereby every Creditor would be his own Carver, and the Goods of the Inteſtate waſted without any Remedy. Carth. 344. *Maſters* and *Lewis*. Ld. Raym. 56. Skin. 516. pl. 6. 5 Mod. 75, 92. S. C. 2 Jon. 165, 204. & *vide* Rol. Abr. 551, 906. Cro. Eliz. 410, 598. Noy 53. Dyer 247.

2. In whoſe Hands, and at what Time the Attachment may be made.

If *A.* recovers a Debt againſt *B.* in *London*, *B.* may attach this Debt in his (*d*) own Hands for ſo much due to him. Rol. Abr. 554. Cro. Eliz. 156.

(*d*) Whether a Debt owing to a Company is attachable, for the Debt of the Company, Mod. 212. *dubitatur*.

By

Carth. 25, 26. Vent. 236. & *vide* Rol. Abr. 554.

By this Cuſtom a Debt contracted without the Juriſdiction of the City may be attached, if the Debtor is found within the Juriſdiction, for every Debt follows the Perſon of the Debtor.

Rol. Abr. 553. 3 Leon. 236.

An Obligee before the Debt is due by Obligation cannot by the Cuſtom attach a Debt for it, becauſe he cannot affirm a Plaint for the firſt Debt before it is due.

S. C. Rol. Abr. 553. 3 Leon. 236.

But if *B.* is indebted to *A.* and *C.* is bound to *B.* but the Day of Payment is not yet come, *A.* may attach this Debt in the Hands of *C.* (*a*) before it is due to *B.*

& *vide* Cro. Eliz. 184. Rol. Rep. 105. Cro. Eliz. 713. Noy 68. (*a*) But the Cuſtom ſo to do muſt be ſpecially alledged. Rol. Abr. 553. Noy 68.—And the Judgment ſhall be, that he ſhall be paid when it becomes due. Rol. Abr. 533. Sid. 327.

Rol. Abr. 553.

So if *A.* lends Money to *B.* to be repaid upon the Death of the Father of *B.* and after an Action is brought by *C.* againſt *A.* and after the Father of *B.* dies, the Money due by *B.* to *A.* may after be attached in the Hands of *B.* though it was not due at the Time the Plaint commenced againſt *A.* in as much as it became due before the Time that by Cuſtom the Proceſs is to be granted againſt him in whoſe Hands it is attached.

*Page 692 Sid. 327. *Robbins* and *Standard.*

* If in Debt upon an Obligation of 100*l.* conditioned for the Payment of 50*l.* at a Day, the Defendant pleads, that before the Day of Payment of the 50*l.* it was attached in his Hands by a Creditor of the Plaintiff, &c. and that after the Day upon a *Scire facias* againſt him according to Cuſtom he paid it; this is a good Bar of the (*b*) whole, becauſe the Attachment being made before the Day of Payment, it became a Debt to the Creditor, and the Obligee could take no Advantage of a Breach of the Condition afterwards.

(*b*) If the Attachment had been of 20*l.* only, it might have been pleaded in Bar of ſo much. Sid. 327. & *vide* Godb. 196. Owen 2. Moor 598.

3. Of the Form of the Proceedings in a Foreign Attachment.

Rol. Abr. 554. Cro. Eliz. 713. Jon. 406.

By this Cuſtom the Plaintiff muſt ſwear that the Debt is *bona fide* due to him, but it is not ſufficient to alledge that he ſwore that the Debt was a true one by himſelf, or his Attorney, for the Attorney's ſwearing is not according to the Cuſtom.

Cro. Eliz. 172. Leon. 321.

If *A.* affirms a Plaint againſt *B.* and upon *Nihil* returned, it is ſurmiſed that *C.* hath Money in his Hands due to *B.* &c. and the Money is attached in the Hands of *C.* who appears upon the Attachment, and pleads that he owes nothing to *B.* though this be found againſt *C.* and thereupon there is Judgment againſt him, yet he ſhall not pay any Coſts, for there are no Coſts recoverable in a Foreign Attachment.

Rol. Abr. 555.

By this Cuſtom if *A.* ſues *B.* in *London*, &c. and *C.* is indebted to *B.* in the ſame Sum, and the ſaid *C.* is condemned there to *A.* according to the Cuſtom, and Judgment given againſt him accordingly, yet if no Execution be ſued againſt *C.* *A.* may reſort to have Judgment and Execution againſt *B.* his principal Debtor, and *B.* may ſue *C.* for his Debt, notwithſtanding the unexecuted Judgment.

Rol. Abr. 555. 22 H. 6. 47. (*c*) Godb. 401. Lach 228.

In Bar of an Action brought in *B. R.* if the Defendant pleads a Judgment in a Foreign Attachment in Bar, and alledges the Cuſtom to be, that if the Plaintiff in the Court hath Proceſs againſt the Defendant, and upon a *Nihil* (*c*) returned makes a Surmiſe that *B.* is indebted in ſo much to the Defendant, and upon his Prayer to attach it in his Hands by Proceſs, and he does it accordingly; and if (*d*) the Defendant makes Default at four Courts after, that by the Cuſtom, at the laſt of the ſaid four Courts the Plaintiff may pray Proceſs againſt *B.* to come in and ſhew Cauſe wherefore the

(*d*) A Cuſtom for a Foreign Attachment before ſome Default in the Defendant is naught

the Judgment ſhould not be againſt him at the next Court after, and when he comes to apply this Cuſtom to his Caſe, he ſhews that there were four Defaults, and that at the fourth Default the Plea was continued for ſeveral Courts, and then Proceſs went againſt *B.* and then after Judgment againſt him, *(e)* this is not warrantable by the Cuſtom, in as much as he ſhews by the Cuſtom it ought to be at the next Court after the four Defaults. Vent. 236. *(e)* Moor 570. pl. 779. like Point.

If in Debt the Defendant pleads that *J. S.* entered a Plaint, *&c.* againſt the Plaintiff in *London*, and upon Proceſs againſt him *Non eſt inventus* was returned, and thereupon a Suggeſtion was made that he had ſo much Money in the Hands of the Defendant, and that the Defendant was attached by the ſaid Money; this is an ill Plea, for it ought to have been that the Plaintiff was attached by ſo much Money in the Defendant's Hands; for ſo is the Cuſtom*. Carth. 282. *Lawrence* and *Atherton*, adjudged.

* *Qu.* If in Caſe, or Debt, not by Specialty, where *Nil debet* would be a good Plea, the Defendant may not plead the *general Iſſue*, and give Foreign Attachment and Payment by Virtue thereof, in Evidence? That would avoid the Nicety of pleading ſpecially, in ſuch a Caſe.

After a *Dilatur* entered by the Garniſhee in the Sheriff's Court, which is in Nature of an Imparlance, he cannot plead to the Juriſdiction of the Sheriff's Court. Carth. 25, 26.

It was ruled, That if *A.* brings Debt in *London* againſt *B.* and *attaches Goods of* B. *in the Hands of* C. from whoſe Poſſeſſion the *Goods* are *not removed*; and *B. by* Certiorari *brings the Cauſe into* K. B. *and puts in Bail*, the Attachment is at an End, and *C.* ought to deliver the Goods to *B.* which if he does not do, *B.* may have *Trover* or *Replevin* †. 12 Mod. 213.

† See farther on this Subject of Foreign Attachment, in a ſmall Volume 12*mo.* intituled "The Practice of the Sheriff's Court *London*, 167."

The End of the FIRST VOLUME.